

M I N U T E S

SPECIAL COMMITTEE ON JUDICIARY

November 15 and 16, 1976

Members Present

Senator J. C. Tillotson, Chairman
Representative David Heinemann, Vice-Chairman
Senator Vincent Moore
Senator James Francisco
Representative Phil Martin
Representative Neal Whitaker
Representative Eugene Gastl
Representative Richard Brewster
Representative Fred Lorentz

Staff Present

Art Griggs, Revisor of Statutes Office
Walt Smiley, Kansas Legislative Research Department

November 15, 1976

Morning Session

Proposal No. 29 - Administrative Procedures

The Chairman called the meeting to order, and asked staff to review the draft bill. Staff noted a change in the definition of "agency," and proposed language to define the term as any department, board, commission, officer or authority of the executive branch of government which has statewide jurisdiction. This definition would exclude water districts and school boards, which are not statewide, and would include all agencies regardless of whether they have rules and regulation power.

Representative Heinemann moved to adopt the recommended language concerning "agency." The motion received a second and carried.

Staff described two approaches to determining when the procedure prescribed for a contested case should apply. One approach would be to review all relevant statutes and allow a committee to decide when the procedure should apply. Staff indicated that a statute search revealed over 1,400 sections containing the word "hearing," and more than 500 sections with the word "appeal." To review these sections would require much committee and staff time. An alternative would be to include language in Section 3 of the present draft so that the procedure described in the bill would supercede any conflicting hearing procedures required by law. Following Committee discussion, Representative Heinemann moved to adopt the latter approach. Motion was seconded and carried.

Following further discussion, Representative Heinemann moved, and Senator Moore seconded a motion to recommend the bill for passage by the 1977 Legislature. Motion carried.

Staff distributed and reviewed copies of a report on Proposal No. 29. Following some discussion, Representative Heinemann moved to adopt the proposed report. Motion received a second, and carried.

Proposal No. 26 - Natural Gas

Staff distributed copies of an Attorney General's opinion on H.B. 3038. (See Attachment 1.) That opinion notes that enactment of H.B. 3038 would operate to impair contractual obligations under leases executed prior to the bill's effective date. Thus, the bill would be unconstitutional in those cases.

In subsequent discussion, the Committee appeared to agree that Kansas can do little about gas dedicated to interstate commerce.

Afternoon Session

The Committee turned to H.B. 3032 and, following some discussion, Representative Martin moved to make the bill applicable only to intrastate gas. Motion received a second and carried.

Senator Moore moved to delete the pricing sentence in Section 3, page 2. The motion received a second and carried.

The Committee discussed specifying that the person who requested gas for irrigation would be required to pay the lowest reasonable price set by the Kansas Corporation Commission. No action was taken on this suggestion.

Following further discussion, Representative Martin moved to recommend the newly amended version of H.B. 3032 for passage by the 1977 Legislature. Representative Lorentz seconded the motion. Following further discussion, the motion was withdrawn.

Representative Brewster moved to amend Section 1 so that it would include language to the effect that the bill applies only to gas not under the jurisdiction of the Federal Power Commission. Motion received a second, and carried.

Representative Brewster moved to change the word "section" to "act" in Section 5. Motion received a second and carried.

Representative Martin moved to recommend the bill for passage by the 1977 Legislature. Representative Heinemann seconded the motion, which carried. Senators Moore and Francisco and Representative Whitaker voted against this motion.

Senator Moore and Senator Francisco stated that they voted against this motion for the following reasons:

1. They noted that the continuing increase in the number of irrigated acres contributes to the crop surplus which works to the detriment of dry land farmers who would have to reduce production in order to maintain a fair price.
2. They also noted that increased use of irrigation in recent years has served to reduce the water reserves in the Oglala Basin.

Ogallala

The Committee then turned to consideration of the "deep zones" bill, H.B. 3038. Staff was directed to distribute copies of an evidentiary presumption proposal (Attachment 2), submitted by Mr. Dale Stuckey at an earlier meeting. Several Committee members expressed the view that Mr. Stuckey's proposal would avoid the problems discussed in the Attorney General's opinion. One Committee member noted that the proposal is almost procedural in nature, in that it gives the burden to the lessee to show that he has fulfilled contract provisions. Another Committee member noted that this bill would remove the burden from the landowner, who may be unable to afford witnesses who could establish that oil or gas exists at lower levels.

Following discussion on the proposal, a series of motions were made, seconded and approved:

1. Delete "in any court of competent jurisdiction in the State of Kansas" in Section 1.
2. Delete "through clear and convincing evidence" in Section 2.

3. Delete all of Section 3.
4. Reword the second sentence of Section 5 as follows: "the evidentiary presumption created hereby shall be cumulative and in addition to all other substantive rights and remedies in existence at the time of the effective date of this act," etc.
5. Delete all of Section 6.

Senator Moore moved to amend line 6 of Section 1 after "lease" by inserting "held by production," and in subsection 2 to reword the sentence "that production on the lease was commenced at least 15 years prior," etc. The motion was seconded and carried.

Representative Lorentz moved to strike "and has not" from Section 1, subsection 1. The motion received a second and carried.

Representative Heinemann moved to recommend the bill for passage by the 1977 Legislature. Motion received a second and carried. Senators Francisco and Moore voted against this motion.

A motion was made to recommend that the bill be referred to the House of Representatives. Motion failed.

Proposal No. 31 - Products Liability

Staff distributed copies of Ford v. Guarantee Abstract and Title Company (220 Kansas 244 (1976)), relating to the authority of a judge to reduce an award. It was noted that Section 10 of the products liability draft bill appears to vary from this decision.

Following some discussion, Representative Lorentz moved to reconsider the Products Liability draft bill only with regard to Section 10. The motion was seconded by Senator Moore and carried.

