

1963

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DIVORCE AND ALIMONY UNDER THE NEW CODE*

Dan Hopson, Jr.†

The new code of civil procedure which takes effect on January 1, 1964, exemplifies the best of modern day law reform. Not only is the state of Kansas given a vastly improved set of procedural rules, but also the way the rules were drafted and their ready acceptance by the legislature argues well for the future of law reform in Kansas.

Before discussing the divorce and alimony provision of the new code, it might be well to point out that the basic changes in this article are not procedural, but substantive. It became part of the new procedural code merely by virtue of the fact that the old divorce code appeared in Chapter 60 of the Kansas General Statutes.¹ Consequently, the Judicial Council took a rather ambivalent attitude. The committee was willing to make certain substantive changes but declined, and undoubtedly rightly so, to make any major controversial (and, of course, the area can be highly controversial) changes. In other words, the basic structure of our family law remains the same.

It also should be pointed out that while both the old and new divorce code contain many of their own procedural and evidentiary rules, the general sections on procedure and evidence of the new code are, presumably, applicable to the new divorce code. What general effect these new rules will have on the trying of a divorce case is speculative, but a few important changes are noteworthy. For instance, new 60-226 *et seq.* on depositions and discovery and new 60-233 on written interrogations should certainly make it easier to discover the property and assets of the spouses.² Although in statutory form pre-trial conferences existed in Kansas prior to the new code,³ the new section 60-216 providing for mandatory pre-trial, on the request of either party or upon the court's own motion, raises the interesting possibility as to its use as a means of effecting reconciliation in divorce actions.⁴

Section 60-235 of the new code, providing for physical and mental examinations of a party by a physician upon the court's order, raises some intriguing new possibilities on the use of a psychiatrist under the defense of mental illness

* A slightly different version of this article was delivered by the author at the Kansas Bar Association Institute on the Kansas Code of Civil Procedure held at Wichita on May 25, 1963.

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¹ KAN. G.S. 1949, 60-1501 to -1520 as amended.

² Presumably this procedure might also be used in connection with the bill of particulars which may be demanded. KAN. CODE CIV. PRO., 60-1604(c). For instance: Ques. "What is the name of the man you were out with the evening of May 6, 1962? At what motel did you and he register?"

³ KAN. G.S. 1949, 60-2701 to -2705.

⁴ Several Kansas District Court Judges now use either a formal or informal pre-trial hearing to induce parties to either reconcile or enter into a property agreement. To what extent the divorce "issues" can be removed by pre-trial, in light of the specific procedure as to a bill of particulars under 60-1604(c) of the new code must be merely speculative.

test of *Crosby v. Crosby*.⁵ One interesting problem concerns the use of this section in a custody fight. While a child is not a "party" in a divorce suit, what is his status in a habeas corpus action? Could an attorney get the child examined to help the court determine "what is best for the child?"

There are, no doubt, other provisions in the new code that may aid, or hinder, an attorney in litigating divorce cases; and an imaginative counsel should be able to discover all sorts of new provisions that will help him in his divorce case.

Grounds for Divorce

The first problem, within the divorce code itself, concerns that of the grounds. Although the committee did not add any new grounds, it certainly "shook up" the old ones. First, the Council recognized the fact that in Kansas, many of the grounds for divorce were, historically, grounds for annulment. The Council, in new 60-1601,⁶ removed these grounds, leaving us with only seven grounds for divorce: (1) abandonment, (2) adultery, (3) cruelty, (4) drunkenness, (5) gross neglect, (6) conviction of a felony and (7) insanity.⁷

The only change in these grounds occurs in the seventh on insanity. While the whole provision is re-worded, the important change was to leave out the second proviso appearing in the old code. This proviso restricted the use of insanity as a ground, when the defendant was in an out-of-state hospital, to citizens of five years standing. By leaving out the proviso, the statute now allows a New Yorker to get a divorce on insanity after staying here one year instead of having to wait five years. Apparently the old proviso was inserted to prevent migratory divorce based on insanity. It would seem, however, that the one year residence, required by the new code would be just as effective.⁸ Note also that when using insanity, the special support provisions are retained. The Kansas court has equated this support concept with that of child support.⁹

⁵ 186 Kan. 420, 350 P.2d 796 (1960).

⁶ The article on divorce appears in the bill as passed by the Kansas legislature as Kansas Senate Bill No. 140, Sess. of 1963, 60-1601 to -1611 (effective Jan. 1, 1964) [hereinafter cited as KAN. CODE CIV. PRO.]. Presumably these section numbers will remain consistent when the new code of civil procedure appears in the statutes. Hereinafter the new code sections found in the chapter on divorce and alimony will be used in the text without footnote citation.

⁷ The full text reads:

"The district court may grant a decree of divorce or separate maintenance for any of the following causes: (1) Abandonment for one year; (2) adultery; (3) extreme cruelty; (4) habitual drunkenness; (5) gross neglect of duty; (6) the conviction of a felony and imprisonment therefor subsequent to the marriage; (7) confinement in an institution for five years because of insanity and a unanimous finding by three physicians, appointed by the judge before whom the action is pending, that the insanity is incurable, but a decree granted on this ground shall not relieve the plaintiff from contributing to the support and maintenance of the defendant."

⁸ See Discussion, "Insanity as a Grounds for Divorce," 1962 *Proceedings*, Section of Family Law, American Bar Association 68 for a general discussion of the problems in using "insanity" as a grounds for divorce.

⁹ *Kessler v. Kessler*, 188 Kan. 255, 326 P.2d 21 (1961).

This is a mandatory duty to support the insane spouse that continues even after the divorce.

There is one other major change in this first section on divorce grounds. These seven grounds are not only listed as grounds for divorce, but also as grounds for separate maintenance. Under KAN. G.S. 1949, 60-1516, a *wife* could bring an action for "alimony only" based on any of the grounds for divorce. This section is repealed. Now both the wife and *husband* can sue for separate maintenance.¹⁰

I assume nothing was intended by the change in nomenclature from "alimony only" to "separate maintenance." Under either title, spouses have the right to live apart without a divorce. Note, however, that the old rule¹¹ prohibiting a division of property on a suit for "alimony only," will probably no longer be controlling. The new 60-1610, providing for support and division of property, applies to every decree, which would surely include a decree for separate maintenance.¹² While the court could argue that "separate maintenance" means only support, I would guess that the assets of the spouses may be divided as well as alimony granted even though the suit is just for "separate maintenance."

Grounds for Annulment

A potentially revolutionary change was added by new section 60-1602. Here the Council, for the first time in our state, gave the people of Kansas some *real* annulment law. In a formal sense this is important, but I am in doubt as to its practical effect. The Council removed four of the old grounds for divorce—bigamy, impotency, fraudulent contract and pregnancy by another at time of marriage—changed the wording a bit, and turned them into grounds for annulment.¹³ Some of the changes are important, some are minor.

