

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1964

Divorce Under the New Code

Dan Hopson Jr.

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Civil Procedure Commons](#), and the [Family Law Commons](#)

Recommended Citation

Hopson, Dan Jr., "Divorce Under the New Code" (1964). *Articles by Maurer Faculty*. Paper 2013.
<http://www.repository.law.indiana.edu/facpub/2013>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

Divorce Under the New Code

By DAN HOPSON, JR.



PROFESSOR HOPSON explores the various new alimony decrees made possible by the new Code of Civil Procedure.

An attorney with an extensive domestic relations practice should rather quickly find that the new divorce code¹ has not revolutionized his practice. In the bulk of his cases, he will proceed, with a few quickly learned changes, as he always has and will probably obtain about the same kind of justice that he obtained in the past. Except in a couple of areas, to be discussed below, the new code makes no radical changes.

Yet a sufficient number of modifications do exist in the new code to require an attorney to look again at the statute book before he tries even a default divorce case. Most of the modifications are obvious and only need reading; a few require some cross reference work; while others must await an authoritative pronouncement from the Supreme Court.

In this short article no attempt will be made to give even a cursory review of all of the new provisions.² Only some of the more important or intriguing will be pointed up.

GROUND S

The legislature removed four of the old grounds for divorce and turned them into grounds for annulment,³ but did not touch the popular grounds of cruelty and

¹ Kan. Code Civ. Pro. 60-1601 to 1611.

² This has been done elsewhere, see Hopson, *Divorce and Alimony Under the New Code*, 12 Kan. L. Rev. 27 (1963) [hereinafter cited as Hopson, *Divorce*].

³ Kan. C.S. 1961 Supp., 60-1501 included bigamy, impotency, fraudulent contract and pregnancy by another. Slightly modified, they now appear in Kan. Code Civ. Pro., 60-1602. See Hopson, *Divorce*, *supra* note 2, at 29.

Dan Hopson, Jr. is a Professor of Law at the University of Kansas School of Law, Lawrence, Kansas. He received an A.B. degree in 1951 and an LL.B. degree in 1953 from K.U. In 1954 he received an LL.M. from the Yale Law School. After a year at Cambridge University, Cambridge, England, and a short stint of practicing in Phillipsburg, Kansas, he started teaching at the K.U. Law School in the fall of 1955.

Professor Hopson is Chairman of the Committee on Family Law of the Kansas Bar Association. He teaches in the area of Family Law and Juvenile Problems as well as Conflict of Laws and Labor Law. He has written and lectured extensively on Family Law.

gross neglect. The legislature did make, however, both annulment and separate maintenance much more useful and attractive remedies.

A suit for separate maintenance, which now can be brought by either the wife or the husband, gives the client all the economic benefits of a divorce⁴ and can be brought by a non-resident⁵ who does not have to wait the 60 days for his hearing.⁶

Separate maintenance, as a remedy, has one major limitation. The marriage relation still continues. If the client wants it ended, he should consider the advantages of annulment as a remedy. There are many advantages; all the same orders as to alimony and property as occur in divorce case may be decreed;⁷ the client need not be domiciled in Kansas;⁸ he need not wait the 60 days for his decree;⁹ and no corroboration is need-

ed as to the grounds.¹⁰

The annulment route has been seldom used in Kansas. This lack of use is probably due to the fact that both the "grounds" for annulment and the right to a division of property were rather vague.¹¹ The new code spells out the grounds,¹² and by including *fraudulent contract* as one of them, an attorney should not have much of a problem, in an easy marriage dissolution state like Kansas, in finding sufficient facts. New York has found at least 150 types of fraud that will dissolve a marriage.¹³ Surely the Kansas Supreme Court will be as liberal.

PROCEDURE

As did the old code, the new code proscribed many of its own procedural and evidence rules.¹⁴ But these rules are not exhaustive and the major changes in the rest of the new code will also effect the trial of a divorce case. For instance, the new sections on depositions and discovery¹⁵ and on written interrogatories¹⁶ should certainly make it easier to discover the property of the spouses. Allowing the court to order physical and mental examinations of a party by a physician¹⁷ might make the existence of mental illness which can be used in a divorce case both offensively and defensively¹⁸ considerably easier to prove.

¹⁰ Kan. Code Civ. Pro., 60-1608(d).

