Approved April 23, 1983
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Elwaine F. Pomeroy at
Chairperson

10:00 a.m./~~p.m.~~ on March 29, 1983 in room 514-S of the Capitol.

All members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaines, Hess, Mulich, Steineger and Werts.

Committee staff present: Mary Torrence, Revisor of Statutes
Mike Heim, Legislative Research Department
Mark Burghart, Legislative Research Department

Conferees appearing before the committee:

Dr. Richard Maxfield, Kansas Psychological Association, Menninger Foundation
William J. Patrota, Attorney, Kansas City
Barbara Reinert, Kansas Women's Political Caucus
Dr. Nancy Maxwell, Professor, Washburn University School of Law

Sub. House Bill 2131 - Divorce, annulment, separate maintenance.

The chairman explained the first hearing on the bill was last Monday, March 21, and the provision to provide waiver of privileges where child custody is in dispute was struck by the House.

Dr. Richard Maxfield presented his testimony that he had redrafted from his House testimony (See Attachment #1). He testified in opposition to the addition of the child custody criteria.

William J. Paprota testified that 40% of his practice is in family law, and because of being a father and practicing in family law, he feels it is necessary to speak out in opposition to the criteria portion of the bill. From the psychological aspects of the criteria, in order to render proper representation to his client, it is necessary to bring in an expert to aid him in the preparation of his case,and it is obvious where costs are going to go. It would not be unreasonable that the fees could be in excess of $10,000, and the present joint custody law has only been in effect since last January. He said he had inquired of judges how many had litigated a case under joint custody; the judges said, none, so they don't have any experience in these cases yet. In regard to waiver of privilege, he is against counseling notes made available; husbands and wives should have free access without it being held against them. Mr. Paprota referred to lines 49 through 51, and stated that provision provides all that is necessary. He feels that would be enough to certify in respect to fitness. He supports including, in line 50, that the court have the power to order examination of husband and wife and the children as well. In reference to line 49, he suggested to include the language, regarding examination of the parties only if issue of fitness exists. It can be done at discovery conference. In Subsection (b), he suggested a provision for costs to be assessed against the person requesting that examination. Committee discussion was held in reference to Jack Paradise' printed testimony (See Attachment #2).

Barbara Reinert testified in opposition to the confidentiality portion of the bill. A copy of her handout is attached (See Attachment #3).

Dr. Nancy Maxwell called the committee's attention to three issues: the waiver of confidentiality, criteria for custody, and amendments that were proposed by the Judicial Council that included non-parental custody, maintenance, effective date of remarriage, how to assess costs, clarification of language in K.S.A. 60-1618, and deletion of a new grounds for separate maintenance. She stated these amendments are necessary issues for a cleanup of this legislation; these things must be enacted because of a problem with interpretation of the language.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on March 29, 1983

Sub. House Bill 2131 continued

She referred to the copy of K.S.A. 60-427 (See Attachment #4), Psychiatrist-Patient Privilege. She reported psychologists have a higher privilege than psychiatrists. She would like to study the subject, criteria for custody; it is the Advisory Committee's opinion these factors are important. Committee discussion with her followed. A copy of excerpts from Professor Nancy Maxwell's article soon to be published in the Washburn Law Journal is attached (See Attachment #5). Following committee discussion, Senator Hess moved to amend the substitute bill by adopting all of the Family Law Advisory Committee amendments except the criteria; Senator Feleciano seconded the motion. Following an explanation of the motion, the motion carried. Following a review and discussion of House Bill 2096, Senator Feleciano moved to amend the contents of House Bill 2096 into Sub House Bill 2131; Senator Hess seconded the motion, and the motion carried. Senator Feleciano moved to report Sub. House Bill 2131 favorably as amended; Senator Hess seconded the motion, and the motion carried.

House Bill 2096 - Child custody investigations in domestic relations cases.

Senator Hess moved to report the bill adversely; Senator Mulich seconded the motion, and the motion carried.

The meeting adjourned.

3-29-83

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Nancy L. Maxwell	Topeka	Kan. Judicial Council (Family Law Advisory Comm)
[illegible]	Topeka	attorney - Divorce Cases
Diane Suber	Lawrence	University Daily Kansan
Randy Maxwell	Topeka	KS Jud Council
Matt Lynch	"	"
Joanne Pomeroy	Topeka	Senatrix
Mary (Pomeroy) McNish	Topeka	Sister-in-law
R Mayfield	Topeka	None
Annemarie Tashash	Topeka	The Menninger Foundation
Mary Harper	Healy	AAM
Pat McKinley	Topeka	Mental Health Assn
Betty Stowers	✓	✓
William Abbott	TOPEKA	Ks. Psy. Assoc.
Ruth Welbert	"	Girl Scouts

3/29/83

3-29-83
Att. 1

Mr. Chairman, Members of the Committee, thank you for the opportunity to give testimony regarding the substitute for House Bill 2131, and to make some brief comments about the additional child custody criteria proposed by the Family Law Advisory Committee of the Judicial Council, which were contained in the original House Bill. I am Dr. Richard Maxfield. I am President-Elect of the Kansas Psychological Association and a staff member of the Adult Outpatient Department of The Menninger Foundation.

