MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 10:00 a. m./p.m., on January 29, 1979.

All members were present except: Senators Burke, Gaar, Hein and Mulich

The next meeting of the Committee will be held at 10:00 a. m./p.m., on January 30, 1979.

~~These minutes of the meeting held on ______, 19__ were considered, corrected and approved.~~

Chairman

The conferees appearing before the Committee were:

Kathleen Sebelius - Kansas Trial Lawyers

Staff present:

Art Griggs - Revisor of Statutes
Jerry Stephens - Legislative Research Department
Wayne Morris - Legislative Research Department

Senator Gaines moved that the minutes of January 24 be approved; Senator Werts seconded the motion, and the motion carried.

Senate Bill 74 - Property held in joint tenancy; garnishment. No conferees appeared on the bill; the chairman announced that he had been told that several conferees who wished to appear were not able to be present today, and so a further hearing will be held on Thursday. Materials concerning the subject matter dealt with in the bill were distributed; copies are attached hereto. Mr. Griggs explained the Walnut State Bank v. Stovall decision.

Senate Bill 117 - Garnishment authorized for certain temporary orders of support. No conferees appeared, because of the conflict noted with regard to Senate Bill 74, and this bill will also receive a further hearing on Thursday. Mr. Griggs explained the thrust of the bill. Committee discussion followed.

Kathleen Sebelius discussed the rights of one spouse to sue the other, and requested that the committee introduce a bill similar to Senate Bill 845 which was passed by the Senate last year, but which was not passed by the House. Following committee discussion, Senator Berman moved to introduce the bill as a committee bill and have it referred back for hearing; Senator Parrish seconded the motion, and the motion carried.

Senate Bill 76 - Enacting the tort claims act. The chairman called to the attention of the committee a letter furnished

continued -

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CD

SB 76

by Frank Gentry concerning the bill; a copy is attached hereto.

Senate Concurrent Resolution 1608 - Ratifying proposed U.S. constitutional amendment concerning representation of the District of Columbia in Congress. The chairman called the attention of the committee to the statement from Congressman Keith Sebelius; a copy is attached hereto.

At the request of the chairman, Jerry Stephens presented information concerning Senate Bill 907 passed last session, and the recent Kansas Supreme Court decision in Cady v. Cady. Committee discussion followed, as to whether the Supreme Court decision perhaps achieves the goal sought by Senate Bill 907 last year better than the bill itself does. The committee was requested to study the memo and the Supreme Court decision, so as to decide at a later date whether a committee bill should be introduced on the subject.

The chairman announced that the annual dinner party for the committee and staff will be held at the Pomeroy residence on Monday, March 26.

Senate Bill 43 - Crime of giving a worthless check, notice and service charges. Mr. Griggs reviewed the action previously taken by the committee, striking out the oral notice provisions. Senator Steineger moved that the bill be amended to provide for notice to be given as prescribed by law; Senator Hess seconded the motion. Committee discussion followed. Senator Gaines made a substitute motion to reinsert the provisions for oral notice; Senator Parrish seconded the motion. Following committee discussion, the substitute motion failed. Senator Berman made a substitute motion to report the bill unfavorably; Senator Simpson seconded the motion. Following committee discussion, that substitute motion failed. The original motion was then voted upon; the original motion also failed.

The meeting adjourned.

These minutes were read and approved by the committee on 2-12-79.

1-29-79

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Marvin C. Umholtz	Lawrence	KCUC
Ed Johnson	Topeka	Kansas Assn of Property & Casualty Ins. Cos.
Dwayne Salkman	"	Div. of Budget
Mike Hrynewich	"	Ks. Savings & Loan League
Judy Teresink	Topeka	KWPC
Oscar Tonk	"	Sen Hein (Intern)
Dave Drey	Lawrence.	" "
Max Moses	Topeka	KCDAA

No. 48,306

WALNUT VALLEY STATE BANK, a Corporation, *Appellant,* v. MERLE J. STOVALL and EMMA M. STOVALL a/k/a EMMA M. MEDLIN, *Appellee,* and TOWANDA STATE BANK, *Garnishee, Defendant.*

(574 P.2d 1382)

SYLLABUS BY THE COURT

1. JOINT TENANCY—*Bank Account—Garnishment.* The garnishment of a joint tenancy bank account severs the joint tenancy and the parties become tenants in common.
2. SAME—*Rebuttable Presumption of Equal Ownership.* There is a rebuttable presumption of equal ownership between tenants of joint tenancy property.
3. SAME—*Bank Account—Burden of Proof to Show Unequal Ownership.* The burden of proof on a claim the account is owned other than equally between the cotenants lies with the party asserting such claim.

Review from the Court of Appeals (1 Kan. App. 2d 421, 566 P.2d 33, filed July 1, 1977). Opinion filed February 25, 1978. Affirmed in part and reversed in part with directions.

Morgan Metcalf, of Coutts, Coutts & Metcalf, of El Dorado, argued the cause and was on the brief for the appellant.

No appearance by the appellee.

The opinion of the court was delivered by

OWSLEY, J.: This is an appeal from an order dissolving a garnishment. The decision of the trial court was affirmed by the Kansas Court of Appeals. See, *Walnut Valley State Bank v. Stovall,* 1 Kan. App. 2d 421, 566 P.2d 33. This court granted review.

Plaintiff first contends the trial court should have dismissed the appeal from the county court to the district court. The basis of the motion to dismiss was the failure to pay the docket fee prior to the hearing of the appeal and failure to provide surety on the appeal bond. Plaintiff also claims prejudicial error in the admission of certain evidence. Each of these points was considered by the court of appeals. The court of appeals concluded they were not grounds for reversal. We adhere to its opinion on these points.

The remaining issue is one of first impression. It involves the right and the extent of the right of a judgment creditor to garnishee a joint tenancy bank account to satisfy a judgment against one of the joint tenants. The court of appeals found such an account may be garnished by the creditor to the extent of the debtor's equitable interest in the account.

The facts relative to this issue are as follows: Plaintiff obtained judgment against defendants Merle J. and Emma M. Stovall.

Thereafter, the Stovalls were divorced and Emma married Archer B. Medlin. The Medlins established a joint checking account at the Towanda State Bank and each of them signed the bank signature card. Thereafter, and upon application of plaintiff, an order of garnishment was issued to the garnishee, which answered stating that Emma had a checking account with that bank in the amount of $411.52. Three days later, Emma moved to vacate the order of garnishment, which motion was overruled by the county court. Emma appealed to the district court, which heard the matter and entered judgment sustaining the motion to vacate and to set aside the order of garnishment, and assessed cost to plaintiff.