The Council removed the word "former" from the bigamy section. A literal reading of the old code¹⁴ allowed a divorce to a second spouse if a first

¹⁰ Of course, just as some of the prior grounds for divorce have been removed to the annulment section, so certain of the grounds for "alimony only" are removed.

¹¹ See *Brayfield v. Brayfield*, 175 Kan. 337, 264 P.2d 1064 (1953).

¹² There is, undoubtedly and unfortunately, an inadvertent choice of terms in calling what is basically a divorce *mensa et thoro* a suit for separate maintenance. Since new 60-1610(c) is headed by the title "Maintenance" and provides that either party may be awarded an allowance for future support, denominated as alimony, an argument is possible that in a suit for separate maintenance, only an award of alimony is possible. However, there is no indication in the history of the act of such an intention and the preface to new 60-1610 specifically states: "A decree in an action under this article may include orders on the following matters. . . ."

¹³ The full text reads:

"The district court may grant a decree of annulment of any marriage for any of the following causes: (1) When either of the parties had a husband or wife living at the time of the subsequent marriage; (2) impotency existing at the time of the marriage; (3) fraudulent contract, including pregnancy on the part of the wife at the time of the marriage by another than her husband and concealed from the husband, or where the marriage is void for any reason."

¹⁴ The old statute read: "When either of the parties had a former husband or wife living at the time of the subsequent marriage; . . ." KAN. G.S. 1949, 60-1501.

and divorced spouse was still living. Now the statute provides for divorce only when "true" bigamy exists.

The Council added the phrase "existing at the time of the marriage," to the word "impotency" which stood unmodified in the old code. Actually this may be cutting down on the required elements, not adding a new requirement. In *Bunger v. Bunger*,¹⁵ the court held that the word "impotency" in the divorce statute actually meant: (1) existing at time of marriage, and (2) incurable. In adding one but not the second requirement to the statutory language, it appears that the attorney need no longer prove the impotency incurable. I would take it that, in theory at least, inability to have intercourse on the wedding night would be grounds for annulment!

The Council also added the phrase "concealed from her husband" to the pregnancy ground and then made it a type of fraudulent contract which seems to present no problem.

But the Council did present one problem. As an apparent afterthought and at the end of the fraudulent contract ground, the Council added the phrase "or when the marriage is void for any reason." It was my understanding that this vague phrase was added to take care of the fact that KAN. G.S. 1949, 60-1515, which provided for annulment on the grounds of "want of age or understanding," was repealed. The Council apparently wanted to be sure that, under the new code, children and insane people could get their marriages annulled. But why put "void for any reason" in with fraudulent contract? The Kansas supreme court could interpret this to mean that "void" refers only to void fraudulent contracts. It might have been clearer to have made this a fourth and separate ground for annulment.

One other point—ever since *Powell v. Powell*¹⁶ in 1877, which was re-affirmed in *Harper v. Dupree*¹⁷ in 1959, the Kansas supreme court has held that, apart from any statute, there is general equitable power in our district courts to annul a marriage. However, the extent of this power is still vague since there are only a few cases. The Court has not listed the "equitable" grounds for annulment. I assume that this power, whatever it is, still exists despite the new specific statute.

What is apt to be the practical effect of changing these old divorce grounds into annulment grounds? It may be very little. They were not used with any frequency when they were listed as grounds for divorce.¹⁸ A few people might be willing to get an annulment for fraudulent contract or bigamy when they

¹⁵ 85 Kan. 564, 117 Pac. 1017 (1911).

¹⁶ 18 Kan. 371 (1877).

¹⁷ 185 Kan. 483, 345 P.2d 644 (1959).

¹⁸ See Dowd, *The Law of Annulment*, May, 1963 (Research paper for Family Law Seminar, on file at the author's office). Mr. Dowd queried nine Kansas District Court Judges as to how often annulment is used. The judges indicated that it was seldom used. The average would appear to be less than one each year in each court.

would not use them to get a divorce. But there are probably not many in this category.

Note, however, that fraudulent contract is a wide open concept in annulment law in other states. For instance, the New York courts have found over 150 types of fraud which are sufficient to annul a marriage.¹⁹ Almost any broken promise or misrepresentation is enough.

Since it is so easy to get an annulment through the use of fraudulent contract, some other provisions in the new code might promote considerable more use of this ground. First, new 60-1608(d), which requires corroboration in divorce and separate maintenance cases, does not make the same requirement for annulment cases. The client need not find a friend to testify. Second, new 60-1610 which provides for alimony and division of property, now applies to annulment as well as to divorce and the wife would lose nothing by suing for annulment. In other words, she can get alimony in her annulment action. Third, new 60-1608, requiring a 60 day waiting period between the petition and the hearing does not apply to annulments. Fourth, and more importantly, the one-year resident requirement of new 60-1603 does not apply to annulments. So, if an attorney has a client who can not meet the resident requirement or who is in a hurry, he should investigate the possibility of fraudulent contract as a way of dissolving the marriage.

Jurisdictional Requirements

Although there are minor changes in wording, the jurisdictional provisions, now contained in new 60-1603, remain substantially the same.²⁰ For a divorce, the plaintiff still must be domiciled for one year. Venue is taken out of the divorce code, but it appears in the general venue section as it did before. It still allows venue at the residence of the plaintiff, of the defendant or "where the defendant . . . may be served."²¹ So, under the new code, the parties still may agree to obtain their divorce away from home.

As mentioned, suits for annulment do not require a one-year domicile, nor does this one-year requirement apply to suits for separate maintenance.

The other changes in the jurisdictional section are minor. The military

¹⁹ See Wells, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303, 319 (1950).

²⁰ The full text reads:

- "(a) *State and county.* The plaintiff in an action for divorce must have been an actual resident of the state for one year next preceding the filing of the petition.
- (b) *Military residence.* Any person who has been a resident of or stationed at a United States post or military reservation within the state for one year next preceding the filing of the petition may file an action for divorce in any county adjacent thereto.
- (c) *Residence of wife.* For the purposes of this article, a wife may have a residence in this state separate and apart from the residence of the husband."

²¹ KAN. CODE CIV. PRO., 60-607. Note that this venue section also applies to suits for separate maintenance and annulment.

residence provision was slightly reworded,²² as was the section on separate domicile of the wife. Neither change should produce any change in interpretation.

Pleading and Practice

The Council made only minor changes in the divorce code, in the pleading and practice of divorce cases.²³ New sections 60-1604 and -1605 set out the new requirements.²⁴ The attorney still pleads his grounds in the language of the statute; the petition still must be verified; and the other side still can ask for a bill of particulars. Note, however, this rule now extends to annulment actions.

A couple of minor changes show up in the service of process by publication. Under the old code,²⁵ the attorney had to mail a copy of the notice and petition within three days. The new 60-1604(d) makes applicable the general publication provision, found in new 60-307. Under this provision the attorney may use restricted mail instead of publication. If he uses publication he has seven days to mail the notice and need not send a copy of the petition.