Comments on the Proposed Amendments Contained in Original HB 2131

My fundamental objection to all of the originally proposed amendments to Section 1610 (3) of the Divorce and Maintenance Code is that, though they appear at first blush to be important psychological variables, they are largely irrelevant for consideration by the court in determining what custody arrangement is in the best interest of the child. I would like to note that I have reviewed Professor Maxwell's article as introduced by Judge Walton during the last Committee meeting on this issue. Her article is quite scholarly, concise and psychologically sophisticated; however, it presents no rationale for adopting the proposed additional criteria other than by referencing existing law in other states. Nor does that article comment on the peculiar paradox that the confidentiality of court ordered marital counselling is protected while the confidentiality of voluntarily sought treatment is eliminated.

For the sake of brevity, I will restrict my comments to the originally proposed amendment (B) (xii). I have attached a brief summary statement raising questions about the other proposed amendments. Proposed amendment (xii) reads as follows, "Whether the child's emotional and psychological needs and development will be enhanced because of active contact with both parents." The phrasing of that section might well lead one to believe that there are numerous instances wherein not having active contact with both parents would be best for the child. Such is not the case.

Att. 1

The psychological literature is clear that having active contact with both parents is nearly always in the best interest of the child. Wallerstein and Kelly in a landmark 1980 book entitled "Surviving the Breakup: How Children and Parents Cope with Divorce," make the following statement in summing up their findings, "Put simply, the central hazard which divorce poses to the psychological health and development of children and adolescents is in the diminished or disrupted parenting which so often follows . . . (the divorce)." The Group for the Advancement of Psychiatry in a 1981 monograph made an even stronger statement in support of the children of divorce maintaining a relationship with both parents: "The child's need for having parents is absolute; it does not depend on the parents' psychological or socio-economic circumstances. Even 'bad' relationships are often preferable to the prospect of unrelatedness." Maintaining a relationship with both parents after the divorce is likely to mitigate against some of the negative effects that divorce has on children. The only exception to the above is if a parent is physically, sexually, or emotionally abusive toward the child.

I would like to respectfully bring to the Committee's attention that the statute as now written [1610(3)] states, "Child Custody Criteria. The court shall determine the custody in accordance with the best interest of the child. The court shall consider all relevant factors, including but not limited to": Leaving the statute as it is now written will allow flexibility on the part of judges and will further allow for the expansion of psychological data on the effects of divorce which can enable the courts to make the wisest possible decision for the child. Such a course of action will not add erroneous information for the courts to consider, thus decreasing the likelihood that the court will be misinformed by misleading arguments.

Comments on the Necessity for Confidentiality and the Best Interests of the Child

Previous testimony and the questions of the Committee on the Confidentiality Sections of this bill have given me the impression that the necessity for confidentiality, on the one hand, is somehow being pitted against the "best interest of the child," on the other hand. I believe that such a polarized view is not reflective of the wishes of either psychotherapists or of the court. Psychologists and psychiatrists do not place confidentiality above the best interest of the child. We believe that the best way to serve the children of divorce and society as a whole is to help people and parents to resolve their psychological difficulties and we believe that confidentiality is essential to accomplish that goal.

Some might argue that confidentiality provides a shield behind which instances of abuse or neglect may be hidden. Such is not the case. As noted briefly last week, both psychologists and psychiatrists (and many others) are required by law to report their suspicions "that a child has been injured as a result of physical, mental, or emotional abuse or neglect or sexual abuse" to the Department of Social and Rehabilitation Services (K.S.A. 38-1522). S.R.S. then does an independent evaluation of the suspicion and that evaluation is available to the court by way of an order of the court. Allow me, also, to note that the psychologist-patient privilege does not allow the psychologist to maintain confidentiality if he or she has reason to believe a crime may be committed in the future. Further, Principle 5 of The Ethical Principles of Psychologists reads as follows: "Psychologists have a primary obligation to respect the confidentiality of information obtained . . . except in those unusual circumstances in which not to do so would result in clear danger to the person or to others." Therefore, it is not within my patient's rights to expect my silence if I believe they are a danger to themselves or to others, for instance if they are abusive toward their child. In fact, I counsel patients not to ask for custody if I believe his or her relationship is

damaging to a child, even in ways less extreme than child abuse. In more extreme instances, I might suggest that the client see his or her child as often as is possible, but only if the visitation is supervised. Frankly, I cannot imagine any psychologist or psychiatrist standing idly by if a child is being abused. To do so would clearly be illegal, unethical and immoral.