The trial judge issued his opinion letter to counsel, which contained his findings of fact as follows:

> "I have read the citations which you gentlemen provided me and find that the garnishment of the bank account held by the Towanda State Bank in the joint account of Archer B. Medlin and Emma Maye Medlin should be set aside. From this ruling it is obvious that I do not reach the same conclusions as the author of the note in the Washburn Law Journal and frankly I was more impressed with the cases set forth at 11 A.L.R. 3, Page 1487 under the section heading of 'Where the Funds in the Act Belong to the Husband Alone.' I feel that this is the situation here and that the funds in said bank account are the property of Mr. Medlin and that the account was established as a joint account for the convenience of Mr. Medlin when he was on the road driving a truck. It is the Court's recollection that it has been at least 6 months since Emma Medlin has been employed and that any loan made by the Liberty Loan Corporation of Hutchinson, Kansas was made primarily to Archer Medlin in March of 1975 and was not in fact made to Emma Medlin."

Through statutory enactment the legislature has sought to limit the creation of joint tenancy agreements unless by clear and convincing evidence the parties to the agreement show the intent to create such an estate. (K.S.A. 58-501). A joint tenancy bank account gives any party on the account a complete power of disposal. Upon death the survivor or survivors take all, even against lawful heirs of the decedent. Financial advisers not versed in the intricacies of the law have convinced many unlearned persons that a joint tenancy agreement is the answer to estate planning. While a joint tenancy has many laudable uses, it is not a panacea. Many injustices have resulted through use of the device. Upon proper showing we have imposed constructive trusts on property in the hands of a surviving joint tenant in order to avoid unintended results. (*Winsor v. Powell*, 209 Kan. 292, 497

P.2d 292; *Agrelius v. Mohesky,* 208 Kan. 790, 494 P.2d 1095; *Grubb, Administrator v. Grubb,* 208 Kan. 484, 493 P.2d 189.)

We have considered the cases cited at 11 A.L.R.3d 1465 and recognize there is support for the position that none of the funds in a joint tenancy account can be garnished, as well as support for the position that all the funds can be garnished. Any argument in support of either of these positions may be eliminated by reference to K.S.A. 58-501(*c*):

> ". . . The provisions of this act shall apply to all estates in joint tenancy in either real or personal property heretofore or hereafter created and nothing herein contained shall prevent execution, levy and sale of the interest of a judgment debtor in such estates and such sale shall constitute a severance."

The statute specifically provides the right to levy on personal property to the extent of the "interest of a judgment debtor." We must construe the phrase "interest of a judgment debtor." The court of appeals has stated the phrase means the equitable interest in joint tenancy property. Its affirmance of the trial court's decision is based on the trial court's finding of fact that the judgment debtor had no equitable interest in the joint tenancy account. We do not believe the solution is that simple. We are concerned with the ownership of a joint tenancy bank account between two or more joint tenants and the burden of proof if such ownership is challenged. In *Miller v. Miller,* 222 Kan. 317, 564 P.2d 524, we considered the ownership of a joint tenancy property conveyed by a father to himself, his son, and his daughter-in-law. We said:

> "The record establishes that each of the three parties—Jessie, Ima Kaye, and Richard—owned an undivided one-third interest in this tract at the time suit was commenced, and had owned such interests for almost ten years, since the recording of the deed in 1965. Jessie made a gift of one-third interest to his son and of a like interest to his daughter-in-law when the property was acquired. That Jessie paid the entire purchase price is immaterial." (p. 321.)

The statement in *Miller,* "[t]hat Jessie paid the entire purchase price is immaterial," is too broad. It would appear that when a party to a joint tenancy attempts to prove an intent to own joint tenancy property other than equally between the parties the issue of who provided the purchase price would be material. Support for this statement is found in *Schierenberg v. Hodges,* 221 Kan. 64, 558 P.2d 133, where we said:

> "It is well established in this jurisdiction that, absent fraud, one spouse may make an *inter vivos* transfer of his or her own personal property to another person

outright or to himself and another person in joint tenancy without contravening the statutory rights of a surviving spouse under K.S.A. 59-602. *Malone v. Sullivan*, 136 Kan. 193, 14 P.2d 647; *In re Estate of Fast*, 169 Kan. 238, 218 P.2d 184; *Eastman, Administrator v. Mendrick*, 218 Kan. 78, 542 P.2d 347. The plaintiff's deceased spouse may well have lawfully transferred the funds in question; the funds may have come from her earnings, or they may have been accumulated solely by the plaintiff. Such questions have not been litigated or determined. We conclude that the court should not have sustained the motion for summary judgment." (p. 66.)

Severance of the joint tenancy into a tenancy in common between a husband and wife gives rise to a rebuttable presumption of equal ownership; that is, the husband and wife each own one-half of the account. Such a presumption is created on the theory of donative intent. In *Norcross v. 1016 Fifth Avenue Co., Inc.*, 123 N.J. Eq. 94, 196 A. 446 (1938), the court explained the theory in this manner:

"There seems to be abundant legal support to the inference that the opening of an account, wherein each depositor agrees that all the moneys deposited are to belong to the parties as joint tenants, is *prima facie* evidence of donative intent. *New Jersey Title Guarantee and Trust Co. v. Archibald*, 91 N.J. Eq. 82. In the last cited case, the court of errors and appeals, in part, said:

" 'We think that where, as here, moneys belonging originally either wholly to the mother, or in part to her and in part to her daughter, are deposited by them in a bank in their joint names, and at the same time they both sign and deliver to the bank a writing stating that 'This account and all money to be credited to it belongs to us as joint tenants and will be the absolute property of the survivor of us; either and the survivor to draw,' and upon the death of the mother the undrawn moneys belong to the surviving daughter.

. . . .

" 'The contract entered into by the bank with the mother and her daughter exhibited a donative purpose from donor to donee (not one merely for use and convenience of the donor) and hence constituted a valid gift.' *Commonwealth Trust Co. v. Grobel*, 93 N.J. Eq. 78; *Commercial Trust Co. v. White*, 99 N.J. Eq. 119; affirmed, 100 N.J. Eq. 561; *Trenton Saving Fund Society v. Byrnes*, 110 N.J. Eq. 617; *Dover Trust Co. v. Brooks*, 111 N.J. Eq. 40; *McGee v. McGee*, 81 N.J. Eq. 190; *Rosecrans v. Rosecrans*, 99 N.J. Eq. 176; *Mendelsohn v. Mendelsohn*, 106 N.J. Eq. 537." (p. 98.)

A similar result has been reached in Michigan. In *Murphy v. Michigan Trust Co.*, 221 Mich. 243, 190 N.W. 698 (1922), the Supreme Court stated:

"We must hold the deposits constituted plaintiffs joint tenants. As joint tenants the ownership of Mr. Murphy is severable for the purpose of meeting the demands of creditors.