The new code also cleared up one point left out of the old code. New 60-1605 provides, in part, that a defendant may file a cross-petition for divorce, separate maintenance or annulment, even if he is a non-resident, if the plaintiff qualifies by being domiciled in Kansas. Although there was no provision in the old code concerning a domiciliary requirement for defendants, in practice non-resident defendants filed cross petitions.

However, one limitation is a little puzzling. The non-resident defendant may file the cross petition only when the plaintiff qualifies under part (a) of 60-1603. On its face, this limitation excludes non-resident wives of soldiers

²² KAN. CODE CIV. PRO., 60-1603(b). This section adds the phrase "stationed at." I doubt that this will have any important consequences since, in *Craig v. Craig*, 143 Kan. 624, 56 P.2d 464 (1936), the supreme court interpreted the word residence to mean physical presence and not domicile. Of course, there is still some question as to whether the United States Supreme Court would uphold such a divorce. See 28 KAN. B.J. 74 (1959).

²³ Except, as discussed above, to the extent that the new general practice rules are applicable.

²⁴ The full text reads:

Sec. 60-1604. *Petition and summons.*

(a) *Verification of petition.* The truth of the allegations of any petition under this article must be verified by the plaintiff in person.

(b) *Contents of petition.* The grounds for divorce, annulment, or separate maintenance shall be alleged as nearly as possible in the general language of the statute, without detailed statement of facts.

(c) *Bill of particulars.* The opposing party may demand a statement of the facts which shall be furnished in the form of a bill of particulars and the facts stated therein shall be the specific facts upon which the action shall be tried. A copy shall be delivered to the judge. The bill of particulars shall not be filed with the clerk of the court or become a part of the record except on appeal, and then only when the issue to be reviewed relates to such facts.

(d) *Service of process.* Service of process shall be made in the manner provided in article 3 of this chapter.

Sec. 60-1605. *Answer and cross petition.* The defendant may answer and may also file a cross petition for divorce, annulment, or separate maintenance regardless of the residence of the defendant if the plaintiff qualifies under subsection (a) of section 60-1603. If new matter is set up in the answer, it shall be verified by the defendant in person. If a cross petition is filed, it shall be subject to the provisions of subsections (a), (b), and (c) of section 60-1604.

²⁵ KAN. G.S. 1949, 60-1504.

who are using part (b) of 60-1603 for jurisdiction. I have no idea why this discrimination exists, and it will produce, I would guess, some hardships when the soldier's wife is not domiciled in Kansas.

Comparative Rectitude

In new 60-1606, the old equal fault statute²⁶ was clarified, particularly as to the power of the court to handle property problems.²⁷ In *Roberts v. Roberts*,²⁸ the court made clear that the old wording, found in KAN. G.S. 1949, 60-1506, that the trial court "may . . . refuse to grant a divorce, . . ." when the parties were in equal wrong, meant that the trial court could also grant the divorce. The new equal fault statute specifically spells out the power to grant the divorce. Note also that the old statute said "equal wrong." The new language is "equal fault." Surely they mean the same thing.

On property matters, the old statute, as construed,²⁹ provided that upon the *refusal* to grant a divorce for any reason, the court could provide for the children and could make an equitable division of all the property. However, the supreme court went on to hold that the trial court could not grant alimony.

But neither the statute, nor the cases, were very clear as to what happened when a divorce *was granted* for mutual fault. Presumably the court could follow KAN. G.S. 1949, 60-1511, which covered alimony and property rights when the divorce was granted for the fault of one of the parties, but could it grant alimony since the divorce was not for the fault of the husband, a requirement of the old 60-1511?³⁰

The new statute gives us a new approach. When the divorce is *either* denied or granted due to equal fault, the court can make the same property, alimony and child support orders as it can when a divorce is granted for the fault of one party.³¹ In other words, the court can order alimony and division of property even when the court denies the divorce on the ground of equal fault.

However, the Council added another sentence, which might more logically be found in the section dealing with decrees generally. This sentence provides that if a divorce, separate maintenance or annulment is denied on other

²⁶ KAN. G.S. 1949, 60-1506.

²⁷ The full text of the new statute reads:

When the parties are found to be in equal fault, the court may grant or refuse a divorce. In either event the court may make any of the orders authorized by section 60-1610 except the restoration of a maiden name if the divorce is refused. If a decree of divorce, separate maintenance or annulment is denied other than for the equal fault of the parties the court may nevertheless make any of the orders authorized by this section for the benefit of the minor children of the parties or for the equitable division of the property of the parties.

²⁸ 103 Kan. 65, 173 Pac. 537 (1918). See also, *Biltgen v. Biltgen*, 121 Kan. 716, 250 Pac. 265 (1926).

²⁹ *Paul v. Paul*, 183 Kan. 201, 326 P.2d 283 (1958).

³⁰ See Hopson, *Economics of a Divorce*, 11 KAN. L. REV. 107, 122 (1962) [hereinafter cited as Hopson, *Economics*] for a discussion of this problem.

³¹ But the statute specifically prohibits the court from restoring a maiden name if the divorce is refused. This is probably logical.

grounds,³² the court can still take care of the children, but can make only an equitable division of the property. It cannot order alimony. The theory seems to be that if the wife cannot show grounds for divorce she should not receive future support. Perhaps this is proper, although the fact that the divorce was filed indicates that the parties will not live together and if she needs support, maybe she should receive it.

Interlocutory Orders

The next section, new 60-1607, covers interlocutory orders.³³ Here the Council added some important clarification. First, the attorney should note that the interlocutory orders now apply to annulment as well as to divorce and separate maintenance. Second, although district courts have regularly issued such orders, for the first time Kansas has statutory authority for personal restraining orders preventing a husband or wife from bothering or molesting the other spouse.³⁴ Third, and more importantly, a temporary alimony or child support order can be entered in favor of *either* party. A husband can now get temporary support.³⁵ A mother may also be ordered to make monthly payments to support the children, a right not spelled out in the old code.³⁶ Note also that either party can obtain suit money from the other.

I would guess that these provisions will end the automatic *ex parte* support order. The trial judge will now have to decide which spouse can more easily afford to pay. I should also add that the limitation in the old code³⁷ on attorney's fees being awarded only if the wife wins is eliminated. By a provision

³² I would guess that insufficient evidence was what was being assumed here. But actually the statute is not limited to denials on the merits. Perhaps the property and alimony orders, discussed below, could be made even if the dismissal were on procedural grounds. If dismissal includes voluntary dismissal, a wife could obtain a division of property by filing a petition, then moving to dismiss the petition and to have the court enter a property order.