You have heard previous testimony to the effect that we behavioral scientists write in a language unique to our professions. Further, as we write our psychotherapy notes, we have a specific reading audience in mind, most usually such notes serve as reminders to ourselves. That information, taken out of the context in which it is written, may well mislead the court, potentially doing violence to the best interest of the child. Further, the judge's responsibility is specifically to protect the best interest of the child, certainly a position I unequivocally support. Given that responsibility, the judge is likely correctly to read the records with a magnifying lens; looking for any indication of, for instance, the potential for abuse. Should the divorce and maintenance law remain as it is now written, it is likely that judges will review records which, while psychologically true in the sense of noting the therapists formulations of his patient's wishes, fears, hopes, and dreads, are not factually true in a legal sense. In the typical case those records may not even reflect professional opinion, but more likely represent speculation and hypothesis formation on the part of the therapist. Treating those speculations as if they were factual truths will not be in the best interest of anyone; and they certainly could lead to <u>unnecessary</u> harm being added to an already harmful situation.

Thank you for your patience in hearing my testimony. I would be happy to attempt to answer any questions the committee might have.

Comments on Proposed Amendments Contained in 1610(3) of HB 2131

(A.) Often the issue of custody is used as a negotiating point in a divorce settlement; therefore, a parent may submit to a custody agreement as a compromise rather than because they believe it is best for the child--see for instance GAP[1] page 86.

(i) Fathers typically are the breadwinners, sacrificing more contact with their children in favor of family financial security. Following the divorce there is also a significant shift in the amount of time a parent spends with his/her child, typically fathers visit more frequently after the divorce is final. Wallerstein and Kelly state,[2] page 315, "by 18 months after the separation there is no correlation between the regularity or frequency of the visits by the parents and the pre-divorce relationship" (between parent and child).

(ii) Similar objection to (i). In addition, the stress of the period of separation may temporarily significantly affect the parents ability to "care" in an active way. After the initial period he/she may be more capable of devoting additional time. See for instance Wallerstein and Kelly,[2] page 48. From their study the typical amount of time it took a parent to "recover" from the divorce was 18 months.

(vii) This is a matter of convenience for the parents, even when there are substantial distances between the parents' homes these obstacles can be overcome for the benefit of the child with effort on the part of the parents. See for instance Luepnitz,[3] page 53.

(vii) Similar to (vii) above. Even when there is not equal visitation, joint custody fathers are more likely to continue to pay child support (56% of single custody mothers had to return to Court for payment versus 0% for joint custody mothers in the Luepnitz[3] study, page 69).

(xi) The mental health of the parent was addressed in testimony, presumably physical health problems should affect custody only if they are so severe as to eliminate care giving on a physical basis: e.g. paralysis if the child is so young as to need considerable physical handling and the parent is unable to make accommodations, e.g. a babysitter or "parent helper".

(x) This is a critical variable, but one that cannot be accurately assessed until after the divorce, perhaps several years after. See for instance the GAP, page 104 and Wallerstein and Kelly,[2] page 15. Note also that the rate of relitigation over a two year period was no higher for joint custody parents than single custody parents even when the joint custody was opposed by one or both the parents at the time of the divorce, Ilfeld, Ilfeld and Alexander, 1982.[4]

(xi) This is also a critical variable. However, in the heat of a custody battle it may be impossible to assess, similar to (x) above. Further, it is a skill which needs to be developed over time as the parent begins to adjust to the fact of the divorce which typically causes a disruption in all normal life routines and expectations.

(xii) Discussed in testimony.

1. Group for the Advancement of Psychiatry; Divorce, Child Custody, and the Family. GAP Report #106, San Francisco:Jossey-Bass, 1981.

2. Wallerstein, J. S. and Kelly, J. B. Surviving the Breakup: How Children and Parents Cope with Divorce. New York:Basic Books, 1980.

3. Luepnitz, D. A. Child Custody: A Study of Families After Divorce. Lexington: D.C. Heath and Co., 1982.

4. Ilfeld, F. W., Ilfeld, H. Z. and Alexander, J. R. Does Joint Custody Work? A First Look at Outcome Data of Relitigation. American Journal of Psychiatry, 1982, 139(1), 62-66.

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#2

March 23, 1983

TESTIMONY RE: Substitute for HB 2131 - Joint Custody

To: Kansas Senate Judiciary Committee Members

Jack D. Paradise, Lifetime Kansas resident, Joint custodial parent since 1977; President, Jayhawk Plastics, Inc., President, Divorced Dads, Inc. (Kansas and Missouri). Extensive work both directly and indirectly with several state legislatures on the subject of child custody after divorce, pro bono publico.

As originally introduced, HB 2131 contained eight new criteria to be used in determining child custody in divorce cases. We testified against the inclusion of these criteria into existing law...so did others. The House Judiciary committee eliminated these criteria from the bill. Our testimony was based on opinions of mental health professionals and attorneys who are respected in the field of child custody.

Our objections to change at this time were twofold:

1. The current statutue was just passed in 1982 and was the subject of substantial testimony and study, both for and against. This new statute, effective January 1, has not had an opportunity to work for the benefit of children. To make a substantial change at this point is without foundation and unnecessary.