"In the absence of proof establishing their contributions toward the deposits

the presumption prevails that plaintiffs were equal contributors thereto and, therefore, equal owners. If the assignee did not want to accept such presumption the way was open to introduce testimony on the subject. We do not, however, have to rest the matter upon such presumption, as all the testimony in the case was to the effect that the principal contributor to the deposits was Mrs. Murphy. We can conceive of no reason why this joint claim for deposits made in the bank should not be allowed, and payment, if any, to Mr. Murphy withheld by order of the court until his contingent liability to contribute as a partner is determined. The joint claim should have been allowed and the right of Mrs. Murphy therein determined as one-half thereof. . . ." (p. 246.)

In accord, *Czajkowski v. Lount,* 333 Mich. 156, 52 N.W.2d 642 (1952); *Sussex v. Snyder,* 307 Mich. 30, 11 N.W.2d 314 (1943); *Darst v. Awe,* 235 Mich. 1, 209 N.W. 65 (1926).

In *United States v. Third Nat. Bank & Trust Co.,* 111 F. Supp. 152, 156 (M.D. Pa. 1953), the court stated:

". . . The attachment of the interest of a joint tenant operates as a severance of the joint ownership, makes them tenants in common and terminates the right of survivorship. Dover Trust Co. v. Brooks, Court of Chancery of N.J., 111 N.J. Eq. 40, 160 A. 890; In re Erie Trust Co., 19 Erie, Pa., 469."

See also, *American Oil Co., Ap., v. Falconer et al.,* 136 Pa. Super. 598, 605, 8 A.2d 418 (1939).

We believe this presumption of equal ownership should prevail in the absence of proof of ownership in some other proportion. Anyone attacking equal ownership should assume the burden of proof. If the debtor can demonstrate that he has an interest less than an equal share of the account the burden is upon him to come forward with such evidence. By the same token the debtor's cotenant may come forward and demonstrate an ownership greater than the interest created by operation of the presumption upon severance. If it is within the power of the creditor-garnisher to demonstrate the debtor has an ownership greater than that of the other cotenant, the garnisher is entitled to claim the greater share upon proper proof.

The trial court found the garnishment must be dissolved because the wife had no interest in the account. Yet the record indicates she wrote nearly all the checks on the account and made numerous deposits, including the proceeds of a $483.18 loan taken out and signed by her and her present husband. The finding of the trial court that Emma Stovall had no interest in the account seems to stem from the fact the garnisher could not prove exactly what her interest was in the account at the time of the

garnishment, rather than from the fact she had absolutely no interest in the account. Without the presumption of equal ownership and applying the rule established by the court of appeals, the garnisher of a joint tenancy account can be defrauded by a debtor and the debtor's cotenants by the act of commingling deposits and withdrawals to the point that no one can determine the origin of the proceeds of the account at the time of garnishment.

We hold that a garnishment upon a joint tenancy bank account severs the joint tenancy, creating a tenancy in common. A rebuttable presumption of equal ownership between the cotenants remains intact. The burden of proof on a claim the account is owned other than equally between the cotenants lies with the party asserting such claim. If married persons wish to avoid the effect of this rule they may maintain their property separate from that of their spouses and receive the protection of K.S.A. 1977 Supp. 23-201, *et seq.*

We reverse the decision of the court of appeals on the issue of garnishment of joint tenancy accounts and remand the case to the trial court with directions to grant a new trial in accord with rules of law established herein.

Affirmed in part and reversed in part with directions.

1-29-79

[As Amended by Senate Committee of the Whole]

Session of 1978

SENATE BILL No. 845

By Committee on Judiciary

2-2

0016 AN ACT relating to married persons; concerning the rights of
0017 spouses to sue one another; amending K.S.A. 1977 Supp.
0018 23-203 and repealing the existing section.

0019 *Be it enacted by the Legislature of the State of Kansas:*
0020 Section 1. K.S.A. 1977 Supp. 23-203 is hereby amended to
0021 read as follows: 23-203. A person ~~may~~, while married, *may* sue
0022 and be sued in the same manner as if he or she were unmarried.
0023 *Spouses shall not be prohibited from suing one another for ~~any~~*
0024 *~~cause~~* ***[damages for personal injury or wrongful death arising***
0025 ***from an intentional tort or from the negligent use of a motor***
0026 ***vehicle].***
0027 Sec. 2. K.S.A. 1977 Supp. 23-203 is hereby repealed.
0028 Sec. 3. This act shall take effect and be in force from and after
0029 its publication in the statute book.

1-29-79

LAW OFFICES OF

GOODELL, COGSWELL, STRATTON, EDMONDS, PALMER & WRIGHT

TWO FIFTEEN EAST EIGHTH STREET

TOPEKA, KANSAS 66603

AREA CODE (913) 233-0593

GERALD L. GOODELL
GLENN D. COGSWELL
WAYNE T STRATTON
ROBERT E. EDMONDS
ARTHUR E. PALMER
THOMAS E. WRIGHT
CHESTER A. ARTERBURN, JR.
H. PHILIP ELWOOD
HAROLD S. YOUNGENTOB

CHARLES R. HAY
PATRICK M. SALSBURY
DEANNE WATTS HAY
WILLIAM J. PAPROTA

WILLIAM M. MILLS, JR.
OF COUNSEL

January 23, 1979

Mr. Frank Gentry
Kansas Hospital Association
1263 S. W. Topeka
Topeka, Kansas 66612

Re: Senate Bill No. 76

Dear Frank:

Wayne Stratton is out of the office for a couple of weeks and requested that I write you. Before he left, we discussed the potential impact of Senate Bill No. 76 on public hospitals in Kansas. Senate Bill No. 76 is a tort claims act patterned after the federal tort claims act. Basically, it provides that governmental entities, such as the state, counties and cities, may be sued and held liable for tortious conduct of their employees. It requires those governmental entities to defend an action filed against an employee and alleging that the employee committed a tort, such as negligence, within the scope of his employment. It also requires that the governmental entity set up funds or provide insurance to pay for the defense of such cases and any judgments against the governmental entity in such a case.

Senate Bill No. 76 would apply to certain Kansas hospitals and would essentially make the hospitals liable for medical malpractice by their employees. There are several problems with the bill. Those include the fact that the bill is somewhat unclear with regard to which hospitals it might apply to, and the fact that it may require insurance coverage that would duplicate coverage already required for medical malpractice under other laws.

The problem in determining which hospitals the bill would apply to arises because of the definitions in the bill. The bill defines employee to mean any officer, employee, servant or member of a board, commission or counsel of a governmental entity, including elected or appointed officials, regardless of whether they receive any compensation. The term governmental entity is defined to mean the state and any agency or instrumentality of the state including a university, commission, board or hospital. The term governmental entity is also defined to mean

any municipality such as a county, township, city, school district or other political or taxing subdivision of the state.