³³ The full text reads:

Interlocutory orders. After a petition for divorce, annulment, or separate maintenance has been filed, the judge of the district court may, without requiring bond, make and enforce by attachment, orders covering the following matters:

- (a) *Property.* Restraining the disposition of the property of the parties, or either of them, and providing for the use, occupancy, management and control thereof;
- (b) *Molesting.* Restraining either party from molesting or interfering with the privacy or rights of the other;
- (c) *Custody and support.* Providing for the custody of the minor children, and the support, if necessary, of either party and of the minor children during the pendency of the action;
- (d) *Expenses of suit.* Making such provisions, if necessary, for the expenses of the suit, including reasonable attorneys fees, as will insure to either party efficient preparation for the trial of the case;
- (e) *Modifying or vacating.* The judge may vacate or modify any interlocutory order from time to time as he may deem proper. In the absence, disability, or disqualification of the judge of the district court, the probate judge may make any order authorized by this section, but he shall not vacate or modify any order issued by the judge of the district court.

³⁴ See Hopson, *Economics*, *supra* note 30, at 139 for a discussion of the use of such orders.

³⁵ Of course, as we will later see, a husband can get permanent alimony also.

³⁶ KAN. G.S. 1949, 60-1507 covered interlocutory orders. The whole import of the statute assumes that only the father pays.

³⁷ KAN. G.S. 1949, 60-1507.

in the section on final decrees,³⁸ the wife or husband can obtain a final order for attorney's fees even if he or she loses so long as "justice and equity . . . require(s)" it. Finally, the statute now specifies that any temporary order may be modified or vacated. The supreme court had so held under the old code even though the old statute was silent on this point.³⁹

"Cooling Off" and Emergencies

In 60-1608, the new code provides, without material change from the old statute,⁴⁰ for a 60 day cooling off period unless the attorney can show the same undefined emergency.⁴¹ Note, however, that the new statute makes it clearer that the 60 day waiting period does not apply to suits for separate maintenance and annulment.⁴²

Evidence

The Council added nothing really new to the old evidence sections⁴³ in the new 60-1609.⁴⁴ The marriage can now be proved in the same manner that one proves a common-law marriage. The old statute read that evidence of cohabitation and reputation was usable to prove a marriage. Certainly this is no basic change, but to my knowledge, this is the first time that Kansas has had statutory reference to, and tacit approval of, common-law marriages.

One omission may provide an argument, although probably an unsuccessful one. In the old code appeared the sentence: "But no divorce shall be granted without proof."⁴⁵ This sentence prohibited, of course, true default divorces. That sentence no longer appears in the code. I doubt, however, even if the defendant does not file an answer, that the supreme court would approve the granting of a divorce on the pleadings. The new code still requires

³⁸ KAN. CODE CIV. PRO., 60-1607(d).

³⁹ *Edwards v. Edwards*, 182 Kan. 737, 324 P.2d 150 (1958).

⁴⁰ KAN. G.S. 1949, 60-1517.

⁴¹ The full text reads:

An action for divorce shall not be heard until sixty (60) days after the filing of the petition unless the judge shall enter an order declaring the existence of an emergency, stating the precise nature of the emergency, the substance of the evidence material thereto, and the names of the witnesses who gave the evidence.

⁴² This section is still not clear as to whether the filing of a cross-petition extends the 60 days. The statute actually says "petition."

⁴³ KAN. G.S. 1949, 60-1508, -1509.

⁴⁴ The full text reads:

Evidence:

- (a) *Admissions.* Upon the trial of the action, the court may admit proof of the admissions of the parties to be received in evidence, excluding such as shall appear to have been obtained by connivance, fraud, coercion, or other improper means.
- (b) *Marriage.* Testimony admissible to prove a common-law marriage may be received as evidence of the marriage of the parties.
- (c) *Husband and wife as witness.* Either party to the action shall be competent to testify upon all material matters involved in the controversy.
- (d) *Corroborating testimony.* A decree of divorce or separate maintenance shall not be granted upon the uncorroborated testimony of either party or both of them.

⁴⁵ KAN. G.S. 1949, 60-1508.

outside corroboration,⁴⁶ and I am sure that the court will interpret this to require proof in every divorce case.⁴⁷

The Decree

We now turn to a most important and, at least for Kansas, revolutionary change in divorce practice. I refer, of course, to the new child support, alimony and division of property provisions.

Before entering into a detailed discussion of these new sections, attention should be drawn to a most important new sentence appearing in Article 3 on Process in the new code. Divorce is traditionally considered to be in the nature of a quasi in rem action with domicile being a sufficient res to exercise jurisdiction.⁴⁸ However, the child support or alimony aspects of the divorce case require in personam jurisdiction over the one against whom the order is entered.⁴⁹ Consequently, in many cases one could obtain a divorce but no alimony or child support from an out-of-state husband.

Now, in new section 60-308, the so called "long-arm" statute, the Council basically copied the new Illinois type statute,⁵⁰ which provides for obtaining in personam jurisdiction over non-residents when they have sufficient contact with the state.⁵¹ However, the Council went beyond Illinois and added a new type of contact. It says:

Living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations arising for alimony, child support, or property settlement under article 16, if the other party to the marital relationship continues to reside in the state.⁵²

In other words, matrimonial domicile is a sufficient contact point for in personam jurisdiction over the leaving spouse. The court can then grant alimony or child support.

Although this new provision may produce a few problems of interpretation,⁵³ its basic thrust is clear. While a wife cannot move to Kansas by herself

⁴⁶ KAN. CODE CIV. PRO., 60-1609(d).

⁴⁷ Actually, the corroboration requirement only reads that a decree shall not be granted on the uncorroborated testimony of either party or both of them. The court could say under the new code, that if neither spouse testifies, and neither will if the divorce is a default matter, no corroboration is needed.

⁴⁸ For a general discussion of the concepts, see EHRENZWEIG, CONFLICT OF LAWS § 71 (1962).

⁴⁹ *Id.* §§ 80-85.

⁵⁰ ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956).

⁵¹ An article on the new jurisdictional statute and its use appears elsewhere in this symposium. See Jacobson, *The Enlargement of Jurisdiction Over Unlicensed Foreign Corporations Committing Torts in Kansas: New Code 60-308*, 12 KAN. L. REV. 49 (1963).

⁵² KAN. CODE CIV. PRO., 60-308(b)(6).

⁵³ One problem may center on how long the parties must have lived "in the marital relationship" to qualify. No time is set. While divorce requires one year's domicile, only one party need be domiciled (KAN. CODE CIV. PRO., 60-1603(a)), so the period of matrimonial domicile may not need to be a year. On the surface, one day of actual "domicile" would appear to be sufficient. In other words, suppose a wife moves to Kansas without her husband—three hundred and sixty-four days later, he shows up and lives with her one day. He then moves out of the state. She could secure in personam jurisdiction and obtain an alimony order.

and then use the statute, it certainly allows a Kansas wife to obtain alimony and child support from a husband who has run off to another state. It should prove exceedingly useful.