2. The proposed criteria can be substantially abused by attorneys who seek to increase litigation and by courts who object to joint custody. As presented in the original bill, any one of these new criteria would be sufficient reason to justify an award of custody to only one parent. This type of criteria might better by placed in a mediation statute as guidelines only for mediators.

My children have enjoyed the benefits of joint custody since 1977 in Kansas. Had the criteria mentioned above been in the statutes in 1977, seven of the eight factors could have disqualifited them from the benefits of joint custody.

I have attached a list of specific objections to each of the proposed criteria and have excerpted appropriate quotes from a recent New Jersey Supreme Court case, Beck vs. Beck. I believe many of the points made in the Beck case will soon be cited nationwide when the issue at hand is joint custody.

In short, none of the proposed additional factors would enhance or aid the courts in determining the best interest of the child. Present law and the wisdom of our judiciary should be left alone to do their job before we make wide sweeping changes in the existing statute.

Att. 2

I had hoped to testify on this important subject personally, however, my wife, children and I are 1500 miles away on a vacation planned some months ago. The cost and time involved in returning to Kansas make personal testimony impossible.

Sincerely,

Jack D. Paradise

JDP:rr

P.S. There are two other areas now or previously addressed in the bill. Our testimony on them is as follows:

1. We support removing "waiver of privilege" as was done by the House Judiciary Committee.

2. We support the following language from the original bill which we overlooked in our House testimony:

   If the parties have a written agreement concerning the custody of their minor child, it is presumed that the agreement is in the best interest of the child. This presumption may be overcome and the court may make a different order if the court makes specific findings of fact stating why the agreement is not in the best interest of the child.

KANSAS HB 2131-Child Custody

PROPOSED NEW CRITERIA	EFFECT ON JOINT CUSTODY POTENTIAL and *Beck v. Beck, 86 N.J. 480 (1981) quotes**
1. The length of time that the child has been under the actual care and control of either parent.....	Disqualifies parents already divorced. Encourages party with temporary custody to delay proceedings, adding to hostility between the parents.
2. The active involvement of each parent in the care of the child before and since the parties separation.	Disqualifies father in traditional family setting. Disqualifies a parent not granted temporary custody and who cannot effect a speedy trial. *"For such* (parent/child) *bonds to exist the parents need not have been equally involved in the child rearing process."*
3. The proximity of each parent to the other and to the child's school.	Disqualifies parents already divorced. Might encourage hostile parents to "move in next door" to satisfy statutory requirement for joint custody.
4. The feasibility of travel between the parents.	A parent with sole custody, who is opposed to joint custody can move away to prevent its potential use. Could the feasibility of travel have financial implications that would disqualify the poor?
5. The mental and physical health of all individuals involved.	The court has the discretion to investigate this now. As a statutory requirement, could it mandate a substantial added cost to the parties in order to satisfy the requirement?
6. The parents ability to communicate with each other regarding the child's needs. AND 7. Each parent's ability to be supportive of the child's relationship with the other parent.	*"that the parents exhibit a potential for cooperation...does not translate into a requirement that the parents have an amicable relationship....that an amicable relationship is comparatively unimportant and not essential as long as the parties are looking out for the best interest of the children...Moreover, the potential for cooperation should not be assessed in the "emotional heat" of divorce."*
8. Whether the child's emotional and psychological needs and development will be enhanced because of active contact with both parents.	Negative phraseology. The American family is the single most important unit in our society. Why would we question in the restructured (divorce) family that which we would never question in an intact marriage family?

* *Quotations from Beck case as decided by the New Jersey Supreme Court.*

From Jack D. Paradise
March 23, 1983

ST. LOUIS GLOBE-DEMOCRAT

MARCH 12, 1983 Page 13A

Oliver Starr

Prejudice against joint custody harms children

It is well known that children brought up in homes where parents are happily married have fewer problems and lead better lives than children of divorced parents.

It also is recognized that children from "broken homes" are more apt to have emotional problems, have more trouble in school and are more subject to delinquent behavior.

In light of the above, we might assume that our courts would feel obliged to do everything possible to maintain the bonds between children and parents after divorce. And we might expect that judges would be strongly committed to protecting the right of both divorced parents to continue their vitally important roles in nurturing their children.

Encouraging joint custody would also seem desirable because experience indicates it increases respect and cooperation between divorced parents.

But such is not the case. The law and the courts, particularly in Missouri, often work to shatter the relationship between one of the parents and the children when there is a divorce, and they make sure that the family remains broken. This is because there is a strong presumption in court practice that sole custody is the best method of providing care for children after divorce.

In Missouri, the prejudice in favor of sole custody is so pronounced that joint custody is not permitted even when both parents request it. In nine out of 10 cases this universal sole custody is awarded to the mother. This is done even though studies show that making a "visitor" of one parent not only undermines the relationship with the children but often destroys it completely. The "rule of thumb" used by judges in Missouri and other states is to permit the losing spouse to see his or her children only every other weekend — four days a month — and for about three weeks during the summer.