Following further discussion, Senator Moore moved to reword Section 10 of the draft so that if the prevailing party does not consent to the reduction of an award by the judge, the judge may order a new trial. Representative Whitaker seconded the motion, which carried.

November 16, 1976

The Chairman called the meeting to order at 9:00 a.m. The Committee agreed that further action was not necessary to recommend the Products Liability draft bill, since the motion on the previous day had to do only with one section of the bill and since the draft had already been recommended.

Staff distributed copies of a draft report on Proposal No. 31. Following some discussion, Senator Moore moved to amend the draft report in the first paragraph in the conclusions section. The motion would include the following language:

The Committee is also aware of concerted efforts being made in several other states, triggered by the introduction in Kansas of S.B. 852, to enact legislation designed to alleviate the mounting costs incident to increased litigation of products liability claims.

The motion was seconded by Senator Francisco. In the course of discussion, Committee members noted that staff has received many requests for copies of S.B. 852 and that 16 or more states participated in a Products Liability conference mentioned earlier during the interim. Following further discussion, motion carried.

Representative Brewster asked the Chairman for permission to submit a minority report (see Attachment 3). Following some discussion, the Committee agreed that Representative Brewster could submit a minority report. Representative Gastl asked that his name also be placed on the minority report.

Representative Heinemann moved to approve the minutes of the meetings of August 23, September 23 and 24, and November 4 and 5. The motion received a second, and carried.

Staff noted that copies of the present meetings' minutes as well as copies of final reports and final bill drafts would be mailed to the Committee for their approval.

The Chairman thanked the Committee members and staff for their work during the interim, and adjourned the meeting.

Prepared by Walt Smiley

Approved by Committee on:

Dec 10, 1976

date



ATTACHMENT 1

STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

November 15, 1976

ATTORNEY GENERAL OPINION NO. 76-342

The Honorable J. C. Tillotson
State Senator
109 South State
Norton, Kansas 67654

Re: Oil and Gas--Leases--Conditions

Synopsis: House Bill No. 3038, if enacted, would authorize partial termination of natural gas leases for breach of a condition imposed on such leases by the bill itself, and thus, if enacted, could not constitutionally be applied to any lease executed prior to the effective date of such law.

* * *

Dear Senator Tillotson:

You inquire concerning House Bill No. 3038, introduced by Representative Farrar, which is being studied by the Special Committee on the Judiciary which you chair.

Section 1 of the bill purports to authorize termination of natural gas leases under certain circumstances. Specifically, it provides that "[w]henever a natural gas lease permits the production of natural gas from all subsurface zones" and surface access for that purpose, the holder of the fee interest in the surface may be entitled to a judicial decree terminating production rights under the lease "from any subsurface zone not presently or previously brought into production," as well as the "rights of entry or occupation as to all or some" of the surface, if the court finds, among other facts, that 1) the lease was executed more than 25 years prior to commencement of the action; 2) that the lessee is not or has not previously during that period "made any effort to commence production of natural gas from such subsurface zone or zones; and 3) that termination will not interfere with the lessee's existing production

The Honorable J. C. Tillotson

Page Two

November 15, 1976

rights in other subsurface zones which are not the subject of the termination action.

You advise that the question has been raised whether the bill, if enacted, would operate as an impairment of existing contractual lease obligations.

In Kansas, absent express provisions in the lease, there is an implied covenant by the lessee to undertake prudent development of the leased tract. The broad general outline of this duty was described in *Stamper v. Jones*, 188 Kan. 626, 364 P.2d 972 (1961) thus:

"There is an implied covenant . . . that the tract will be prudently developed, and where the existence of oil in paying quantities is made apparent, it is the duty of the lessee to continue the development of the property and to put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both the lessor and the lessee.

A lessee, under the implied covenant to develop an oil and gas lease, is required to use reasonable diligence in doing what would be expected of an operator of ordinary prudence, in the furtherance of the interests of both the lessor and lessee. Under this rule neither the lessor nor the lessee of an oil and gas lease is the sole judge of what constitutes prudent development of the tract.

A lessor who alleges breach of the implied covenant to develop has the burden of showing, by substantial evidence, that the covenant has been breached. He must prove that the lessee has not acted with reasonable diligence under the facts and circumstances of the particular situation at the time." [Citations omitted.] 188 Kan. at 631.

The diligence which the lessee must demonstrate is to be measured by a number of considerations. In *Fischer v. Magnolia Petroleum Co.*, 156 Kan. 367, 133 P.2d 95 (1943), the court stated thus:

"It has generally been recognized that in determining whether there is prudent development under the lease there are various

pertinent factors to be considered -- all the facts and circumstances which would affect the reasonableness of an ordinarily prudent operator's position in connection with development of the particular tract involved In *Brewster v. Lanyon Zinc Co.*, . . . [140 Fed. 801], the circuit court of appeals said:

"Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir -- whether such as to permit the drainage of a large area by each well -- and the usages of the business." [Citations omitted.]

The costs of drilling, equipment and operation of wells, costs of transportation and storage, prevailing prices, and general market conditions as influenced by supply and demand or by governmental resolution or both must be considered.

There are many Kansas cases concerning the lessee's implied covenant to develop, and it would unduly lengthen this opinion to attempt to canvass even a few selected cases here. See, 3 Summers, *Oil and Gas* § 464 (2nd ed.) The extent of the lessee's duty is determined essentially by a standard of reasonableness. In *Berry v. Wondra*, 173 Kan. 273, 246 P.2d 282 (1952), the court quoted from *Merrill on Covenants Implied in Oil and Gas Leases*, § 57 (2nd ed.) thus:

"Where oil or gas is discovered in paying quantities, and, as is usually the case, there are no express provisions governing the drilling of additional wells, it is held uniformly that there is an implied covenant to drill as many wells as are reasonably necessary to develop the premises and to secure the oil or gas for the mutual benefit of the lessor and the lessee."