One word of caution, however. The United States Supreme Court has not yet held constitutional the Illinois type long-arm statute, although I am sure that they will, at least as to most types of contacts. But there may be more of a question as to the alimony provision. I have never seen a similar statute⁵⁴ and no court, to my knowledge, has ever passed on the constitutionality of a similar provision.⁵⁵ There might be some trouble getting another state to uphold Kansas' jurisdiction when the Kansas plaintiff demands full faith and credit for her Kansas judgment. The other states will argue that the attempt to gain jurisdiction over the non-resident spouse violates due process. But I would guess that if a case ever gets to the United States Supreme Court, its prior decisions⁵⁶ indicate that it would find matrimonial domicile a sufficient "contact point" upon which to base in personam jurisdiction.⁵⁷ The statute would be upheld.

Turning to the substantive provisions, first note the change in form. The new code now lumps together in 60-1610 all of the various orders that the trial court may make in its decree. No longer are they scattered through various sections of the code.

Care of Minor Children

Subsection (a) of new 60-1610⁵⁸ covers the child support and custody mat-

⁵⁴ It was suggested by the Council that California had such a statute. A hasty skimming of the California Code failed to yield a citation.

⁵⁵ New York in *David-Ziesenis v. David-Ziesenis*, 205 Misc. 836, 129 N.Y.S.2d 649 (1954), held constitutional a divorce statute which used as a jurisdictional base the fact that the parties had married in New York, but this did not allow in personam jurisdiction for purposes of alimony.

⁵⁶ *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Milliken v. Meyer*, 311 U.S. 457 (1940). But cf. *Hanson v. Denckla*, 357 U.S. 235 (1958).

⁵⁷ See generally *ERKENZWEIG*, *op. cit. supra* note 48, §§ 27-33 (1962).

⁵⁸ The full text reads:

Decree. A decree in an action under this article may include orders on the following matters:

- (a) *Care of minor children.* The court shall make provisions for the custody, support and education of the minor children, and may modify or change any order in connection therewith at any time, and shall always have jurisdiction to make any such order to advance the welfare of a minor child if (i) the child is physically present in the county, or (ii) domicile of the child is in the state, or (iii) the court has previously exercised jurisdiction to determine the custody or care of a child who was at such time domiciled in the state. In connection with any decree under this article, the court may set apart such portion of the property of either the husband or the wife, or both of them, as may seem necessary and proper for the support of all of the minor children of the parties or of either of them. If the court finds that both parties are unfit to have the custody of such minor children, their parental rights may be terminated and the custody of such children placed with an appropriate person, agency, or association, in or out of the state of Kansas. If such an order remains in effect for one year or more, the person, agency, or association having such custody may be given by the court the power to consent to the adoption of any such minor child under the adoption laws of this state under the following conditions:
- (1) *Application.* Application shall be made to the district court in which the decree was granted for permission to consent to such adoption.
 - (2) *Notice.* At least thirty (30) days written notice of such application shall be given to the parents, if their whereabouts are known, and to their attorneys of record, if any, by restricted mail prior to the hearing of the application.

ters formerly set out in KAN. G.S. 1961 Supp., 60-1510. There are two key changes—one jurisdictional and one substantive. There is also one minor change in language which might prove to be important. This minor change occurs in the first part of subsection (a). The old code provided that the court “may modify or change any order [child support and custody] in this respect *whenever circumstances render such change proper.*” (Emphasis added.)⁵⁹ The new code substitutes “may modify or change any order in connection therewith at any time” In other words, there is no longer any “change of circumstances” language.

At face value, the statutory change should give the trial judge more freedom to change custody or support orders. Although the Kansas supreme court has apparently held⁶⁰ that the moving party need not show a change of circumstances, there is some indication that the court, in later years, has required such a showing.⁶¹ Apparently the change in the statute eliminates any argument that the trial court has no power to modify absent a showing of “change of circumstances.” The court may now base its order solely on the basis of “what is best for the child.”

The new code provides, in its key *jurisdictional* change, that to advance the welfare of the child, the court shall have jurisdiction to make support and custody orders if “(i) the child is physically present in the county, or (ii) domicile of the child is in the state, or (iii) the court has previously exercised jurisdiction to determine the custody or care of a child who was at such time domiciled in the state.”⁶² This language was obviously intended by the Council to overrule—and apparently successfully does overrule—the various late Kansas supreme court cases requiring domicile of the child as a jurisdictional touchstone before the trial court could enter a new custody order.⁶³

The Council also tidied up the statutory provision on jurisdiction for a writ of habeas corpus to make it conform to the new divorce code. The first section in the article on habeas corpus, new 60-1501, provides “. . . any parent, guardian, or next friend for the protection of infants . . . *physically present in this state*, may prosecute a writ of habeas corpus” (Emphasis added.)

(3) *Restoration of parental rights.* If the court permits such consent to be given, the court in which the adoption proceedings are commenced shall have exclusive jurisdiction over the custody of the minor child. If the adoption proceedings do not result in final adoption, the jurisdiction of the district court shall be immediately restored, and parental rights which have been terminated under the provisions of this subsection may be restored on the application of either party by order of the court in which they were terminated and on such reasonable notice to all parties affected as the court may require.

⁵⁹ KAN. G.S. 1961 Supp., 60-1510.

⁶⁰ See *In re King*, 66 Kan. 695, 72 Pac. 263 (1903).

⁶¹ See *Kimbell v. Kimbell*, 190 Kan. 488, 376 P.2d 881 (1962); *Bierce v. Hanson*, 171 Kan. 422, 233 P.2d 520 (1951). As to a foreign decree, see *White v. White*, 160 Kan. 32, 159 P.2d 461 (1945). See Johnstone, *Child Custody*, 1 KAN. L. REV. 165, 176 (1953) for a discussion of the problem.

⁶² KAN. CODE CIV. PRO., 60-1610(a).

⁶³ See Comment, 10 KAN. L. REV. 595 (1962) for an excellent discussion of the now overruled cases.

The new provisions are extremely broad and there might be some danger, in light of some of the Kansas cases, that the Kansas court would feel that to exercise jurisdiction in all of the above situations would violate the due process clause of the United States Constitution. The provision allowing for jurisdiction once the child has left the state seems particularly vulnerable, since the court has hinted that domicile might be a Constitutional requirement.⁶⁴ However, most of the authorities would sustain jurisdiction.⁶⁵ I would guess that the Kansas court will also. The Kansas supreme court has not committed itself to the view that domicile is a constitutional requirement and might gladly follow the statute. To what extent other states will recognize our decree is another question,⁶⁶ although it will probably be no worse than when we used domicile. Full faith and credit has never worked very well in the custody area anyway.⁶⁷

The other major change concerns the power of the court to provide for the children. There is one obvious change and one that may arise from construction. Tacked on at the end of the old alimony statute⁶⁸ was a sentence which allowed a trial court, when the wife was at fault, to "set apart such a portion of the wife's separate estate as may seem proper for the support of the children, issue of the marriage." The Council approved the idea behind this sentence and thought that it should logically extend to the husband since, as a practical matter, this might be a way to protect the children against a shiftless father. Consequently, they included in the child support section the following language:

In connection with any decree under this article, the court may set apart such portion of the property of either the husband or the wife, or both of them, as may seem necessary and proper for the support of all of the minor children of the parties, or of either of them.⁶⁹

While the language seems clear, although "set apart" may present some problems,⁷⁰ the attorney should particularly note the last phrase—"or of either of them." This language was deliberately added and it clearly allows

⁶⁴ In *Kruse v. Kruse*, 150 Kan. 946, 96 P.2d 849 (1939), the Kansas supreme court refused to give full faith and credit to a Missouri custody order since the child was not domiciled in Missouri. The court found that Missouri lacked "jurisdiction" even though the Missouri court had found jurisdiction.