Clinical psychologist Gerald H. Vanderberg says that research "has shown that frequently the noncustodial parent gradually 'fades away.' Visits often become less and less... Even when they continue, however, the noncustodial parent's input and influence are seriously diluted."

This gradual elimination of the influence of one parent, usually the father, can be tremendously damaging to the children as well.

In a study of the effects of divorce on children, clinical psychologists Judith S. Wallerstein and Joan B. Kelly report that in cases where sole custody is awarded to mothers the children "are left with with feelings of abandonment and experience serious depression at the loss of their fathers even years after the divorce."

Despite a common belief that joint custody is not workable due to clashing views of divorced parents, research shows otherwise. In "Surviving the Breakup," Wallerstein and Kelly say that they found in their study of 60 families in the first 5 years after divorce that a high percentage of divorced parents "who disagree strongly with each other on a great many issues were able to cooperate in the care of their children. Child-rearing issues were not a source of disagreement for over one-third of the parents. One-half of the children experienced relatively consistent handling by both parents."

In another study of 46 divorced fathers, 24 of whom were joint-custody fathers, Ann D'Andrea, registered psychological assistant of Beverly Hills, Calif., found that "joint custody status offers fathers the impetus to be more involved in their children's lives and to remain active participants in their children's upbringing."

As the evidence has mounted in support of joint custody, many states have enacted joint custody preference laws, including Kansas in 1982.

In Missouri, Jack Paradise and Erv Steinberg, president and executive vice president respectively of Divorced Dads, Inc., have led the campaign for a joint custody preference law in this state. This year they have been joined by many other individuals in an association, "In the Child's Best Interest...A Better Way," organized by Mary Wright of the Human Rights office, Archdiocese of St. Louis, and Joanne Gilden, psychologist.

A 30-member committee appointed by the Archdiocesan Commission on Human Rights has unanimously endorsed presumptive joint custody legislation. The Society of St. Louis Psychologists also has endorsed the joint custody concept.

#3

March 24, 1983

To the Senate Judiciary Committee

Mr. Chairman and Members of the Committee:

Please accept these copies as my testimony re: Sub. for HB 2131, in my absence.

My name is Pat Young. I am a non-custodial parent and the Metro Kansas City Coordinator of the (national) Mothers Without Custody, Inc.

Many of the members of Mothers Without Custody are Kansas residents. Therefore, I urge your support of Sub. HB 2131 on behalf of those MW/OC members (and all Kansas non-custodial parents).

(We STRONGLY oppose the criteria under Section 3 Child Custody, of the original bill, because it would seem to question the benefits of children having contact with/input from two caring parents. This criteria would also not help the non-custodial parents' position at all.)

Again, I urge you to support Sub. HB 2131 as it passed out of the House.

Thank you.

Sincerely,

Pat Young

Pat Young
KC Coordinator
Mothers Without Custody

Atch. 3

3-29-83

#4

60-427. Physician-patient privilege. (*a*) As used in this section, (1) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his or her physical or mental condition, consults a physician, or submits to an examination by a physician; (2) "physician" means a person licensed or reasonably believed by the patient to be licensed to practice medicine or one of the healing arts as defined in K. S. A. 65-2802 in the state or jurisdiction in which the consultation or examination takes place; (3) "holder of the privilege" means the patient while alive and not under guardianship or conservatorship or the guardian or conservator of the patient, or the personal representative of a deceased patient; (4) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(*b*) Except as provided by subsections (*c*), (*d*), (*e*) and (*f*) of this section, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if the person claims the privilege and the judge finds that (1) the communication was a confidential communication between patient and physician, and (2) the patient or the physician reasonably believed the communication necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (3) the witness (*i*) is the holder of the privilege or (*ii*) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (*iii*) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his or her agent or servant and (4) the claimant is the holder of the privilege or a person authorized to claim the privilege for him or her.

(*c*) There is no privilege under this section as to any relevant communication between the patient and his or her physician (1) upon an issue of the patient's condition in an action to commit him or her or otherwise place him or her under the control of another or others because of alleged incapacity or mental illness, or in an action in which the patient seeks to establish his or her competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor, or (2) upon an issue as to the validity of a document as a will of the patient, or (3) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

(*d*) There is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(*e*) There is no privilege under this section as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

(*f*) No person has a privilege under this section if the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

(*g*) A privilege under this section as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his or her agent or servant gained knowledge through the communication. [L. 1963, ch. 303, 60-427; L. 1965, ch. 354, § 8; Jan. 1, 1966.]

Att. 4

74-5323. Privileged communication. The confidential relations and communications between a certified psychologist and his client are placed on the same basis as provided by law for those between an attorney and his client. Nothing in this act shall be construed to require such privileged communications to be disclosed.