This bill is distinctive in that it provides a ground for termination by the lessor which, in many instances, may be certainly unrelated to the lessee's entire satisfaction of all implied covenants to develop and market production from the leasehold. The lessee may, with extraordinary diligence, completed an ample number of wells on the tract and acted in all respects as a prudent operator. No Kansas case holds that it is a measure of the prudent operator standards that, absent express provision in the lease, the lessee shall develop every subsurface zone or horizon in the leasehold. Reasonable development of the leasehold might well be accomplished without production from every separate subsurface zone or horizon. Thus, the effect of the bill is to permit termination of the lessee's rights at the instance of the lessor for grounds which would not legally support such action prior to enactment of the bill.

In *Oil Fork Development Co. v. Huddleston*, 202 Ky. 261, 259 S.W. 334 (1924), the court considered a 1920 Kentucky statute which was enacted to prevent the courts from implying a covenant to develop in an oil and gas lease contrary to express provisions therein for delay in drilling by payment of rental. The lease at issue in the case was executed in 1919, and the 1920 statute was raised as a defense to forfeiture. The court refused to apply the statute, stating thus:

"The answer proceeds on the theory that section 3 is controlling, and that the completion of the nonproductive well automatically extended the lease for a period of 12 months without further payment of rentals. The lease was executed prior to the enactment of the statute, and though the statute purports to apply to existing leases, the question is: Is it valid when so applied? Article 1, § 10, federal Constitution, provides that no state shall pass any law impairing the obligation of contracts. The obligation of contracts is impaired by a statute which alters its terms by imposing new conditions, or dispensing with conditions, or which adds new duties or rights, or releases or lessens any part of the contract obligation, or substantially defeats its end. . . . There was no statute of similar import in force when the lease was executed. . . . The statute not only lessens the lessee's obligation, but confers

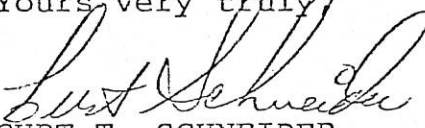
The Honorable J. C. Tillotson
Page Five
November 15, 1976

new rights and privileges wholly inconsistent with the contract, and very prejudicial to the lessors. It follows that the statute is invalid as applied to the lease in question." 259 S.W. at 335.

Section 1 of the bill does not authorize partial termination of a lease for breach of any implied covenant to develop. Rather, regardless of how extensive the lessee's development of the leasehold has been, the bill authorizes termination as to any subsurface zone or horizon which has not been placed in production. Thus, production from each subsurface zone or horizon is made a condition of the lease, not by express agreement of the parties and not by implication, but by statute.

Clearly, enactment of this bill would operate to impair contractual obligations under leases executed prior to its effective date. It would permit a lessor to compel termination of a lease as to one or more subsurface zones or horizons, notwithstanding the lessee had breached no express or implied covenant with the lessor; the ground of any termination order entered under the bill would necessarily be a breach of a condition imposed by the bill itself, *i.e.*, production from every subsurface zone under the leasehold within twenty-five years from its execution. Interposition of such a condition by statute clearly constitutes an abridgement of existing contractual obligations. Thus, in my judgment, the bill could not constitutionally be applied to enforce termination of any lease executed prior to the enactment and effective date of the bill.

Yours very truly



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

An Act relating to the covenants of reasonable exploration and development implied or expressed in oil, gas and oil and gas leases on lands, or interests therein, insofar as such covenants apply to non-producing subsurface parts of land, and prescribing circumstances under which a presumption of breach and violation of any such covenant is created, continued and overcome.

Be it enacted by the legislature of the State of Kansas:

Section 1. In any action in any court of competent jurisdiction in the State of Kansas in which relief is sought based upon breach or violation by lessee of an implied or expressed covenant of reasonable exploration or of reasonable development of lands covered by an oil, gas or oil and gas lease, if the party who seeks such relief produces competent evidence that (1) at the time such action is commenced there is not and has not been wellhead production pursuant to such lease from a subsurface part or parts of the land covered thereby with respect to which such relief is sought and (2) that the lease was executed at least fifteen (15) years prior to the commencement of such action, a presumption shall arise that the lessee has breached and violated such covenant insofar as it relates to such subsurface part or parts of the land.

Section 2. The presumption created by Section 1 shall continue to exist until the lessee has sustained the burden of establishing, through clear and convincing evidence, that lessee has fully complied with such covenant.

Section 3. (1) This act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this act are:

(a) To encourage the continual exploration and development of oil and gas mineral resources under lands in Kansas.

(b) To promote fairness in legal proceedings by facilitating proof of relevant facts and circumstances pertaining to exploration and development which are peculiarly within the knowledge of and peculiarly available to the party or parties engaged in and in control of such activities.

(c) To discourage unjustifiable withholding of or delays in exploration and development of any parts of leased premises.

Section 4. It shall be against public policy for any oil, gas or oil and gas lease on lands in the State of Kansas to provide for a waiver of the presumption created by this act.

Section 5. Except as expressly required hereby, this act shall not alter or affect rights or remedies under any such leases under the common law or statutes of the State of Kansas. The rights and remedies afforded hereby shall be cumulative and in addition to all other rights and remedies in existence at the time of the effective date of this act under the common law and statutes of the State of Kansas.

Section 6. If any provision or clause of this act or application thereof to any person or circumstances are held to be invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision and application, and to this end the provisions of this act are declared to be severable.

Section 7. This act shall take effect and be in force from and after its publication in the statute book.