Speaking of the jurisdiction of the Kansas court when no domicile existed, the court said in *Leach v. Leach*, 184 Kan. 335, 336 P.2d 425 (1959): "Any attempt on the part of our courts to assert continuing jurisdiction over children domiciled in sister states would be *unseemly*, and such orders would not be entitled to full faith and credit in the courts of any state." (Emphasis added.) *Id.* at 339, 336 P.2d at 428.

⁶⁵ See EHRENZWEIG, *op. cit. supra* note 48, §§ 86-89 (1962).

⁶⁶ *Ibid.*

⁶⁷ *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

⁶⁸ KAN. G.S. 1949, 60-1511.

⁶⁹ KAN. CODE CIV. PRO., 60-1610(a).

⁷⁰ While the phrase appeared in the old alimony section, the Kansas supreme court has, apparently, never considered it. Does "set apart" mean that legal title to the property is transferred to the child? If so, must a guardian be appointed for the child?

the property of a stepfather or stepmother to be "set apart" to his or her stepchildren. In so doing, of course, the Council takes the position that the socially and legally significant family unit are those living together, as well as the family created by blood or adoption.

But this position may also mean that the trial court may, under this new statute, order a father or mother to pay monthly child support payments to his or her stepchildren. Note that the new language on child support merely reads: "Of the minor children" leaving out the old qualifying phrase "of the marriage." Couple this with the fact that even under the old language, in custody cases, the court has held that stepchildren are "of the marriage."⁷¹ Consequently, it should be quite easy for the court to now find from the change in language on support and from the specific language as to setting aside property, that the "legislature" intended to allow child support payments to be ordered for the benefit of stepchildren.

In closing out the section on children, the attorney should note that the provisions added in 1953⁷² to the old statute on custody and support,⁷³ which allowed the court to find both parents unfit and put the children out for adoption was not changed in any way.

Alimony, Division of Property and Separation Agreements

The really vital changes in the Code are those concerning alimony, division of property and separation agreements—sections (b), (c) and (d) of new 60-1610.⁷⁴ The old alimony and division of property statute⁷⁵ was a hodge-

⁷¹ Anderson v. Anderson, 191 Kan. 76, 379 P.2d 348 (1963). Cf. State v. Taylor, 125 Kan. 594, 264 Pac. 1069 (1928).

⁷² Kan. Sess. Laws 1953, ch. 278.

⁷³ KAN. G.S. 1949, 60-1510.

⁷⁴ The full text reads:

- (b) *Division of Property.* The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reasonable manner, either by a division of the property in kind, or by setting the same or a part thereof over to one of the spouses and requiring either to pay such sum as may be just and proper, or by ordering a sale of the same under such conditions as the court may prescribe and dividing the proceeds of such sale.
- (c) *Maintenance.* The decree may award to either party an allowance for future support, denominated as alimony, in such amount as the court shall find to be fair, just and equitable under all of the circumstances. The decree may make the future payments conditional or terminable under circumstances prescribed therein. The allowance may be in a lump sum or in periodic payments or on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the alimony originally awarded that have not already become due, but no modification shall be made, without the consent of the party liable for the alimony, if it has the effect of increasing or accelerating the liability for the unpaid alimony beyond what was prescribed in the original decree.
- (d) *Separation agreement.* If the parties have entered into a separation agreement which the court finds to be valid, just, and equitable, it shall be incorporated in the decree; and the provisions thereof on all matters settled thereby shall be confirmed in the decree except that any provisions for the custody, support, or education of the minor children shall be subject to the control of the court in accordance with all other provisions of this article. Matters settled by such an agreement, other than matters pertaining to the custody, support, or education of the minor children, shall not be subject to subsequent modification by the court except as the agreement itself may prescribe or the parties may subsequently consent.

⁷⁵ KAN. G.S. 1949, 60-1511.

podge of confusing sentences with which the Kansas supreme court had experienced considerable difficulty.⁷⁶ So, the Council junked the old scheme and tried an entirely new approach. The keys to this new approach lie in the attempt by the Council, (1) to separate the division of property concept from that of alimony, viewing alimony as a purely future support concept, something the old code certainly did not do,⁷⁷ and (2) to cut down on the uncertainty of awards by giving the spouses statutory contractual control over alimony and property.

Turning to the provisions themselves, the attorney finds in subsection (b) on "Division of Property," that the source of the property held by either spouse is no longer relevant. The wife no longer gets her "separate" property set aside to her. All property, no matter what the state of the title or its source, is put into a common pot and divided by the court "in a just and reasonable manner." The concept of "jointly acquired" property is now irrelevant and the attorney no longer will have to litigate to determine whether a particular piece of property was in fact "jointly acquired."⁷⁸

But I doubt, as a practical matter, whether the supreme court or trial courts will (and they probably should not) ignore the many factors such as source of property, contributions of each spouse, and length of marriage, which were important factors under the prior decisions.⁷⁹ The court just will not have to start by giving the wife her property first.

Note also, that in contrast to the old language about division of property, the court can divide it in kind or by kind and money in *any* combination. In practice this was done under the old code.⁸⁰ However, the old language—"by a division of property in kind, or by setting the same apart to one of the parties, and requiring *the other* thereof to pay such sum . . ."—could be construed to allow cash payment only from the one who did *not* receive the property in kind. The new statute clears this up. Also the Council gave the additional power to the court to sell the property and order the proceeds divided. This power should prove particularly helpful when neither of the parties want the family home or other property, but cannot agree on how to sell it.

Maintenance

The biggest change is in the alimony concept. Perhaps the easiest way to examine it is to just list the key changes:

⁷⁶ See Hopson, *Property Rights in Divorce and Separate Maintenance Cases*, 30 KAN. B.J. 302 (1962) [hereinafter cited as Hopson, *Property Rights*].

⁷⁷ *Ibid.*

⁷⁸ See, e.g., *Kelso v. Kelso*, 182 Kan. 665, 324 P.2d 165 (1958); *Cunningham v. Cunningham*, 178 Kan. 97, 283 P.2d 405 (1955).