History: L. 1967, ch. 432, § 23; July 1.

Law Review and Bar Journal References:

Kansas law discussed in "The Psychotherapists' Privilege," Craig Kennedy, 12 W.L.J. 297, 306, 309 (1973).

Referred to in "Evidence: Justification for Extension of the Psychotherapist Privilege," Ronald P. Wood, 17 W.L.J. 672 (1978).

"Disclosure of Psychiatric Records," Philip Elwood and Gerald L. Goodell, 49 J.B.A.K. 301, 308 (1980).

CASE ANNOTATIONS

1. In deprived child-parental severance proceeding, since mental and physical condition of parent and child are in issue, physician-patient, psychologist-client privilege waived. *In re* Zappa, 6 K.A.2d 633, 638, 631 P.2d 1245 (1981).

60-426. Lawyer-client privilege. (*a*) *General rule.* Subject to K. S. A. 60-437, and except as otherwise provided by subsection (*b*) of this section communications found by the judge to have been between lawyer and his or her client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (1) if he or she is the witness to refuse to disclose any such communication, and (2) to prevent his or her lawyer from disclosing it, and (3) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (*i*) in the course of its transmittal between the client and the lawyer, or (*ii*) in a maner not reasonably to be anticipated by the client, or (*iii*) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by his or her lawyer, or if an incapacitated person, by either his or her guardian or conservator, or if deceased, by his or her personal representative.

(*b*) *Exceptions.* Such privileges shall not extend (1) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the commission or planning of a crime or a tort, or (2) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction, or (3) to a communication relevant to an issue of breach of duty by the lawyer to his or her client, or by the client to his or her lawyer, or (4) to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (5) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.

(*c*) *Definitions.* As used in this section (1) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in his or her professional capacity; and includes an incapacitated person who, or whose guardian on behalf of the incapacitated person so consults the lawyer or the lawyer's representative in behalf of the incapacitated person; (2) "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship; (3) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. [L. 1963, ch. 303, 60-426; L. 1965, ch. 354, § 7; Jan. 1, 1966.]

Source or prior law: G. S. 1868, ch. 80, § 323; L. 1909, ch. 182, § 321; R. S. 1923, 60-2803 (4th clause).

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Excerpts from Professor Nancy Maxwell's article, "In the Best Interests of the Divided Family: An Analysis of the 1982 Amendments to the Kansas Divorce Code," soon to be published in the Washburn Law Journal

1. *When Is Joint Custody Appropriate?*

Numerous articles and books have been written about the benefits

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225. The first sentence was added by the House, and second by the Senate. *See* Kan. H.B. 2706 (as amended by House Committee of the Whole and Senate Substitute for H.B. 2706, as amended by Senate on Final Action (Kan. Leg. Sess. 1982)).

226. *See* KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1982).

227. Presumably this means the parents are fit.

228. *See supra* notes 61 & 63.

229. Although it can be argued that the court should hesitate to award joint custody if the parents cannot agree on a plan, the court should evaluate the areas of disagreement. "The 'frivolous objections of one party' do not necessarily indicate that the parents will be unable to cooperate once the arrangement is imposed. The court must examine the degree and scope of the parents' hostility and determine that cooperation is possible in several key areas." Note, *Joint Custody Award: Toward the Development of Judicial Standards*, 48 FORDHAM L. REV. 105, 121 (1979-80) (citing Dodd v. Dodd, 93 Misc. 2d 641, 643, 403 N.Y.S.2d 401, 402 (Sup. Ct. 1978)).

230. *See* KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1982).

231. *See* Interview with Elwaine F. Pomeroy, *supra* note 101. *See also supra* note 9. This provision was the result of a compromise with the House version which required the person requesting sole custody to have the burden of proving joint custody was not in the child's best interests. *Id. See also infra* text accompanying notes 261-265.

232. *See infra* text accompanying notes 258-269 (discusses the application of the joint custody preference).

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or disadvantages of joint custody,[233] but few have discussed specific guidelines for determining the appropriateness of joint custody.[234] Even when commentators suggest specific standards, some of the guidelines conflict. Nonetheless, general guidelines can be formulated,[235] particularly if the court realizes flexibility is the key to a successful joint custody award.