MINORITY REPORT

The minority of the Special Committee on Judiciary begs leave to submit the following report:

The draft bill recommended by the Committee is an attempt to help our Kansas manufacturers in their attempt to obtain products liability insurance at reasonable premiums. But it does not accomplish this sincerely sought goal. We oppose this bill for the following reasons:

1) We have heard no evidence that restricting recovery by products-injured plaintiffs in Kansas will in any way effect the premium or availability of products liability insurance by Kansas firms.

2) Restricting recovery, as does this bill, can only benefit out-of-state firms, and a few Kansas firms, who build and market defective goods in Kansas, resulting in injured Kansas consumers, whose recovery is restricted.

There is much more which can be said, but the facts contained in the report speak for themselves. And in our opinion do not logically -- or practically -- demonstrate the need for this bill. Therefore, we are opposed to the products liability proposal approved by the majority of the Committee.

Richard Brewster

ATTACHMENT 1

WORKING DRAFT FOR SPECIAL COMMITTEE ON JUDICIARY

Re: Proposal No. 31

AN ACT

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-513 is hereby amended to read as follows: 60-513. (a) The Except for actions arising from allegedly defective products. the following actions shall be brought within two (2) years: (1) An action for trespass upon real property.

(2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

(5) An action for wrongful death.

(6) An action to recover for an ionizing radiation injury as provided in K.S.A. 60-513a, 60-513b and 60-513c and amendments thereto.

(7) An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

(b) Except as provided in subsection (c) of this section, the cause of action in this ~~action~~ section shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party,

but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the cause of action.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such an action be commenced more than four (4) years beyond the time of the act giving rise to the cause of action.

(d) The provisions of this section as it was constituted prior to the effective date of this act shall continue in force and effect for a period of two (2) years from the effective date of this act with respect to any act giving rise to a cause of action occurring prior to the effective date of this act.

New Sec. 2. (a) In any civil action against a manufacturer or seller of any product brought for the recovery of damages for personal injury, death or property damage allegedly sustained by reason of a defect in such product, such action shall be commenced within two (2) years from the time the alleged defect first causes substantial injury, unless the fact of injury is not reasonably ascertainable when first sustained, then the action must be commenced within two (2) years from the time the fact of injury becomes reasonably ascertainable to the injured party.

(b) In any action commenced within the time period prescribed by subsection (a) no damage award shall be allowed if the trier of fact finds that the injury was sustained after the time period which a reasonable person would expect to be the ordinary useful life of such product.

(c) The provisions of this section shall not be applicable for a period of two (2) years from the effective date of this act to any cause of action which could be maintained pursuant to

K.S.A. 60-513 as it was constituted immediately prior to the effective date of this act.

Sec. 3. K.S.A. 60-471 is hereby amended to read as follows:

60-471. (a) In any action for damages for personal injuries or death ~~arising out of the rendering of or the failure to render professional services by any health care provider,~~ evidence of any reimbursement or indemnification received by a party for damages sustained from such injury or death, excluding payments from insurance paid for in whole or in part by such party or his or her employer, and services provided by a health maintenance organization to treat any such injury, excluding services paid for in whole or in part by such party or his or her employer, shall be admissible for consideration by the trier of fact subject to the provisions of subsection (b). Such evidence shall be accorded such weight as the trier of fact shall choose to ascribe to that evidence in determining the amount of damages to be awarded to such party.

(b) As a condition precedent to presenting evidence of reimbursement or indemnification received by a party for damages sustained from such injury or death or services provided by a health maintenance organization, the party against whom claim is made in any such action shall make disclosure of such evidence at a pretrial conference on such action. Upon such disclosure, the claimant shall be allowed an opportunity to show that an obligation exists to reimburse the person making the initial reimbursement or indemnification or providing the services from any damages awarded in such action. The claimant shall specify in such showing the amount of any such obligation. Upon such showing by the claimant, the court shall include in its order that any evidence of such reimbursement or indemnification or the providing of such services, to the extent that the same is an obligation on the claimant, shall not be admissible into evidence at the trial of the action.

~~(c) As used in this section, (1) "Health care provider" means a person licensed to practice the healing arts or engaged~~

~~in a post-graduate training program approved by the state board of healing arts, a person who holds a temporary permit to practice any branch of the healing arts, licensed medical care facility, health maintenance organization, licensed dentist, licensed professional nurse, licensed practical nurse, licensed optometrist, registered podiatrist, registered pharmacist, professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this subsection, registered physical therapist or an officer, employee or agent thereof acting in the course and scope of his or her employment or agency; and (2) "professional services" means those services which require licensure, registration or certification by agencies of the state for the performance thereof.~~

New Sec. 4. In any action for personal injury or death, where such action is tried to a jury, the jury shall be advised and instructed by the court that the party making the claim for damages for personal injury will not be required to pay any state or federal income taxes on any monetary verdict which may be rendered by the jury in favor of such party.

New Sec. 5. (a) A manufacturer or seller is not liable for injuries caused by a defective product, if the defect was created by an alteration made by another which amounts to an intervening or superseding cause of the injuries. This principle applies whether the plaintiff's theory of liability is based on negligence, breach of warranty, or strict liability in tort. Where injuries are caused by a product in which the defect was created by the alteration made by another and not by the manufacturer or seller, the manufacturer and seller are not liable.

(b) The fact that there has been some alteration of the product does not relieve the seller or manufacturer of liability when the alteration in question has no effect in the chain of causation between defective manufacture of the product and harm.