¹¹ See Hopson, Divorce, *supra* note 2, at 29.

¹² Kan. Code Civ. Pro., 60-1602.

¹³ See Wells, New York: *The Poor Man's Reno*, 35 Cornell L. Q. 303, 319 (1950).

¹⁴ See e.g. Kan. Code Civ. Pro., 60-1603 to 1605; 60-1607 to 1609.

¹⁵ Kan. Code Civ. Pro., 60-226 et seq.

¹⁶ Kan. Code Civ. Pro., 60-233.

¹⁷ See Kan. Code Civ. Pro., 60-235.

¹⁸ See *Katz v. Katz*, 191 Kan. 500, 382 P.2d 331 (1963); *Carter v. Carter*, 191 Kan. 80, 379 P.2d 311 (1963); *Hammack v. Hammack*, 189 Kan. 509, 370 P.2d 93 (1962); *Crosby v. Crosby*, 186 Kan. 420, 350 P.2d 796 (1960). For a discussion of these cases, see Brand and Hopson, Family Law, 1961-1963 Survey of Kan. Law., 12 Kan. L. Rev. 257, 263-267 (1963).

⁴ See circa note 38, *infra*.

⁵ Kan. Code Civ. Pro., 60-1603 only requires domicile for those filing a divorce petition.

⁶ Kan. Code Civ. Pro., 60-1608 apparently is limited to divorce actions.

⁷ Kan. Code Civ. Pro., 60-1610.

⁸ Kan. Code Civ. Pro., 60-1603.

⁹ Kan. Code Civ. Pro., 60-1608.

It surely should help in proving a parent's fitness in a custody fight.¹⁹

A couple of changes within the divorce code itself bear watching. In the section covering answers and cross-petitions²⁰ the legislature provided that a defendant might file a cross-petition for divorce, separate maintenance or annulment, even if he is a non-resident. But the plaintiff must be domiciled in Kansas. Apparently the old practice was the same, although the old code was silent.

This provision has caused one problem. Since it limits the filing of a cross-petition to the situation where the plaintiff is domiciled in Kansas,²¹ and since those in the Armed Services stationed in Kansas for one year may obtain a divorce without being domiciled in Kansas by using the Armed Service provision,²² the domicile requirement has excluded non-resident wives of service personnel. An attorney representing a service wife may find himself unable to cross-petition.²³

A couple of provisions in the new section on interlocutory orders²⁴ are noteworthy. The section specifically provides for a restraining order on molesting, something the old code did not do.²⁵ It also provides for temporary alimony, child support, and suit money (including attorney's fees) to be ordered paid by either party. Thus a wife can now be ordered to pay both child support and temporary alimony to a husband and to

pay the cost of his attorney.²⁶ It has been the practice of many trial courts to issue *ex parte* temporary orders. Since the new codes make such orders less automatic, some trial courts may change this practice.

ALIMONY AND DIVISION OF PROPERTY

The most revolutionary change in the new code centers on the complete revision of the power of the trial court to award alimony and to divide the property of the spouses. The court's power is now spelled out in detail. This power changes with the type of decree entered.

Perhaps the clearest way to approach these problems in the new code is to look at each decree and point up the court's power and how it contrasts with the old practice.

1). *When the court enters a decree granting a divorce based on the fault of either of the spouses:*

A) The court must divide the property of the parties.²⁷ The key change here is that 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." "Jointly acquired" property²⁸ is no longer a meaningful concept in Kansas divorce law.

This change is certainly revolutionary. A woman, married 40 years ago, now finds that the property she owned prior to her marriage can be given to her husband no matter who gets the divorce or annulment, a situation that did not exist at the time of her marriage. Yet this is true for a husband who finds the alimony statute changed after his marriage. Surely a spouse has no right at the time

¹⁹ Cf. *Stafford v. Good*, — Kan. —, 392 P.2d 140 (1964).

²⁰ Kan. Code Civ. Pro., 60-1605.

²¹ Section 60-1605 reads in part: "... if the plaintiff qualifies under subsection (a) of section 60-1603. Section 60-1603 (a) requires domicile.

²² Kan. Code Civ. Pro., 60-1603(b). See *Craig v. Craig*, 143 Kan. 624, 56 P.2d 464 (1936) which so interpreted almost identical language in the old code.