Thus, the bill clearly applies to state hospitals and state university hospitals. On the other hand, the bill does not clearly apply to all hospitals operated by municipalities, such as county hospitals or city hospitals.

It is my understanding that such municipal hospitals are operated in several ways. For example, there is statutory authority in some cases to allow a hospital district to be set up similar to a school district. The hospital district would have taxing authority and thus would be within the definition of municipality in Senate Bill No. 76. Therefore, those hospitals would be liable for medical malpractice by their employees and would be obligated to defend medical malpractice actions against their employees. In contrast, it is my understanding that most city and county hospitals are operated by a board of trustees appointed by the county commission or city government. The trustees would be employees of the municipality within the definition in Senate Bill No. 76, and the municipality would be liable for and obligated to defend any action against them for negligence. If the board of trustees contracts with an organization which actually runs the hospital, then the organization will probably be considered an independent contractor under Senate Bill No. 76. Thus, the board of trustees and the municipality would not be liable for medical malpractice on the part of employees of the hospital. Similarly, if the board of trustees directly operates the hospital, it is probable that they would not be liable for or obligated to defend an action against an employee of the hospital, because hospital employees would not directly be employees of the municipality. However, we have based this conclusion upon the normal rules of statutory construction as they relate to the definitions in the bill; the conclusion is not crystal clear from the bill itself.

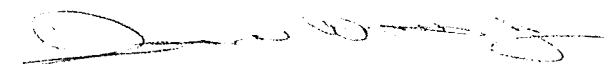
In short, the bill is somewhat unclear as to which hospitals would be affected by it; in all probability, this question would be determined by the manner in which the hospitals are operated, resulting in some city and county hospitals being covered by the act and others not being covered. In addition, for certain hospitals, the board of trustees could be covered by the act but the hospital employees would not be covered by the act. If the bill is passed, an effort should certainly be made to clarify this in the language of the bill itself.

As I indicated above, the bill requires a governmental entity such as the state, a hospital district, a county, a city or a state hospital to either set up a fund to defend lawsuits or obtain insurance coverage to defend those lawsuits. As you know, all hospitals are currently required to be self-insurers or obtain medical malpractice insurance. In addition, many individual medical practitioners are required to maintain their own malpractice insurance. This act would require the hospitals affected by it to maintain duplicate coverage to defend malpractice actions against those practitioners. In addition, it would make those hospitals affected by it legally responsible for the acts of employees who are not currently required to maintain insurance, such as nurses and aides.

Frank, I have discussed the impact of the bill in the context of medical malpractice because that is probably the area where most tort claims against a public hospital would come from. However, the bill will also make hospitals affected by it liable for other negligence or other torts, for example, where a person on the hospital premises would slip and fall.

If you have any questions about this or would like to discuss it, please feel free to contact me. By the way, the bill is set for hearing in the Senate Judiciary Committee on Thursday and Friday, January 25 and 26, 1979.

Very truly yours,



Deanne Watts Hay

DWH:jls

1-29-79

Statement by Congressman Keith Sebelius
Congressional Representation for the District of Columbia

I appreciate this opportunity to discuss the Constitutional amendment to grant full Congressional representation to the District of Columbia. First, let me stress that I agree with my colleagues who believe that the citizens of the District of Columbia should be granted their rightful representation and accorded their civil rights. To be sure, the District has changed drastically since our founding fathers set it aside as a special area intended only as the seat of our national government. My views have been influenced in part by the fact I have worked within the District as a Federal employee while attending law school and, of course, from residing in Washington over the past ten years.

It is my contention, however, that while proponents of full representation view this issue as one of representation, civil rights and equity, that in fact this is a complicated issue posing very serious problems. More to the point, there are preferable alternatives that have received little public attention or discussion. From the standpoint of Kansas, this is a complicated issue with important States rights questions which could have a great impact on Kansas and other Midwestern States.

Let us take the basic issue of representation first. Under the present system, first organized in 1801, the District has been represented. Some would say that it is already better represented than a State. It has a non-voting delegate in the House of Representatives, committees in both the House and Senate devoted exclusively to its interests (representation that no State has), an <u>elected</u> city government and direct government contributions to its city finances. Proponents of the amendment rightfully point out that there are over 700,000 people living in the District with a larger population than 10 States that do have voting representation in the House and Senate. What has not been pointed out is that an estimated 200,000 District residents are registered to vote in other jurisdictions and many residents vote through State registration procedure. And, while only 251,778 citizens are registered to vote in the District and only 101,496 actually voted in the most recent elections, the point is that these citizens already have the right to vote and take an active part in determining local government and policy.

Proponents of the amendment also point out residents of the District pay more in Federal taxes annually than is paid by residents of each of 11 States which have voting representation. What has not been publicized is that the District receives more in Federal benefits each year than it contributes.

In fiscal 1977, the District received a total in Federal funds of $749,740,600 not including the costs of the multibillion dollar subway system. Against these receipts, the Federal tax collection from D. C. residents in 1976 amounted to $645,802,000. Residents of the nation's capital are not being shortchanged and as a matter of fact receive more in Federal benefits on a per person basis than any other State.

The issue of representation also involves the issue of disenfranchisement. It is clear which States would lose representation. Population projections show that if the House of Representatives is held at 435 members, the District's new representatives will be added at the expense of rural States. And, the District's two new Senate seats would dilute the power of all other States. But, because the District is a "company town" with no need to balance urban and rural interests that exist in all other States, rural Americans would be hurt the most. In both cases, Midwest and rural influence would be diminished. While I favor some form of representation for the citizens of the District, I cannot support an amendment that could reduce our current Congressional representation from five to four.

The issue of representation also involves who and what is being represented. The District does not have the diversity of even our smallest States. Over the years, it has developed into a large commercial city and Federal enclave. It has no farms, no mines, no forests, no small towns, and no industry. Its interests while valid are narrow and unrepresentative. While members of the House of Representatives represent people, Senators represent States and must face a multitude of competing interests. District Senators would face no such competing interest.

In fact, the Federal government is the District's major tenant. It has a population largely of lawyers, lobbyists, government workers and newsmen. Over 63 percent of those working in the District are Federal employees or work in related services such as lobbying, government consulting and law -- all people with an axe to grind. That does not even include businesses that indirectly feed off the government. Senators from the District would be in the ironic position of representing the interests of the Federal government to the Federal government.

With the issue of representation also comes the issue of responsibility. Granting the District full representation is to award it all the benefits of Statehood -- namely Senators and Representatives, but without the accompanying burdens and

responsibility of Statehood. Because of its status as a Federal entity and its dependence upon Congress, it need not be concerned about the responsibilities, problems or revenue needs of the individual States. Indeed, full representation is like having your cake and eating it too. Not only is such a proposal bad policy, it is unfair to the States.