Sec. 6. K.S.A. 60-2609 is hereby amended to read as fol-

laws: 60-2609. (a) Whenever judgment is entered on a claim in any action for recovery of damages for personal injury or death ~~arising out of the rendering of or the failure to render professional services by any health care provider,~~ the court may include in such judgment a requirement that the damages awarded be paid in whole or in part by installment or periodic payments, and any installment or periodic payment upon becoming due and payable under the terms of any such judgment shall constitute a separate judgment upon which execution may issue. Any judgment ordering any such payments shall specify the amount of each payment, the interval between payments and the number of payments to be paid under the judgment. For good cause shown, the court may modify such judgment with respect to the amount of such payments and the number of payments to be made or the interval between payments, but the total amount of damages awarded by such judgment shall not be subject to modification in any event.

(b) ~~As used in this section, "health care provider" means a person licensed to practice any branch of the healing arts, a person who holds a temporary permit to practice any branch of the healing arts or a person engaged in a postgraduate training program approved by the state board of healing arts, a licensed medical care facility, a health maintenance organization, a licensed dentist, a licensed professional nurse, a licensed practical nurse, a licensed optometrist, a registered podiatrist, a registered pharmacist, a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this subsection, a registered physical therapist or an officer, employee or agent thereof acting in the course and scope of his or her employment or agency.~~ Whenever the court orders that damages be paid by installment or periodic payments, such payments shall bear interest at the rate provided in K.S.A. 16-204, and any amendments thereto, from the day on which judgment in the action was rendered.

New Sec. 7. (a) In any action for damages for personal injury, death or property damage where punitive or exemplary damages are claimed, the plaintiff shall have the burden of proving the defendant's or defendants' liability for such damages beyond a reasonable doubt.

New Sec. 8. In any action for damages for personal injury, death or property damage: (a) Any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product, shall not extend to those safeguards, precautions and actions which a person reasonably could and should take for himself or herself and for others, considering his or her activity at the time in question, his or her training, experience, education and any special knowledge he or she does, should or was required to possess, and shall not extend to situations where said safeguards, precautions and actions would or should have been taken by such a person similarly situated exercising reasonable care, caution and procedure.

(b) The manufacturer or seller of the product shall not be liable to any person for any injury, death or property damage caused by an alleged defect in such product, or by a failure to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, or by a failure to properly instruct in the use of such product, where the injured or deceased party or the user of the product was aware or should reasonably have been aware that there was a risk or danger of some type of harm or injury to him or her, and he or she proceeded to voluntarily expose himself or herself to it.

New Sec. 9. (a) In any action for damages for personal injury, death or property damage allegedly caused by a defect in a product:

(i) A product shall be considered to have a defect or be in a defective condition only if, at the time the product was sold by the manufacturer or other seller, there was a defect or defec-

tive condition in the product which made the product unreasonably dangerous to the user or consumer. The test for whether any defect or defective condition was "unreasonably dangerous" shall be whether or not the product as sold was dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer or user who purchases such a product, assuming the ordinary knowledge of the community, or of similar buyers, users or consumers, as to its characteristics, propensities, risks, dangers and proper and improper uses, as well as any special knowledge, training or experience possessed by the particular buyer, user or consumer or which he or she was required to possess.

(2) It shall be rebuttably presumed that such product was free from any alleged defect where the allegedly defective plan or design, or methods, standards and techniques of manufacturing, inspecting and testing, were in conformity with the generally recognized and prevailing standards and practices in the industry in existence at the time the applicable plan or design and methods, standards and techniques of manufacturing, inspecting and testing were prepared or used.

(3) No manufacturer or seller of a product shall be liable to any person for any injury, death or property damage caused by the plan or design or the manufacture, inspection or testing of a product where the plan, design, methods, standards and techniques of manufacturing, inspecting and testing were prepared and used in conformity with the generally recognized and prevailing state of the art in existence at the time such plan, design, methods, standards and techniques were prepared or used.

(b) In any civil action against a manufacturer or seller of a product for damages for personal injury, death or property damage allegedly caused by a defect in such product, or by an alleged failure to warn or protect against any danger or hazard which may arise in the use or misuse of such product, or by an alleged failure to properly instruct in the use of such product, the following evidence shall not be admissible for any purpose:

(1) Evidence of any advancements or changes in technical or other knowledge or techniques, in design theory, knowledge or philosophy, in labeling, in warnings or instructions for use of such product, in testing procedures, or in manufacturing knowledge, techniques or processes, which such advancements or changes have been made or learned, became available, or were placed into use subsequent to the design or manufacture of the product allegedly causing such injury, death or damage.

(2) Evidence of any changes made in the design, testing, inspecting, manufacture, warnings, labeling or instructions for use of the product, or in or for any similar product, which such change or changes was or were made or placed into use subsequent to the design or manufacture of the allegedly defective product.

New Sec. 10. Any agreement entered into after the effective date of this act between: (a) A person who may be liable to another person for personal injuries or death, and (b) the person so injured or, if such person is deceased, such person's representative:

Whereby the person who may be so liable or such person's agent or insurer agrees to loan or guarantee the payment of a certain sum of money to the injured person in exchange for a promise from the injured person that such person will prosecute or continue to prosecute a claim against another person who may be jointly liable with the person making or for whom the loan or guarantee is made, and apply or credit any amounts obtained as a result of such claim against said loan or the amount guaranteed or which agreement limits the obligation of the person making or for whom the loan or guarantee is made, as to any judgment rendered against the person making or for whom the loan or guarantee is made in favor of the injured party, are hereby declared to be void and unenforceable. As used in this section, "person" shall mean the representative of a person's estate, if such person is deceased.

New Sec. 11. In any civil action in which a jury awards damages for nonpecuniary loss in an amount which shocks the con-

science of the court, the court may reduce such nonpecuniary damage award to an amount which the court deems fair and reasonable under the circumstances.