⁷⁹ See, e.g., *Walno v. Walno*, 164 Kan. 620, 192 P.2d 165 (1948); *Mann v. Mann*, 136 Kan. 331, 15 P.2d 478 (1932).

⁸⁰ See, e.g., *Kelso v. Kelso*, *supra* note 78.

1. Alimony no longer retains its division of property aspects.⁸¹ It is now purely a support matter to be paid in cash.

2. The court is no longer forced to award alimony. It is purely discretionary. *Garver v. Garver*⁸² is overruled. No criteria, except that which the court finds "fair, just and equitable under all the circumstances" are set out. The philosophy behind the new code would indicate that ability to pay and need would be the primary considerations. In other words, the court should figure alimony as it now figures child support. Apparently, such matters as how much property the husband had and its source, criteria under the old code,⁸³ are no longer relevant since these factors are adjusted in the division of property. The new code seems to do all it can to induce the court to separate the division of property concept and the support concept.

3. Fault is now irrelevant. It makes no difference who obtains the divorce. This provision should eliminate a few of the races to the courthouse door and may eliminate the filing of some cross petitions which used to be filed to protect the right to alimony. Of course, I would guess that the Kansas District Court Judges will still, at least subconsciously, be influenced by "fault" considerations in setting the amount of the alimony decree. The habit is probably ingrained.⁸⁴

4. Note that alimony is no longer only the privilege of the wife. A trial court may now award alimony to a husband. Such an award will probably not appear too often. Trial courts are not apt to exercise their discretion in this fashion. But if a wife is earning good money and a husband is unable to work, the trial court can order her to support him.

5. While lump sum awards are still provided for, the court is now free to provide for variable alimony and the statutes make clear that the terms of the variation can be as wide as judicial imagination allows. The court can now decree alimony to be payable until death or remarriage. No longer is Kansas faced with the spectra of one husband paying alimony to the second husband as happened in *Bourman v. Bourman*.⁸⁵

The attorney should also note that by allowing variable alimony in the decree, the parties no longer need resort to the non-merged separation agreement to gain the federal income tax benefits. Under the new code, the husband can deduct his alimony payments, so long as the alimony decree is made variable.⁸⁶

6. In a somewhat similar fashion to child support, a spouse may, after

⁸¹ See Hopson, *Property Rights*, *supra* note 76, at 303.

⁸² 184 Kan. 145, 334 P.2d 408 (1959).

⁸³ See, e.g., *Carlat v. Carlat*, 168 Kan. 600, 215 P.2d 200 (1950).

⁸⁴ Hopson, *Economics*, *supra* note 30, at 136.

⁸⁵ 155 Kan. 602, 127 P.2d 464 (1942).

⁸⁶ See Hopson, *Property Rights*, *supra* note 76, at 312.

notice, ask the trial court to modify its prior alimony decree. However, the court may not, without consent of the party paying, increase the award either in amount or by decreasing the time in which the spouse must pay off the alimony award. Also, the court may not retro-actively change any alimony order. In other words, the party liable can try to obtain a decrease in what is to be paid, but the recipient may not ask for an increase.

I personally disagree with this provision, preferring that the statute allow modifications both ways as needs and ability to pay change. The court has the power to modify child support both ways.⁸⁷ I see no reason to make a distinction. But, be that as it may, I would suggest that trial court judges will now have a tendency to award larger amounts of alimony than they might have. They will correctly reason that if the amount proves to be too high, they can later reduce it, but that if they set it too low, there is no way to increase it.

The Separation Agreement

The Council also added a whole new section on separation agreements. After having given almost unlimited discretion to the trial court judge to adjust the economic relations between the spouses, the Council added a section giving the parties the right to bind the court by using a separation agreement or property stipulation. The Council apparently took the position that the parties should be encouraged to settle their economic differences by themselves.

Actually, the statute does not change the Kansas law to any great extent. The new code says the agreement is binding on the court if the court finds the agreement "to be valid, just and equitable." The new statute seems to successfully write into the new code the old Kansas rules on fraud, overreaching, full disclosure and understandingly made.⁸⁸ Thus, it is only when the agreement is basically proper, that the court has no power to change it. This was the old rule under the Kansas decisions.⁸⁹ Even though the statute does not change the law, it has one distinct advantage. Although the Kansas court recognized separation agreements, there was no statutory authority for them, and there was always some danger that the court might find that a particular agreement was against public policy in that it was collusive or in that it promoted a divorce.⁹⁰ This danger should now be lessened.

Note also that the statute provides that all agreements are to be incorporated into the decree and that the court may not modify the agreement later unless the contract so provides. These requirements eliminate two problems. First, the attorney no longer need worry about what language in a journal entry

⁸⁷ See, e.g., *Grunder v. Grunder*, 186 Kan. 766, 352 P.2d 1067 (1960).

⁸⁸ Hopson, *Property Rights*, *supra* note 76, at 310.

⁸⁹ Hopson, *Property Rights*, *supra* note 76, at 310.

⁹⁰ See, e.g., *Hoch v. Hoch*, 187 Kan. 730, 359 P.2d 839 (1961) for a statement that the agreement may be collusive.

shows merger and what shows mere approval,⁹¹ and, since the statute allows for variable alimony, there is no need to keep a variable alimony agreement from being merged.⁹²

Second, by requiring merger and not allowing the decree to be modified, the Council eliminated the problem existing in many states as to the power of the court to modify an alimony decree in both the situation where the contract is merged and where it is merely approved.⁹³ The problem centers on whether, upon a subsequent motion to modify, the power of the court is controlled by the statute or by the contract. The new code provides for the best of both worlds. The parties obtain the benefit of a court decree. Yet the statute protects the parties since it provides that even though the contract is merged, the court may not subsequently modify it unless the contract so provides or the parties subsequently consent. In other words, under the new code, the contract is king.

In one area, however, the Council took the other tack. On questions of child support and child custody, the court is king. Clauses on these questions cannot limit the court's power to make the original determination or to modify it later. The Council bought the rationale of the recent *Grunder* case⁹⁴ that the public policy of Kansas should allow the court the complete power to protect the children no matter what the parents do.⁹⁵ But, of course, trial courts will continue to approve the bulk of the child support clauses in property stipulations. This is proper.

To sum up, it should be pointed out that while the new provisions on alimony and division of property are quite radical, they are a basic attempt to reach a workable compromise between freeing the trial courts from the shackles of an unworkable statute and allowing the parties to settle their property problems by themselves so that they can predict what will happen. Perhaps too much faith was placed in the discretion of the trial court. Perhaps too much faith was placed in the parties and their attorneys. If so, the Council can always try to get a new compromise enacted into law.

⁹¹ See 1 KAN. L. REV. 199 (1953) for a survey of the two lines of cases.