²³ Attorneys have reported that they have run into this problem. At least one District Court Judge has ruled that the service wife may not cross petition unless she has an independent Kansas domicile.

²⁴ Kan. Code Civ. Pro., 60-1607.

²⁵ Kan. G.S. 1949, 60-1507.

²⁶ Note also that in Kan. Code Civ. Pro. 60-1610 allows the court to give a final order for attorney's fees against either spouse and such an order is not dependent on who wins the divorce case.

²⁷ Kan. Code Civ. Pro., 60-1610(b).

²⁸ See e.g. *Kelso v. Kelso*, 182 Kan. 665, 324 P.2d. 165 (1958).

of marriage to the use of a particular set of alimony and division of property statutes.

B) The court may, not must,²⁹ award something called maintenance, but still to be denominated as alimony.³⁰ This "maintenance" or "alimony," however, is a far cry from the alimony concept under the old code.³¹ The old code allowed the court to divide the husband's property by decreeing lump sum alimony to the wife. The concept of alimony under the old code was an admixture of a concept of division of property and of support.³² The new code tries to turn alimony into purely a support concept. For instance, the court is given discretion to decline to award alimony if there is no need or if there is no ability to pay. The court is no longer limited to awarding it to the innocent wife. Fault is irrelevant. A husband can be the recipient. More importantly, the court may provide for variable alimony and may later modify it. The legislature did all it could to suggest that alimony was to be decreed only when a monthly cash payment was appropriate.

Three or four problems result, however, from the wording of the maintenance section. The legislature, in wishing to give the trial court as broad as possible discretion in setting the terms and conditions of the alimony award, left in the phrase "lump sum." Thus a court may still award a wife \$10,000 to be paid immediately or in installments. Since the trial judges are used to making such awards, attorneys will, unfortunately, probably continue to see them.

Such an award has several bad aspects. First it tends to perpetuate the use of "alimony" as an equalizer in the division

of property. It should and need not be so used. The court may make cash awards in the division of property.³³ This cash award, which allows a fair division of the present assets of the spouses, should not be labeled alimony. Alimony is to come out of future income and, as stated above, should be based on need, not the present wealth of the parties. But the old practice will probably die hard. Second, a lump sum award is presumably non-modifiable. *Bourman v. Bourman*,³⁴ which allowed a second husband to collect from a first husband alimony installments not yet due, has not been completely laid to rest. Third, a lump sum award, unless payable over a ten-year period, will not give the spouses the federal income tax benefit of making the wife treat alimony as income as will the new variable alimony decree.³⁵

There are also several problems that the attorney and judge must watch in awarding variable alimony. One such problem concerns the conditions imposed in the original decree. The court is free to use any type of condition and typical will be a decree awarding so much alimony until the death or remarriage of the wife. But it can be conditioned on other factors. For instance, under the old statute judges frequently tried to guess how much money it would take to let a wife finish college or secretarial school. Now the judge may make his decree read that the wife will receive \$150 a month so long as she is in school and progressing towards graduation. Other, even more exotic, conditions are possible. For example, the court may order support so long as the husband's net income is above a certain figure or on a straight percentage of the husband's income. The court could even put it on a shifting per-

(Continued on page 214)

²⁹ See Kan. G.S. 1949, 60-1511 as interpreted in *Carver v. Carver*, 182 Kan. 145, 334 P.2d 408 (1959).

³⁰ Kan. Code Civ. Pro., 60-1610(c).

³¹ Kan. G.S. 1949, 60-1511.

³² See Hopson, Property Rights in Divorce and Separate Maintenance Cases, 30 Kan. B.J. 302 (1962).

³³ Kan. Code Civ. Pro., 60-1610(b).

³⁴ 155 Kan. 602, 127 P.2d 464 (1942).

³⁵ See Hopson, Property Rights, *supra* note 32, 312. A separate article on the income tax problems of family dissolution will appear in a later issue of the Journal.

Divorce

Continued from page 168.

centage, e.g., 15% for the first year, 10% thereafter, but if the wife decides to go back to school, then 15% once again.

Judicial imagination in setting the conditions in the original decree is important because of the unique limitation on the courts' power to modify the award later. Kan. Code Civ. Pro., 60-1610(e) reads in part "The court may modify the amounts or other conditions. . . , but no modifications shall be made . . . if it has the effect of increasing or accelerating the liability for unpaid alimony beyond what was prescribed in the original decree."