Sec. 12. K.S.A. 1976 Supp. 7-121b is hereby amended to read as follows: 7-121b. Whenever a civil action is commenced by filing a petition or whenever a pleading shall state a claim in a district court for damages for personal injuries or death arising ~~out-of-the-rendering-of-or-the-failure-to-render-professional services-by-any-health-care-provider,~~ compensation for reasonable attorneys' fees to be paid by each litigant in the action shall be approved by the judge prior to final disposition of the case by the district court. Compensation for reasonable attorneys' fees for services performed in an appeal of a judgment in any such action to the court of appeals shall be approved by the chief judge or by the presiding judge of the panel hearing the case. Compensation for reasonable attorneys' fees for services performed in an appeal of a judgment in any such action to the supreme court shall be approved by the departmental justice for the department in which the appeal originated. In approving such compensation, the judge or justice shall examine the same and make such determination considering the nature and difficulty of the issues involved in the case and the time reasonably necessary to prepare and present the same. ~~As--used--in--this section--(a)--"Health-care-provider" means a person licensed to practice any branch of the healing arts, a person who holds a temporary permit to practice any branch of the healing arts, a person engaged in a postgraduate training program approved by the state board of healing arts, a licensed medical care facility, a health maintenance organization, a licensed dentist, a licensed professional nurse, a licensed practical nurse, a licensed optometrist, a registered podiatrist, a registered pharmacist, a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this subsection, a registered physical therapist or~~

~~an officer, employee or agent thereof acting in the course and scope of his or her employment or agency; and (b) "professional services" means those services which require licensure, registration or certification by agencies of the state for the performance thereof.~~

See Moore

ATTACHMENT 1

New Section 5. A manufacturer or seller of a product is not liable
personal injuries injury, death or property damage: (a) which was allegedly caused
by a defective product, if the defect was created by an alteration made by another
where the primary cause of the injury, death or property damage was an alteration,
modification or change in the product or the part thereof claimed to be defective
which was made by one other than the manufacturer or seller against whom claim is
made or suit is filed, and which amounts to an intervening or superceding cause of
the injuries. This principle applies whether the plaintiff's theory of liability
is based on negligence, breach of warranty, or strict liability in tort; which was
not made by or at the direction of or with the consent of such manufacturer or
seller; where injuries are caused by a product in which the defect was created by
the alteration made by another and not by the manufacturer or seller, the manufacturer
and seller are not liable.

(b) Which was allegedly sustained by reason of an alleged failure to warn
or protect against a danger or hazard in the use or misuse of a product, or an
alleged failure to properly instruct in the use of such product, where such alleged
failure to warn or to properly instruct pertains to a product or a part of such
product which was subjected to an alteration, modification or change made
by one other than the manufacturer or seller against whom claim is made or suit is
brought, and which was not made by or at the direction of or with the consent of
such manufacturer or seller.

(c) As used in this section the words "alteration, modification or change"
shall include an alteration, modification or change in the make-up, characteristics,
purpose, use, function, design or manner of use of the product, or the part thereof
claimed to be defective, from that originally designed, tested, specified,
manufactured, or intended by the manufacturer.

(d) The principles set forth in subsections (a) and (b) of this section
apply whether the plaintiff's theory of liability is based upon negligence, breach
of warranty, strict liability in tort or upon any other theory.

ATTACHMENT

Redraft

WORKING DRAFT FOR SPECIAL COMMITTEE ON JUDICIARY

Re: Proposal No. 31

AN ACT

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-513 is hereby amended to read as follows: 60-513. (a) The Except for actions arising from defective products. the following actions shall be brought within two (2) years: (1) An action for trespass upon real property.

(2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

(5) An action for wrongful death.

(6) An action to recover for an ionizing radiation injury as provided in K.S.A. 60-513a, 60-513b and 60-513c and amendments thereto.

(7) An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

(b) Except as provided in subsection (c) of this section, the cause of action in this ~~action~~ section shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party,

but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the cause of action.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such an action be commenced more than four (4) years beyond the time of the act giving rise to the cause of action.

(d) The provisions of this section as it was constituted prior to the effective date of this act shall continue in force and effect for a period of two (2) years from the effective date of this act with respect to any act giving rise to a cause of action occurring prior to the effective date of this act.

New Sec. 2. (a) In any civil action against a manufacturer or seller of any product brought for the recovery of damages for personal injury, death or property damage allegedly sustained by reason of a defect in such product, such action shall be commenced within two (2) years from the time the alleged defect first causes substantial injury, unless the fact of injury is not reasonably ascertainable when first sustained, then the action must be commenced within two (2) years from the time the fact of injury becomes reasonably ascertainable to the injured party.

(b) In any action commenced within the time period prescribed by subsection (a) no damage award shall be allowed if the trier of fact finds that the injury was sustained after the time period which a reasonable person would expect to be the ordinary useful life of such product.

(c) The provisions of this section shall not be applicable for a period of two (2) years from the effective date of this act to any cause of action which could be maintained pursuant to

K.S.A. 60-513 as it was constituted immediately prior to the effective date of this act.

Sec. 3. K.S.A. 60-471 is hereby amended to read as follows:
60-471. (a) In any action for damages for personal injuries or death ~~arising out of the rendering of or the failure to render professional services by any health care provider,~~ evidence of any reimbursement ~~or~~ indemnification or services provided by a health maintenance organization received by a party for damages sustained from such injury or death, excluding payments from insurance or services provided by a health maintenance organization when such insurance or services were paid for in whole or in part by such party or his or her employer, ~~and services provided by a health maintenance organization to treat any such injury, excluding services paid for in whole or in part by such party or his or her employer,~~ shall be admissible for consideration by the trier of fact subject to the provisions of subsection (b). Such evidence shall be accorded such weight as the trier of fact shall choose to ascribe to that evidence in determining the amount of damages to be awarded to such party.