In addition to the issue of representation, I believe there are serious Constitutional problems that should be considered. The proposed amendment would give the District Federal representation "as though it were a State." This contravenes the language of Article V of the Constitution which states that, "No State, without its consent shall be deprived of its equal suffrage in the Senate." To accord two Senators to an entity of government other than a State -- a District purposely set apart from the States -- would be to diminish and deprive the States of their "equal suffrage" in the Senate.

The Constitution makes it clear that only States can have full representation in the national legislature. The District cannot be considered a "State" for purposes of representation because it lacks the sovereignty and independence common to States. Congress can exercise all police and regulatory powers in the District. Congress must approve the District's budget and appropriations for operation of the city and taxpayers across our nation pay for them. Congress can veto the decisions of the City Council.

The simple fact is, the District does not have the autonomy of function that States have under our Constitution. To give it full representation in the Congress and treat it "as though it were a State" would not make it so. The proposed amendment would merely introduce a new political entity within the Federal system, a unique creature having rights heretofore accorded only to the States. Such a "pseudo State" would be at cross purposes with the Constitution and undermine the nature of the Federal system, a system that has served us well and withstood repeated tests of time.

In addition to weakening the States by violating the "equal suffrage" provision of the Constitution and upsetting the Federal nature of our Constitutional framework, this amendment poses other Constitutional problems. Many Constitutional experts have testified that the language and working of the amendment will lead to further Constitutional difficulties. Its ambiguous wording leaves many questions unanswered. For

instance, the District will be able to ratify Constitutional amendments in the future, just as the Kansas State Legislature is doing on this very issue. But, the District has no State legislature. Since Congress has the power to veto actions of the city's only legislative body, the city council, will the Congress have the right to veto ratification of Constitutional amendments? It makes little sense to me to hurriedly pass a proposal as important as a Constitutional amendment when even its proponents concede its faulty draftmanship.

Let me also point out that while the District has changed drastically since the days of our founding fathers, I believe their intent in terms of the original need and purpose for a seat of national government is pertinent today. The founding fathers intended that the seat of the national government be located in a special area set aside for that purpose only. They believed the seat of the national government should be outside the jurisdiction of any State, secure from harrassment and free of entangling interests and political pressures. They realized that such an area would not represent the diversity of interests that the States did. The framers of our government did not intend it to be a "State," because that would have created a soverign power in the nation's capital, which would come in conflict with the Federal government. Accordingly, they created the District of Columbia and reserved representation exclusively for the States. It is my strong belief that the reason for creating a separate entity that belongs to each and every citizen of this nation still rings true.

Up to this point, I have been critical of the current amendment. Let me emphasize that there are several alternatives that I believe are preferable, but that have not received public attention or discussion. The District could be granted representation in the House, which would provide representation and answer many of the Constitutional objections concerning State's rights and diversity and avoid the problem of two Senators. Quite frankly, <u>some</u> proponents of full representation would not allow serious consideration of alternatives and in my view were simply "using" this issue and the citizens of the District to further their primary objective -- a power grab to insure even a greater majority within the Congress; a majority made up of those whose special and political interests match their own.

There are other alternatives as well. In 1846, the populated area of the District was retroceded to Virginia. The current populated areas could be retroceded to Maryland for voting purposes. These populated areas could be granted Statehood. These proposals also raise questions, but I believe they are more reasonable than the present amendment.

In closing, let me emphasize again that this issue is not simply one of civil rights and representation. The basic question is this:

Should the District of Columbia, a Federal enclave without the diversity of a State or the duties and responsibilities of a State, be given Congressional representation exactly "as if it were a State?" More specifically, should the District have two Senators and two Representatives? To grant full representation would be to vastly over-represent the valid but narrow interests of a 63 square mile city of Federal workers who are already locally represented. I strongly believe the answer to both questions is no and that we should get to the business of drafting an appropriate alternative.

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

Room 545-N - State House

Phone 296-3181

Date January 19, 1979

TO: SENATOR ELWAINE POMEROY Office No. 143

RE: MARITAL PROPERTY

You requested information on the recent Kansas Supreme Court decision of Cady v. Cady, 224 Kan. 339 (1978), and how it compares to the effect of 1978 Senate Bill No. 907 (L. 1978, ch. 134), and codified as K.S.A. 1978 Supp. 23-201(b).

S.B. 907 was introduced at the request of the Kansas Bar Association. The bill addressed the question whether the transfer of property from one spouse to the other at the time a divorce petition is filed is a taxable transfer of property by any resemblance to a conveyance for the release of an independent obligation owed to the spouse receiving the property. S.B. 907, in creating a class of property known as "marital property", was proposed as a way to reverse the 1974 Tenth Circuit decision of Wiles v. Commissioner of Internal Revenue, 499 F. 2d 255, which had found the transfer of appreciated stock by the husband to the wife to be a taxable event under Kansas law and not a division of property between co-owners of the property.

The Cady decision recognized a species of common ownership of property acquired after marriage. Each spouse, at the time of the marriage, becomes the owner of a vested but undetermined interest in all the property individually or jointly acquired, except as provided in K.S.A. 1978 Supp. 23-201(a). The right to take a share in this "marital property" is dependent upon the occurrence of a particular event, the commencement of an action for divorce or separate maintenance.

You asked whether the Cady decision accomplishes what the Legislature was intending to do by enacting S.B. 907. For two reasons the decision may be more satisfactory. First the decision rests on an interpretation of K.S.A. 60-1610(c), a provision mandating a division by the district court of the real and personal property of the spouses pursuant to the divorce proceeding. The decision pinpoints the vesting of the interest in the marital property as the moment at which the petition for divorce or separate maintenance is filed. Furthermore, language in S.B. 907 may, in contrast, allow more to be read into the statute than the sponsors intended. S.B. 907 speaks of marital property as property "which vests not later than the time of commencement

. . . of an action in which a final decree is entered for divorce, separate maintenance, or annulment. . .". The emphasized language is ambiguous as to the time of vesting, to be contrasted to the specificity in Cady where vesting takes place at the time petition is filed.

As you noted, the Supreme Court did not rule on the effect of S.B. 907. The appellee -- the wife in this action -- took the position that S.B. 907 reversed pre-existing state law, with the effect that the trasnfer of property held in the husband's name would be a taxable event upon transfer. The Court avoided a ruling here by finding that the statute's effective date was later than the date the divorce petition was filed, and, thus, not controlling. Also, the Court stated that there can be no presumption that the Legislature was attempting to alter pre-existing law when there is no existing legislation or court decisions on the particular issue.

Nancy Suelter, an attorney with the Department of Revenue, did indicate that the Department's position is in line with S.B. 907. They no longer recognize this type of division of property as a taxable transfer. They are, in any event, satisfied with either S.B. 907 or the Cady decision.