Several essential factors *must* be present before the court can order joint custody. As required by the Kansas statute, both parents must be

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233. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD (1973); I. RICCI, MOM'S HOUSE, DAD'S HOUSE, MAKING SHARED CUSTODY WORK (1980); M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT (1978); Bratt, *Joint Custody*, 67 KY. L.J. 271 (1978-79); Cox & Crase, *Joint Custody, What Does It Mean? How Does It Work?*, FAM. ADVOCATE 10 (1978); Folberg & Graham, *Joint Custody of Children Following Divorce*, 23 U.C.D. L. REV. 523 (1979); Foster & Freed, *Joint Custody—Legislative Reform*, 16 TRIAL 24 (1980); Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197 (1964); Levy & Chambers, *The Folly of Joint Custody*, FAM. ADVOCATE 6 (1981); Ramey, Stender & Smaller, *Joint Custody: Are Two Homes Better Than One?*, 8 GOLDEN GATE 559 (1979); Trombetta, *Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. FAM. L. 213 (1980-81); Note, *Joint Custody as a Fundamental Right*, 23 ARIZ. L. REV. 785 (1981); Note, *A Case For Joint Custody After The Parents' Divorce*, 17 J. FAM. L. 741 (1978-79); Note, *Divided Custody of Children After Their Parents' Divorce*, 8 J. FAM. L. 58 (1968); Note, *Divorce: The Joint Custody Alternative*, 34 OKLA. L. REV. 119 (1981); Note, *Joint Custody: A Revolution in Child Custody Laws?*, 20 WASHBURN L.J. 326 (1981); Comment, *California's Presumption Favoring Joint Child Custody: California Civil Code Sections 4600 and 4600.5*, 17 CAL. W.L. REV. 286 (1981); Comment, *New Joint Custody Statute: Chrysalis of Conflict or Conciliation?*, 21 SANTA CLARA L. REV. 471 (1981); Comment, *Joint Custody: An Alternative for Divorced Parents*, 26 UCLA L. REV. 1084 (1979); Recent Cases, *Domestic Relations-Child Custody-Reasonable Visitation or Divided Custody?*, 42 MO. L. REV. 136 (1977). *See also* Miller, *supra* note 219; Note, *supra* note 229.

234. For two discussions of guidelines for awarding joint custody, *see* Miller, *supra* note 219; Note, *supra* note 229. *See also* Beck v. Beck, 86 N.J. 480, 432 A.2d 63 (1981); Foster & Freed, *supra* note 233.

235. Kan. H.B. 2131 (Kan. Leg. Sess. 1983) proposes additional child custody criteria were proposed that would better guide the court in awarding joint custody.

See supra note 202. Other states have enacted statutory guidelines for determining the appropriateness of joint custody. For example, IOWA CODE § 598.1 was amended in 1982 as follows:

> 3. In considering what custody arrangement . . . is in the best interests of the minor child, the court shall consider the following factors:
>
> a. Whether each parent would be a suitable custodian for the child.
>
> b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
>
> c. Whether the parents can communicate with each other regarding the child's needs.
>
> d. Whether both parents have actively cared for the child before and since the separation.
>
> e. Whether each parent can support the other parent's relationship with the child.
>
> f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.
>
> g. Whether one or both of the parents agree or are opposed to joint custody.
>
> h. The geographic proximity of the parents.

IOWA CODE § 598.1 (1982).

Also, the Alaska legislature has enacted the following guidelines:

fit.[236] The parents should show an ability to agree on important decisions concerning the child.[237] As one author stated, "[i]t is unrealistic to expect all hostilities to be submerged; all that is necessary is the ability to accept the ex-spouse's capacity for positively influencing the children."[238] Finally, both parents should give priority to the best interests of the child and show a commitment to a continuing relationship with the child.[239]

Beyond these factors, there is some disagreement on the requirements for a successful joint custody arrangement. For example, some authors believe close proximity of the parents' residences is necessary for joint custody to work, yet others cite cases in which the parents live great distances apart.[240] This disagreement can be reconciled if a distinction is made between the two types of joint custody — joint *legal* custody and joint *physical* custody. Joint legal custody does not require the equal sharing of residence by the parents, but rather is the equal sharing of decision-making power concerning the best interests of the child.[241] Thus, under joint *legal* custody, continued communication between the parents is important for a successful joint custody arrangement, but close geographical proximity is not. For joint *physical* custody to work at an optimum level, close geographical proximity is more important so the child can maintain the same friendships, attend the same school, church and extra-curricular activities.[242] Because the new

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In determining whether to award shared custody of a child the court shall consider
(1) the child's preference if the child is of sufficient age and capacity to form a preference;
(2) the needs of the child;
(3) the stability of the home environment likely to be offered by each parent;
(4) the education of the child;
(5) the advantages of keeping the child in the community where the child presently resides;
(6) the optimal time for the child to spend with each parent considering
(A) the actual time spent with each parent;
(B) the proximity of each parent to the other and to the school in which the child is enrolled;
(C) the feasibility of travel between the parents;
(D) special needs unique to the child that may be better met by one parent than the other;
(E) which parent is more likely to encourage frequent and continuing contact with the other parent;
(7) any findings and recommendations of a neutral mediator;
(8) whether there is a history of violence between the parents;
(9) other factors the court considers pertinent.

ALASKA STAT. § 25.20.090 (1982). *See also* Beck v. Beck, 86 N.J. 480, 432 A.2d 63 (1981).

236. Miller, *supra* note 219, at 369; Note, *supra* note 229, at 119; Note, *Joint Custody, A Revolution in Child Custody Laws?*, 20 WASHBURN L.J. 326, 341 (1981).