(b) As a condition precedent to presenting evidence of reimbursement or indemnification received by a party for damages sustained from such injury or death or services provided by a health maintenance organization, the party against whom claim is made in any such action shall make disclosure of such evidence at a pretrial conference on such action. Upon such disclosure, the claimant shall be allowed an opportunity to show that an obligation exists to reimburse the person making the initial reimbursement or indemnification or providing the services from any damages awarded in such action. The claimant shall specify in such showing the amount of any such obligation. Upon such showing by the claimant, the court shall include in its order that any evidence of such reimbursement or indemnification or the providing of such services, to the extent that the same is an obligation on the claimant, shall not be admissible into evidence at the trial of the action.

~~(c) As used in this section: (1) "Health-care provider" means a person licensed to practice the healing arts or engaged in a post-graduate training program approved by the state board of healing arts; a person who holds a temporary permit to practice any branch of the healing arts; licensed medical care facility; health maintenance organization; licensed dentist; licensed professional nurse; licensed practical nurse; licensed optometrist; registered pediatricist; registered pharmacist; professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health-care providers as defined by this subsection; registered physical therapist or an officer, employee or agent thereof acting in the course and scope of his or her employment or agency; and (2) "professional services" means those services which require licensure, registration or certification by agencies of the state for the performance thereof.~~

New Sec. 4. (a) A manufacturer or seller of a product is not liable for personal injury, death or property damage which was caused by a defective product, where the primary cause of the injury, death or property damage was an alteration, modification or change in the product or the part thereof claimed to be defective which was made by one other than the manufacturer or seller against whom claim is made or suit is filed, and which was not made by or at the direction of or with the consent of such manufacturer or seller.

(b) As used in this act the words "alteration, modification or change" shall include an alteration, modification or change in the make-up, characteristics, purpose, use, function, design or manner of use of the product, or the part thereof claimed to be defective, from that originally designed, tested, specified, manufactured or intended by the manufacturer or from that which was reasonably foreseeable by the manufacturer.

(c) The principles set forth in this section apply whether the plaintiff's theory of liability is based upon negligence,

breach of warranty, strict liability in tort or upon any other theory.

Sec. 5. K.S.A. 60-2609 is hereby amended to read as follows: 60-2609. (a) Whenever judgment is entered on a claim in any action for recovery of damages for personal injury or, death ~~arising out of the rendering of or the failure to render professional services by any health care provider~~ or property damage, the court may include in such judgment a requirement that the damages awarded be paid in whole or in part by installment or periodic payments, and any installment or periodic payment upon becoming due and payable under the terms of any such judgment shall constitute a separate judgment upon which execution may issue. Any judgment ordering any such payments shall specify the amount of each payment, the interval between payments and the number of payments to be paid under the judgment. For good cause shown, the court may modify such judgment with respect to the amount of such payments and the number of payments to be made or the interval between payments, but the total amount of damages awarded by such judgment shall not be subject to modification in any event.

(b) ~~As used in this section, "health care provider" means a person licensed to practice any branch of the healing arts, a person who holds a temporary permit to practice any branch of the healing arts or a person engaged in a postgraduate training program approved by the state board of healing arts, a licensed medical care facility, a health maintenance organization, a licensed dentist, a licensed professional nurse, a licensed practical nurse, a licensed optometrist, a registered podiatrist, a registered pharmacist, a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this subsection, a registered physical therapist or an officer, employee or agent thereof acting in the course and scope of his or her employment or agency.~~ Whenever the court orders that damages be paid by

installment or periodic payments, such payments shall bear interest at the rate provided in K.S.A. 16-204, and any amendments thereto, from the day on which judgment in the action was rendered.

New Sec. 6. (a) In any action for damages for personal injury, death or property damage where punitive or exemplary damages are claimed, the plaintiff shall have the burden of proving the defendant's or defendants' willful or wanton conduct beyond a reasonable doubt.

New Sec. 7. In any action for damages for personal injury, death or property damage any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product, shall not extend to those safeguards, ¹precautions and actions which a person reasonably could and should take for himself or herself and for others, considering his or her activity at the time in question, ²his or her training, experience, education and any special knowledge he or she does, should or was required to possess, and shall not extend to situations where said safeguards, precautions and actions would or should have been taken by such a person similarly situated exercising reasonable care, caution and procedure ³or where ³is a cause of action which pertains to a product or a part of such product which was subjected to an alteration, modification or change made by one other than the manufacturer or seller against whom claim is made or suit is brought, and which was not made by or at the direction of or with the consent of such manufacturer or seller.

New Sec. 8. (a) In any action for damages for personal injury, death or property damage allegedly caused by a defect in a product:

(1) A product shall be considered to have a defect or be in a defective condition only if, at the time the product was sold by the manufacturer or other seller, there was a defect or defective condition in the product which made the product unreasonably

dangerous to the user or consumer. The test for whether any defect or defective condition was "unreasonably dangerous" shall be whether or not the product as sold was dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer or user who purchases such a product, assuming the ordinary knowledge of the community, or of similar buyers, users or consumers, as to its characteristics, propensities, risks, dangers and proper and improper uses, as well as any special knowledge, training or experience possessed by the particular buyer, user or consumer or which he or she was required to possess.

(2) No manufacturer or seller of a product shall be liable to any person for any injury, death or property damage caused by the plan or design or the manufacture, inspection or testing of a product where the plan, design, methods, standards and techniques of manufacturing, inspecting and testing were prepared and used in conformity with the generally recognized and prevailing state of the art in existence at the time such plan, design, methods, standards and techniques were prepared or used.