If I can be of any further assistance in this matter please let me know.

Jerry E. Stephens
Research Assistant

JES/jsf

that such parents have subsequent to the birth of the child lawfully intermarried.

History: K.S.A. 23-126; L. 1976, ch. 145, § 127; Jan. 10, 1977.

23-127. Same; evidence of marriage and of birth of children; finding; jurant; duties of judge; case file not to be open. The judge of the district court shall require the parents to exhibit or file with the court evidence of their lawful marriage. The judge of the district court shall require the parents to exhibit or file with the court evidence of the birth of said child or children. If said judge finds that the birth of said child or children has been registered in the state of Kansas as illegitimate and the parents of said child or children subsequently have become lawfully married to each other he or she then shall affix such jurat to each affidavit and forward both affidavits to the state registrar of vital statistics. Further, said judge shall return all other evidence and exhibits to the parents of said child or children. No fee shall be charged for the performance of this service. No case file will be opened in the district court, nor will any record be made by the court of the performance of this act.

History: K.S.A. 23-127; L. 1976, ch. 145, § 128; Jan. 10, 1977.

23-130. Artificial insemination; consent executed and filed; file not open to public. The consent provided for in this act shall be executed and acknowledged by both the husband and wife and the person who is to perform the technique, and an original thereof may be filed under the same rules as adoption papers in the district court of the county in which such husband and wife reside. The written consent so filed shall not be open to the general public, and the information contained therein may be released only to the persons executing such consent, or to persons having a legitimate interest therein as evidenced by a specific court order.

History: K.S.A. 23-130; L. 1976, ch. 145, § 129; Jan. 10, 1977.

Article 2.—MARRIED PERSONS

23-201. Married persons; separate property; common ownership of marital property. (a) The property, real and personal, which any person in this state may own at the time of his or her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to him or her by descent, devise or bequest, or by gift from any person except his or her spouse, shall remain his or her sole and separate property, notwithstanding the marriage, and not be subject to the disposal of his or her spouse or liable for the spouse's debts.

(b) Property, other than property described in subsection (a) or property excluded by a written agreement by the parties, acquired by either spouse after marriage and before commencement of an action for divorce, separate maintenance, or annulment, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy or tenancy in common, shall be marital property. Each spouse has a common ownership in marital property which vests not later than the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment, the extent of the vested interest to be determined and finalized by the court pursuant to K.S.A. 1978 Supp. 60-1610, and any amendments thereto.

1978 SB 907

History: K.S.A. 23-201; L. 1976, ch. 172, § 1; L. 1978, ch. 134, § 1; July 1.

Law Review and Bar Journal References:

Discussed in "Women Under the Law: The Pedestal or the Cage?," Louise A. Wheeler, 43 J.B.A.K. 25, 26 (1974) (Incorrectly cited as 23-210).

CASE ANNOTATIONS

33. Referred to in holding garnishment of joint tenancy account severed relationship; presumption of ownership. Walnut Valley State Bank v. Stovall, 223 K. 459, 464, 574 P.2d 1382.

23-202. Conveyances and contracts concerning property. A married person, while the marriage relation subsists, may bargain, sell and convey his or her real and personal property and enter into any contract.

History: K.S.A. 23-202; L. 1976, ch. 172, § 2; July 1.

23-203. Sue and be sued. A person may, while married, sue and be sued in the same manner as if he or she were unmarried.

History: K.S.A. 23-203; L. 1976, ch. 172, § 3; July 1.

23-204. Married person may carry on trade or business; earnings. Any married

No. 48,693

JOHN J. CADY, *Appellant,* v. LOWANDA B. CADY and STATE OF KANSAS, *Appellees.*

SYLLABUS BY THE COURT

1. DIVORCE—*Property Jointly Acquired—Division of Property.* The filing of a petition for divorce or separate maintenance creates a species of common or co-ownership and a vested interest in one spouse in jointly acquired property held by the other, the extent of which is to be determined pursuant to K.S.A. 1972 Supp. 60-1610(*b*) (now K.S.A. 60-1610[*c*]).
2. TAXATION—*Transfer of Property—Application of State or Federal Statutes.* State law controls the determination of what constitutes a taxable transfer under federal tax statutes only in the event federal tax law, by express language or necessary implication, makes operation of the tax law dependent upon state law.
3. CIVIL PROCEDURE—*State Law Application over Federal Law.* Where state law controls, federal courts, both trial and appellate, must ascertain and apply state law.
4. JURISDICTION—*Domestic Relations—State Law Exclusive.* The field of domestic relations belongs exclusively to the state.
5. CIVIL PROCEDURE—*Declaratory Judgment—Construction of State Taxation Statute.* In a declaratory judgment action (K.S.A. 60-1701) the requirement of an actual controversy is provided when the construction of a state statute determines a taxpayer's liability for federal and state income taxes.

Appeal from Sedgwick district court, division No. 2; WILLIS W. WALL, acting administrative judge. Opinion filed July 15, 1978. Reversed and remanded with directions.

E. Lael Alkire, of Alkire, Wood, Wilson & Wilson, of Wichita, argued the cause, and *Patrick J. Regan* and *James J. McGannon,* of Regan & McGannon, of Wichita, were with him on the brief for the appellant.

Clarence J. Malone, assistant attorney general, argued the cause, and *Curt T. Schneider,* attorney general, and *Donald R. Hoffman,* assistant attorney general, were with him on the brief for the appellee State of Kansas.

Jerry G. Elliott, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Gerald L. Green,* of the same firm, was with him on the brief for the appellee Lowanda B. Cady.

The opinion of the court was delivered by

OWSLEY, J.: This is a declaratory judgment action brought to construe the provisions of K.S.A. 1972 Supp. 60-1610(*b*) (now K.S.A. 60-1610[*c*]). The issue is whether a spouse has a species of common or co-ownership in property held in the name of the other spouse before a judgment in a divorce action divides the property.

John J. Cady, plaintiff, and Lowanda B. Cady, defendant, were married in 1956. On February 28, 1973, they were divorced. The decree of divorce incorporated an executed property settlement agreement which determined alimony and a division of property. Included therein was a provision requiring plaintiff to assign to defendant 50,000 shares of corporate stock held in his name. This stock, as well as other stock retained by plaintiff under the property settlement agreement, was acquired during the marriage. After the divorce the Internal Revenue Service assessed a substantial income tax deficiency on the basis there had been a taxable transfer of appreciated property under 26 U.S.C. §§ 1001 and 1002.

Plaintiff filed this lawsuit against his former wife to determine the nature of the transfer under the laws of Kansas. Plaintiff joined the Director of Taxation of the Department of Revenue for the State of Kansas, fearing the state was also preparing to assess a tax deficiency.