This prohibition on upward revision will force the court into either of two devices. The court may award a higher amount than it thinks necessary on the correct assumption that if it proves too much the court may reduce the amount, but if it is too little the court may not increase it or the court may try to control the situation through imaginative conditions. Apparently the court could, *in the original decree*, order \$150 a month so long as the husband's income was below \$10,000, but if it went above \$10,000 the alimony payment would be \$200. Although this type of decree will possibly increase the husband's liability, this liability is spelled out in the original decree and that is all the statute requires. The apparent thrust of the limitation is to allow a husband to know the outside limit of his future liability. He need not know the exact future amount. The various decrees, set out above, should all satisfy the statutory limitation.

2) *When the court enters a decree granting an annulment.*

The section on alimony and division of property³⁶ starts off with the following language: "A decree in an action under

this article may include orders on the following matters:" Certainly a trial court will have the same power in awarding alimony and dividing the property on a decree of annulment as it does on a decree of divorce. On its face this section is also quite revolutionary. It gives the court the power to award alimony or transfer title to property from one person to another even though they have never been married. Actually whether they have ever been married depends, in theory, on whether the grounds for the annulment render the purported marriage void *ab initio* or whether they render marriage only voidable and consequently valid until the date of the decree.³⁷ In effect, by allowing alimony and a broad division of property as part of a decree of annulment, the legislature is saying that any purported marriage is a valid marriage until the date of decree. Therefore the court can make the award.

3) *When the Court enters a decree granting separate maintenance.*

Under the old statute, a client could obtain a decree labeled by the statute alimony only,³⁸ which the court construed this statute to mean that a division of property could not be awarded.³⁹ This rule is apparently changed by the new code. Although the cause of action under the new code is called "separate maintenance," it is, in fact, if not in theory, the equivalent of a divorce *mensa et thoro*. As in the case of a decree of annulment, the section on alimony and division of property says "a decree in an action under this article. . ." Surely this includes a decree for separate maintenance. Thus a client may obtain the same economic decree whether the cause of action is for a divorce, annulment or separate maintenance. A suit for separate maintenance differs from a suit for di-

³⁷ See 3 Nelson, Divorce and Annulment, §§31.01 to 31.03 (2d. ed. 1945).

³⁸ Kan. C.S. 1949, 60-1516.

³⁹ See *Brayfield v. Brayfield*, 175 Kan. 337, 264 P.2d 1064 (1953).

³⁶ Kan. Code Civ. Pro. 60-1410.

voiced only in that the latter decree will allow the parties to remarry while under the former decree the spouses remain technically married. The economic consequences should not differ. A division of property and alimony are both obtainable.

One problem may result, however, when the court divides the property. The court should state in its decree that title is held free and clear of the rights of the other spouse which are granted by KAN. G.S. 1949, 59-505.⁴⁰ The Kansas Supreme Court would probably hold that the separate maintenance decree takes precedence over the probate code,⁴¹ or it could hold that the division of property is an "other legal proceeding" which by operation of 59-505 itself would allow the spouse to sell the real property free and clear. But it probably would be safer to have the decree exclude the rights of the other spouse. Even then a title attorney might want the spouse not holding title to sign the deed and it might be well to have the court include an order that each spouse is to sign the other's deeds.⁴²

4) *When a divorce is granted on the fault of both spouses.*

Under the old code,⁴³ as construed,⁴⁴ the court could grant or deny a divorce where both parties were at fault. If it denied the divorce the statute was clear as to the court's power to award alimony and a division of property. But its power to award alimony and a division of

property was in doubt when it granted the divorce. Apparently trial courts assumed they could act under KAN. G.S. 1949, 60-1511. But that section limited the granting of alimony to the situation where only the husband was at fault and the wife was innocent.⁴⁵

The new code clears up any doubt.⁴⁶ The court may make any of the economic orders it could make when it granted a divorce for the fault of one of the spouses. Thus all of the problems concerning a division of property and alimony, discussed above, exist when the divorce is granted for the fault of both.

5) *When the divorce is denied due to the equal fault of the parties.*

Under the old code⁴⁷ as construed⁴⁸ the court could divide the property of the spouses when it denied the divorce because of equal fault or for any other reason, but was prohibited from granting "alimony" or "separate maintenance." The new code⁴⁹ takes the approach that if both parties prove fault the court should be free to enter all of the economic orders⁵⁰ it could award when the divorce was granted for the fault of one spouse, even though it denied the divorce itself. When both prove fault, it is a fair assumption that the spouses will not live together, so a maintenance order may be needed and it is now authorized.