(b) In any civil action against a manufacturer or seller of a product for damages for personal injury, death or property damage allegedly caused by a defect in such product, or by an alleged failure to warn or protect against any danger or hazard which may arise in the use or misuse of such product, or by an alleged failure to properly instruct in the use of such product, the following evidence shall not be admissible for any purpose:

(1) Evidence of any advancements or changes in technical or other knowledge or techniques, in design theory, knowledge or philosophy, in instructions for use of such product, in testing procedures, or in manufacturing knowledge, techniques or processes, which such advancements or changes have been made or learned, became available, or were placed into use subsequent to the design or manufacture of the product allegedly causing such injury, death or damage.

(2) Evidence of any changes made in the design, testing,

inspecting, manufacture or instructions for use of the product, or in or for any similar product, which such change or changes was or were made or placed into use subsequent to the design or manufacture of the allegedly defective product.

New Sec. 9. Any agreement entered into after the effective date of this act between: (a) A person who may be liable to another person for personal injuries or death, and (b) the person so injured or, if such person is deceased, such person's representative:

Whereby the person who may be so liable or such person's agent or insurer agrees to loan or guarantee the payment of a certain sum of money to the injured person in exchange for a promise from the injured person that such person will prosecute or continue to prosecute a claim against another person who may be jointly liable with the person making or for whom the loan or guarantee is made, and apply or credit any amounts obtained as a result of such claim against said loan or the amount guaranteed or which agreement limits the obligation of the person making or for whom the loan or guarantee is made, as to any judgment rendered against the person making or for whom the loan or guarantee is made in favor of the injured party, are hereby declared to be void and unenforceable. As used in this section, "person" shall mean the representative of a person's estate, if such person is deceased.

New Sec. 10. In any civil action in which a jury awards damages for nonpecuniary loss in an amount which shocks the conscience of the court, the court may reduce such nonpecuniary damage award to an amount which the court deems fair and reasonable under the circumstances.

Sec. 11. K.S.A. 1976 Supp. 7-121b is hereby amended to read as follows: 7-121b. Whenever a civil action is commenced by filing a petition or whenever a pleading shall state a claim in a district court for damages for personal injuries or, death arising-out-of-the-rendering-of-or-the-failure-to-render-professional-services--by-any-health-care-provider or property damage, compen-

sation for reasonable attorneys' fees to be paid by each litigant in the action shall be approved by the judge prior to final disposition of the case by the district court. Compensation for reasonable attorneys' fees for services performed in an appeal of a judgment in any such action to the court of appeals shall be approved by the chief judge or by the presiding judge of the panel hearing the case. Compensation for reasonable attorneys' fees for services performed in an appeal of a judgment in any such action to the supreme court shall be approved by the departmental justice for the department in which the appeal originated. In approving such compensation, the judge or justice shall examine the same and make such determination considering the nature and difficulty of the issues involved in the case and the time reasonably necessary to prepare and present the same. ~~As used in this section: (a) "Health care provider" means a person licensed to practice any branch of the healing arts, a person who holds a temporary permit to practice any branch of the healing arts, a person engaged in a postgraduate training program approved by the state board of healing arts, a licensed medical care facility, a health maintenance organization, a licensed dentist, a licensed professional nurse, a licensed practical nurse, a licensed optometrist, a registered podiatrist, a registered pharmacist, a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this subsection, a registered physical therapist or an officer, employee or agent thereof acting in the course and scope of his or her employment or agency; and (b) "professional services" means those services which require licensure, registration or certification by agencies of the state for the performance thereof.~~

PROPOSED BILL NO. _____

By Special Committee on Judiciary

Re: Proposal No. 28

AN ACT relating to the code of civil procedure; concerning decrees in actions for divorce, separate maintenance or annulment; amending K.S.A. 60-1610 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-1610 is hereby amended to read as follows: 60-1610. 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. Any order requiring either parent or both parents to pay for the support of any child until the age of majority shall terminate when such child attains the age of eighteen (18) years, unless by prior written agreement approved by the court such parent or parents specifically agreed to pay such support beyond the time such child attains the age of eighteen (18). 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 asso-

ciation, 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.

(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.

(b) Child custody where parental rights not terminated. (1) In all cases involving the custody of any minor children, the court shall consider the best interests of such children to be paramount. Where parental rights have not been terminated, neither parent shall be considered to have a vested interest in the custody of any such child as against the other parent, regardless of the age of the child.

(2) At any time after custody of any minor child has been awarded pursuant to a divorce, annulment or separate maintenance decree, any person who has had actual physical custody of any such child after such decree was rendered may request by motion to the court rendering such decree that legal custody of such child or children be awarded to such person. Notwithstanding the

parental preference doctrine the court may award custody of any such child to such person if the best interests of such child will be served. No motion may be made pursuant to this subsection, unless the movant has had actual physical custody of the child or children within six (6) months from the date of the motion. In determining the best interest of the child, the court shall consider all relevant factors, including but not limited to the following: (A) The length of time, if any, that any such child has been under the actual care and control of any person other than a parent and the circumstances relating thereto; (B) the desires of the child's parents as to custody; (C) the desires of the child as to his or her custodian; (D) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests; (E) the child's adjustment to such child's home, school, and community; and (F) the mental and physical health and age of all individuals involved.

(c) 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.

(d) 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.

(e) 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.

(f) Restoration of name. Upon the request of the wife, the court shall order the restoration of her maiden or former name.

(g) Costs and fees. Costs and attorneys' fees may be awarded to either party as justice and equity may require.

(h) Effective date. 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 entry of the decree, unless an appeal is taken, and then until the receipt of the mandate issued in accordance with subsection (c) or K.S.A. 00-2100. Any marriage contracted before the expiration of that period shall be null and void, and any agreement to waive the right of appeal shall not be effective to shorten such period of time.

Sec. 2. K.S.A. 00-1610 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.