⁹² Under the rule of *Conway v. Conway*, 130 Kan. 848, 288 Pac. 566 (1930), merging a variable alimony agreement rendered the judgment void. In the second *Conway* case, *Conway v. Conway*, 133 Kan. 148, 298 Pac. 744 (1931) the court held that the contract was no longer enforceable since merged into the prior, but void, decree.

⁹³ See *e.g.*, *Miner v. Miner*, 10 Wis. 2d 438, 103 N.W.2d 4 (1960); *Plumer v. Plumer*, 48 Cal. 2d 820, 313 P.2d 549 (1957); *North v. North*, 339 Mo. 1226, 100 S.W.2d 582 (1936). See generally, Annot., 166 A.L.R. 675 (1947).

⁹⁴ *Grunder v. Grunder*, *supra* note 87.

⁹⁵ This means that the Council seems to have rejected the possible implications of the second *Feldmann* case, *Feldmann v. Feldmann*, 179 Kan. 109, 292 P.2d 716 (1956), that by combining child support and alimony, contractual control could be maintained. See *Hopson, Property Rights, supra* note 76, at 312. It may be possible that by combining child support and alimony the parties would induce the court to still give contractual control to the parties on child support. But this interpretation is doubtful since the new code provision shows such a strong policy on leaving matters of child support within the discretion of the trial court.

Change of Name

Although of no great importance, attorneys should note that the new code allows, in 60-1610(e), the ex-wife to obtain restoration of her maiden or former name.⁹⁶ If she requests it, the court cannot deny it to her. Under the old code,⁹⁷ the court had to restore her name if the husband was at fault, but the court had discretion when the wife was at fault.

Costs and Fees

Another change is important, however. Sub-section (f) of new 60-1610 provides that "Costs and attorneys' fees may be awarded to either party as justice and equity may require." The key change, of course, is that the award of costs and attorney's fees to a wife is no longer contingent on her obtaining or successfully defending the divorce.⁹⁸ Note also that a husband can now obtain attorney's fees if equity so requires.⁹⁹

Effective Date of Divorce Decree

Sub-section (g) of new 60-1610 introduces a welcome change in our jurisprudence.¹⁰⁰ The Council took out the old remarriage within six months-bigamy provision,¹⁰¹ and the requirement that the decree must recite that it would not be effective for six months.¹⁰² However, the substitute is a bit ambiguous. It provides that the decree should state that the parties should not marry another until 30 days after the decree is "final."¹⁰³

But what should the attorney tell his client? When he walks out of the courtroom, how can the attorney tell from what date to start counting the 30 days? Under the old code a divorce decree was presumably "final" when rendered unless an appeal was taken. Under new 60-258(b) a judgment, at least in a divorce case, will not be entered until the attorney files the journal entry with the clerk.¹⁰⁴ No time limit is set, other than it be done

⁹⁶ The full text reads: "Upon the request of the wife, the court shall order the restoration of her maiden or former name."

⁹⁷ KAN. G.S. 1949, 60-1511.

⁹⁸ The old code so provided, see KAN. G.S. 1949, 60-1507.

⁹⁹ It may be possible for the court to award attorney fees to both attorneys out of the assets of the parties. This would be a welcome addition.

¹⁰⁰ The full text reads:

Every decree of divorce shall contain a provision to the effect that the parties are prohibited from contracting marriage with any other persons until thirty (30) days after the decree shall become final, and any marriage contracted before the expiration of that period shall be null and void, and any agreement to waive the right to appeal shall not be effective to shorten such period of time.

¹⁰¹ KAN. G.S. 1949, 60-1512.

¹⁰² KAN. G.S. 1949, 60-1514.

¹⁰³ The wording is certainly preferable to that of the old code. Here it is clear that the divorce is absolute at the time of decree and the prohibition is on remarriage. Under the old code, the wording made it appear that the decree was not "final" for six months. See *In re Estate of Troemper*, 160 Kan. 464, 163 P.2d 379 (1945), where the court points out that the parties are in fact divorced as of the date of the decree.

¹⁰⁴ The extra legal device that some attorneys now use of telling their client that they will not file the journal entry until they are paid their fee and that the divorce is not "final" until the filing is now apparently sanctioned by the new code.

“promptly.”¹⁰⁵ That is the first uncertainty. Another uncertainty exists as to the effect of an appeal on the finality of the judgment. The final clause of the sub-section (g) of new 60-1610 says the parties cannot, by agreement, shorten the time for appeal. This would seem to imply that the attorney should start counting the 30 days after the time for appeal has expired. Since the time for appeal in the new code¹⁰⁶ is normally 30 days, the party may not be able to remarry for 60 more days. Since the time for appeal can be extended by various motions, the prohibition on remarriage could run well over 90 days.

I doubt that this ambiguity will be of too much bother. Since clients did not obey their attorney when told not to get married for six months, they probably will not wait 90 days either.

I might note that the old provision on giving notice of appeal within 10 days on divorce has been eliminated, as has the distinction between appealing from the divorce and from the other aspects of the divorce case.¹⁰⁷ Apparently the same appeal time applies to divorce as to other cases.

Effect of a Decree in Another State

KAN. G.S. 1949, 60-1518 which required full faith and credit to a foreign divorce decree, but allowed economic problems to be settled here, if suit were brought within 2 years, was retained with only one change—and that change, I would guess, is unconstitutional. The old code provided that a party could not re-try property rights and alimony if the defendant (1) was personally served in or (2) appeared in or defended the foreign action. The new code leaves out the first condition: “was personally served.” In other words, the Kansas code now provides that even though the court had in personam jurisdiction over the defendant, Kansas will let the defendant re-litigate here in Kansas, the property problems. But the cases in the United States Supreme Court which allow divisible divorce,¹⁰⁸ indicate that in personam jurisdiction is enough to evoke res judicata—full faith and credit. Once the court has in personam jurisdiction, a spouse may not re-litigate the alimony question. I do not know why the clause on personal service was omitted, but I am afraid nothing was accomplished by omitting it.¹⁰⁹

While Article 16, unlike the rest of the new code, does not present a major revision of either the form or substance of the prior law, it does clear up several existing ambiguities and inconsistencies and does take a new look at the economic aspects of divorce. This new approach is an attempt to provide

¹⁰⁵ See KAN. CODE CIV. PRO., 60-258(a).

¹⁰⁶ KAN. CODE CIV. PRO., 60-2103.

¹⁰⁷ See *Bunch v. Bunch*, 185 Kan. 543, 345 P.2d 624 (1959).

¹⁰⁸ *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1918).

¹⁰⁹ For a discussion of the previous Kansas statute in relation to the United States Supreme Court cases, see Comment, 6 KAN. L. REV. 429 (1958).

a more workable and fairer method of dividing the assets of the parties and providing for support. Undoubtedly there will be many problems of interpretations not mentioned in this article. There always are. But the new divorce code certainly offers the opportunity to the legal profession to more adequately meet the needs of its clients.