6) *When a decree of divorce, separate maintenance or annulment is denied other than on the grounds of equal fault.*

As mentioned above, the old code⁵¹ allowed the court to divide the property but not grant alimony when it denied the divorce either because of equal fault or

⁴⁰ This section gives a surviving spouse a one-half interest in all real property owned by the other during the marriage.

⁴¹ See *Marshall v. Marshall*, 159 Kan. 602, 156 P.2d 537 (1945) where the court went a long way to protect a division of property decree when it conflicted with the probate code.

⁴² Actually this problem existed when the court divided the property after denying a divorce pursuant to Kan. G.S. 1949, 60-1506. Apparently the court has never been called upon to pass on the problem.

⁴³ Kan. G.S. 1949, 60-1506.

⁴⁴ *Roberts v. Roberts*, 103 Kan. 65, 173 Pac. 537 (1918). See also *Biltgen v. Biltgen*, 121 Kan. 716, 250 Pac. 265 (1926).

⁴⁵ See Hopson, *Economics of a Divorce*, 11 Kan. L. Rev. 107, 122 (1962) for a discussion of this problem.

⁴⁶ Kan. Code Civ. Pro., 60-1606.

⁴⁷ Kan. G.S. 1949, 60-1506.

⁴⁸ Cf. *Paul v. Paul*, 183 Kan. 201, 326 P.2d 283 (1958).

⁴⁹ Kan. Code Civ. Pro., 60-1606.

⁵⁰ Except restoring to the wife her maiden name!

⁵¹ Kan. G.S. 1949, 60-1506.

for any other reason.⁵² Under the new code, this distinction is maintained when the divorce is denied "other than for equal fault. . . ."⁵³ The theory seems to be that if the wife can not show fault, she should not receive future support. She can have the property divided, but no alimony. The concept of fault dies slowly.

This section also applies to suits for separate maintenance and annulment that are denied. Thus a wife, who sues for separate maintenance or annulment, but cannot prove grounds, may still obtain a division of property and child support, but will be denied alimony.

CHILD CUSTODY AND SUPPORT

A couple of new concepts in child custody and support should be touched on in closing. The new section on children⁵⁴ allows Kansas courts to decide custody cases even though the child is not domiciled in Kansas.⁵⁵ This provision overrules a long line of Kansas cases,⁵⁶ and is certainly welcome.

Two key changes were made in the rules on child support. The court may order property of the father or mother "set apart" to the children for their support. The court may also order this property "set apart" to step-children and apparently can decree a monthly support order in favor of step-children.⁵⁷ A new husband not only marries the girl but agrees to support her children.

CONCLUSION

The many other changes in the code are too numerous to mention in this short comment. A few are important but most are easily discovered by looking at

the new code. The new code still needs some improvement, but is better than the divorce code it replaced. The attorney should not have too many problems operating under it.

Reapportionment

Continued from page 172.

whelming number of voters in the state, and (c) was a plan which could be changed at any time by the electors through initiative and referendum, notwithstanding legislative inaction. The high court, nevertheless, declared the new Colorado apportionment provisions unconstitutional under the rule of *Reynolds v. Sims*, and in so doing stated:

While a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy, such as initiative and referendum, individual constitutional rights cannot be deprived or denied judicial effectuation, because of the existence of a non-judicial remedy through which relief against the alleged malapportionment, which the individual voters seek, might be achieved. An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a state's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. . . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose to do so. We hold that the fact that a challenged legislative apportionment plan was approved by the electors is without federal constitutional significance, if the scheme adopted fails to satisfy

⁵² Presumably the normal reason would be because the spouse could not prove his case.

⁵³ Kan. Code Civ. Pro., 60-1606.

⁵⁴ Kan. Code Civ. Pro., 60-1610(a).

⁵⁵ See Hopson, Divorce, *supra* note 2, at 38 for a fuller discussion.

⁵⁶ See Comment, 10 Kan. L. Rev. 595 (1962) for an excellent discussion of the now overruled cases.

⁵⁷ These new provisions are discussed in Hopson, Divorce, *supra* note 2, at 39.