The trial court dismissed the action on the basis that (1) it lacked jurisdiction of the subject matter of the action, (2) there was no real case in controversy, and (3) the action was a collateral attack on the original divorce decree. For the reasons set forth below we reverse.

The decision of the I.R.S. to assess taxes against property held by one spouse and transferred in a divorce proceeding to the other spouse evolves from *United States v. Davis,* 370 U.S. 65, 8 L.Ed.2d 335, 82 S.Ct. 1190 (1962), reh. denied 371 U.S. 854, 9 L.Ed.2d 92, 83 S.Ct. 14. There a Delaware taxpayer transferred shares of stock to his wife pursuant to a property settlement agreement executed prior to divorce. The I.R.S. assessed a capital gains tax against the taxpayer for one-half the appreciation on the stock. The taxpayer paid the assessment and sued to recover for the alleged overpayment in the court of claims. He recovered there but the United States Supreme Court reversed.

The decision of the Supreme Court revolved around the issue of whether the stock transaction was a taxable event. If the disposition of the stock was a sale or other transfer the tax was due; otherwise, it was not. The taxpayer asserted the disposition was comparable to a division of property between two co-owners and was not a transfer. The government, on the other hand, contended the transaction resembled a taxable transfer of prop-

erty given in exchange for an independent legal obligation (support and alimony). Although the Court recognized the binding effect of the Delaware law, it found there was no co-ownership by the wife in the husband's property, and held the transfer had been made to satisfy an independent and taxable legal obligation.

Under federal tax statutes a taxable transfer presents a question controlled by federal law. State law may control only in event the federal tax law, by express language or necessary implication, makes operation of the tax law dependent upon state law. (*Lyeth v. Hoey,* 305 U.S. 188, 83 L.Ed. 119, 59 S.Ct. 155 [1938].) Where state law controls, federal courts must ascertain and apply state law. (*Huddleston v. Dwyer,* 322 U.S. 232, 88 L.Ed. 1246, 64 S.Ct. 1015 [1944].) The field of domestic relations belongs exclusively to the state. (*McCarty v. Hollis,* 120 F.2d 540 [10th Cir. 1941].) Actions of this nature have been considered and decided by the Supreme Courts of the states of Colorado and Oklahoma.

In *Pulliam v. C.I.R.,* 329 F.2d 97 (10th Cir. 1964), the Tenth Circuit applied the *Davis* decision to Colorado law, holding that such a property transfer was taxable. The court reasoned that since under Colorado law a wife did not have a vested right in any part of her husband's property during marriage, acquiring the property in a divorce was a taxable transfer. This decision was later nullified by the Colorado Supreme Court in *Questions Re Imel v. U.S.A.,* 184 Colo. 1, 517 P.2d 1331 (1974). There the court disapproved the position of the federal appeals court and held:

> ". . . [U]nder Colorado law, the transfer involved here was a recognition of a 'species of common ownership' of the marital estate by the wife resembling a division of property between co-owners. We answer in the negative whether the transfer more closely resembles a conveyance by the husband for the release of an independent obligation owed by him to the wife. . . .
>
> "Except for those rights which vest upon the filing of the divorce action, we in no way change the Colorado law that a husband's property is free from any vested interest of the wife and, with a possible exception or two, he can sell it or give it away. . . ." (p. 8.)

The question was resolved in Oklahoma in a series of four cases. The first was *Collins v. C.I.R.,* 388 F.2d 353 (10th Cir. 1968) (*Collins* I). There the court followed *Pulliam* and held that the transfer was taxable under Oklahoma law. In *Collins v. Oklahoma Tax Commission,* 446 P.2d 290 (Okla. 1968) (*Collins* II), the Oklahoma Supreme Court disagreed with the holding in *Collins* I and held the transfer was a division of property between

co-owners and not a taxable event. On the heels of *Collins* II, the United States Supreme Court decided *Collins v. Commissioner of Internal Revenue,* 393 U.S. 215, 21 L.Ed.2d 355, 89 S.Ct. 388 (1968) (*Collins* III). It remanded *Collins* I to the lower court for a redetermination of its prior holding in light of *Collins* II. On remand the court of appeals reversed itself and followed *Collins* II, stating:

"As indicated in the former opinion, we read United States v. Davis, 370 U.S. 65, 82 S.Ct. 1190, 8 L.Ed.2d 335 (1962) to require that state law be consulted in determining the nature of the disposition of property undertaken in connection with a termination of marital relations. Just as the Court in Davis, we seek to determine whether, under state law, the present transfer more nearly resembles a nontaxable division of property between co-owners, or whether it is a taxable transfer in exchange for the release of an independent legal obligation. Having the benefit of an interpretation of state law on this very point, we must conclude that the stock transfer operated merely to finalize the extent of the wife's vested interest in property she and her husband held under 'a species of common ownership.'

"The Commissioner agrees that state law is significant, but argues that a determination of whether the wife's rights in the transferred property reach the dignity of co-ownership does not depend upon the labels assigned to that interest for state tax purposes. It is contended that when the Court in Davis discussed such factors as right of control, descendable interest, and the like, federal criteria were established that must be met before the rights conferred by state law can be said to constitute co-ownership. The language of Davis will not support that interpretation. The Court merely discussed certain general characteristics of co-ownership in an attempt to determine whether the wife possessed the rights of a co-owner under state law. In so doing, the Court determined that 'regardless of the tags, Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof.' 370 U.S. at 70, 82 S.Ct. at 1193. Collins v. Oklahoma Tax Commission proclaims that in Oklahoma the wife is made 'a part owner thereof,' consequently, there is no need to search state law for indications of other factors that might signify the nature of the wife's property interest.

"In sum, we look to the law of the state, as the Supreme Court did in Davis and as this court did in Pulliam v. C.I.R., 329 F.2d 97 (1964), and conclude that the transfer of stock was a nontaxable division of property between co-owners." (*Collins v. C.I.R.*, 412 F.2d 211, 212 [10th Cir. 1969].)

Subsequently, the Oklahoma court modified *Collins* II, limiting the vesting of the rights in the wife to the filing of the divorce action. The court stated:

"Plaintiff argues she has a vested interest in property acquired during coverture and for that reason the gratuitous gifts were in and of itself a fraud on her marital rights. In support of her conclusion she cites two cases. Collins v. Oklahoma Tax Commission, Okl., 446 P.2d 290; Thompson v. Thompson, 70 Okl. 207, 173 P. 1037 (1918). We disagree. Both of these cases involve an interpretation of jointly acquired property under our divorce statutes. They do not purport to construe the

vested interest of a wife in jointly acquired property beyond the statutory disposition of property in a divorce action. When a divorce action is pending her right to the jointly acquired property is vested. But the vesting takes place by reason of the divorce pendency under our statute and not by the marriage relationship which existed between the parties." (*Sanditen v. Sanditen*, 496 P.2d 365, 367 [Okla. 1972].)

While the question is one of first impression in this state, *Davis* was applied to Kansas case law in *Wiles v. C.I.R.*, 499 F.2d 255 (10th Cir. 1974). There the appeals court distinguished Oklahoma and Colorado law from Kansas law and held that under Kansas law such a transfer of property is to be treated as a taxable exchange. The court stated that under the pertinent statutes and decisions a wife has no vested co-ownership in property of the husband during marriage.

The division of property pursuant to a divorce proceeding is controlled by K.S.A. 1972 Supp. 60-1610(*b*). The statute states:

"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."

Historically, division of property has been a concept separate and apart from alimony. In *Garver v. Garver*, 184 Kan. 145, 147, 334 P.2d 408 (1959), this court said:

"We are of the opinion that alimony and property division are completely separate and that a wife who prevails in a divorce action is entitled to both alimony and division of property. The right to alimony is separate and distinct from the right to division of the property jointly acquired by the parties during the marriage. The doctrine of alimony is based upon the common law obligation of the husband to support his wife, which obligation is not removed by her obtaining a divorce for his misconduct. Division of property, on the other hand, has for its basis the wife's right to a just and equitable share of that property which has been accumulated by the parties as a result of their joint efforts during the years of the marriage to serve their mutual needs. In this sense, the marital relationship is somewhat analogous to a partnership, and when the relationship is dissolved the jointly acquired property must be divided, regardless of which party has been at fault. . . ."

K.S.A. 1972 Supp. 60-1610(*b*) broadens the power of the court in entering orders for a division of property over that set forth in *Garver*. The court is no longer restricted to a division of property which is accumulated as a direct result of joint efforts of the

spouses during the marriage. (*Parish v. Parish,* 220 Kan. 131, 551 P.2d 792 [1976].) In the present action we are concerned only with the taxable status of jointly acquired property.

Prior to the filing of a petition for divorce a spouse may dispose of his or her personal property without regard to the other spouse. (*Eastman, Administrator v. Mendrick,* 218 Kan. 78, 542 P.2d 347 [1975]; *Winsor v. Powell,* 209 Kan. 292, 497 P.2d 292 [1972].) At that time a spouse possesses only an inchoate interest in real estate held by the other spouse. (*McGill v. Kuhn,* 186 Kan. 99, 348 P.2d 811 [1960].) The filing for divorce, however, has a substantial effect upon the property rights of the spouses. At that moment each spouse becomes the owner of a vested, but undetermined, interest in all the property individually or jointly held. The court is obligated to divide the property in a just and equitable manner, regardless of the title or origin of the property. (*McCain v. McCain,* 219 Kan. 780, 549 P.2d 896 [1976]; *McCrory v. McCrory,* 216 Kan. 359, 533 P.2d 278 [1975]; *Almquist v. Almquist,* 214 Kan. 788, 522 P.2d 383 [1974].)

We hold that the filing of a petition for divorce or separate maintenance creates a species of common or co-ownership in one spouse in the jointly acquired property held by the other, the extent of which is determined by the trial court pursuant to K.S.A. 1972 Supp. 60-1610(*b*). Except for those rights which vest by virtue of the filing of the divorce action, we in no way change the interest of one spouse in the property held by the other, or in the ability of the other spouse to convey, sell or give away such property. Our decision is in accord with the cases decided by the Oklahoma and Colorado courts. We have examined the pertinent statutes in those jurisdictions and, contrary to the conclusion in *Wiles v. C.I.R.,* supra, we find no differences which prevent this court from assigning precedential value to the Oklahoma and Colorado cases.

Defendant Lowanda B. Cady argues that we should consider the effect of recently enacted legislation in Kansas (L. 1978, ch. 134) in the determination of the issue in this case. This act appears to identify part of the property of a husband and wife as marital property. We have concluded the effect of this statute should not be considered in the present action. We do so for two reasons. First, the statute was not in effect at the time of the divorce. Second, we do not accept defendant's argument that the

enactment of this statute created a presumption the legislature was attempting to change pre-existing law. There can be no presumption when the legislature has not enacted laws related to the issue in this action and when the issue has not heretofore been determined by the appellate courts of this state.

The subject matter contained in plaintiff's petition involved a determination of the nature of a division of property pursuant to K.S.A. 1972 Supp. 60-1610(*b*). Since K.S.A. 60-1701 (declaratory judgments) specifically includes controversies involving the validity or interpretation of a statute, a district court is under a duty to proceed with the cause if the petition sets forth facts showing an actual controversy. (*Wagner v. Mahaffey,* 195 Kan. 586, 588, 408 P.2d 602 [1965]; *Huber v. Schmidt,* 188 Kan. 36, 39, 360 P.2d 854 [1961]; *School District v. Sheridan Community High School,* 130 Kan. 421, 286 Pac. 230 [1930].) Courts do not render advisory opinions on abstract questions of law unless there is an actual dispute between the parties. (*Wagner v. Mahaffey,* supra; *Witschner v. City of Atchison,* 154 Kan. 212, 117 P.2d 570 [1941]; *City of Cherryvale v. Wilson,* 153 Kan. 505, 112 P.2d 111 [1941]; *Kern v. Newton City Commissioners,* 151 Kan. 565, 100 P.2d 709, 129 A.L.R. 1156 [1940]; *Klein v. Bredehoft,* 147 Kan. 71, 75 P.2d 232 [1938]; *West v. City of Wichita,* 118 Kan. 265, 234 Pac. 978 [1925].)

Here an actual controversy exists between plaintiff and his former wife as to the nature of the transfer of stock. In view of the requirement that the federal courts must follow the state law as stated in *United States v. Davis,* supra, each party will be affected by the outcome of this action. At oral argument the state indicated it intended to assess a tax deficiency against plaintiff similar to that assessed by the I.R.S. The case clearly involves an issue having serious implications for all parties concerned and is more than an abstract question of law.

We do not find plaintiff's lawsuit to be a collateral attack upon the property settlement or the previous divorce decree. Plaintiff's goal is to interpret, not attack. Such a purpose is within the scope of a declaratory judgment action. (See, *Savage v. Savage,* 192 Kan. 230, 387 P.2d 190 [1963]; *Bodle v. Balch,* 185 Kan. 711, 347 P.2d 378 [1959]; 49 C.J.S., Judgments, § 408, p. 805.)

The trial court erred in dismissing this action and because the issue involves a question of law which the parties have fully

briefed and argued we find the case should be decided on its merits. We therefore remand the case to the trial court with directions to enter judgment in favor of the plaintiff in accord with this opinion.