237. *Id. See also* Foster & Freed, *supra* note 233, at 31.

238. Miller, *supra* note 219, at 370.

239. Foster & Freed, *supra* note 233, at 31; Note, *supra* note 229, at 119.

240. Miller, *supra* note 219, at 373.

241. *See supra* note 219.

242. Because the separation of the parents is a stressful time for the child, it is advisable in any type of custody award to maintain the child's preseparation schedule as closely as possible. Consequently, the child will cope better with the divorce if there is continuity of the same school,

Kansas statute allows the court to designate the primary residence of the child in a joint custody order, the court should be less hesitant to order joint *legal* custody, which is defined in the statute as "equal rights to make decisions in the best interests of the child."

Another factor to consider in awarding joint custody is the wishes of the parents for joint custody.[243] The more enthusiastic the parents are about joint custody, the more likely they will cooperate in making the custodial arrangement workable. Parents are more willing to cooperate in joint custody arrangements if they understand that uncooperative behavior may result in the other parent obtaining sole custody.[244]

The court should also consider the wishes of the child and the child's emotional and psychological needs.[245] Unless the child strongly opposes joint custody, however, the wishes of the child should not be given undue weight, because children can be influenced or are too immature to make a well reasoned decision.[246] Psychological evaluations of the parents and the child may be helpful in deciding whether joint custody will be beneficial to the child.[247]

Another factor the court should consider is the child rearing philosophies of the parties.[248] Major philosophical differences may make it difficult for parents to agree on important decisions concerning the child's best interests. Minor disagreements should not hinder a joint custody order and day-to-day decisions should be made by the parent with whom the child is staying at the time.[249] It is the major decisions,

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friends, religious training, medical care and extracurricular activities. *See* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN COPE WITH DIVORCE (1980).

Consistent with this idea, the court should hesitate to order the sale of the family home until the last child reaches eighteen. By allowing a parent to remain in the family home, the chidren will not be required to adjust to two new homes. In some joint custody cases, the court has awarded the house to the children and each parent moves in or out, in order to exercise their individual physical custody rights. *See* Topeka Capital J., Jan. 20, 1982, at 1, col. 1.

243. Miller, *supra* note 219, at 372; Note, *supra* note 229, at 121.

244. Folberg & Graham, *supra* note 233, at 550.

245. This factor is common in many custody statutes. *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1979).

246. Research has discovered "that children below adolescence are not reliable judges of their own best interests and that their attitudes at the time of the divorce crisis may be very much at odds with their usual feelings and inclinations . . . The long-lasting anger of children in the nine to twelve-year-old group at the parent whom they held responsible for the divorce; the eagerness of these youngsters to be co-opted into the parental battling; *their willingness to take sides, often against a parent to whom they had been tenderly attached during the intact marriage;* and the intense, compassionate, caretaking relations which led these youngsters to attempt to rescue a distressed parent often to their own detriment have led us to rethink our expectations of these children."

J. WALLERSTEIN & J. KELLY, *supra* note 242, at 314 (emphasis added).

247. An intensive five year study of the psychological impact of divorce on children found the most well adjusted children of divorce were those children who had continued contact with both parents after the divorce. Consequently, joint custody appears to be the best psychological alternative for children. *See* J. WALLENSTEIN & J. KELLY, *supra* note 242.

248. Note, *supra* note 229, at 121-23.

249. Attorneys arguing for joint custody indicate that children can adjust to different expectations and standards of behavior if there is consistency within each setting. For example, children have little difficulty adjusting to the different expected behaviors at school, at home, at their friend's home or at their grandparent's home. Therefore, minor differences in child rearing tech-

such as education, religious training, non-emergency medical treatment and financial considerations, that should be made by both joint custodians.

The financial ability of the parents should also be considered by the court in awarding joint custody.[250] Because parents are required to maintain suitable homes to accommodate the children, financial means must be available to provide adequate housing. The court should not require the homes to be equal, but rather, the homes should not be drastically dissimilar or inadequate. The court should also consider awarding child support as a way of equalizing great income disparities that may hamper one party from obtaining adequate housing for the child.[251]

In awarding joint custody, the court should have a detailed order or an agreement by the parties to avoid future litigation.[252] For exam-

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niques should not be an obstacle to awarding joint custody. Interview with Thad Nugent in Topeka, Kan. (Sept. 17, 1982). *See also supra* note 15.

250. Miller, *supra* note 219, at 372-73; Note, *supra* note 229, at 124-25.

251. Because child support is for the benefit of the child, the court should not conclude that joint custody means no payment of child support. Child support may be necessary if one parent does not have the financial means to house the children and the other parent has adequate finances to pay support.

252. *See* Miller, *supra* note 219, at 390-93, for a list of provisions in a joint custody agreement. Also, Judge Walton suggests the following joint custody order:

JOINT CUSTODY ORDER

The following joint custody order is entered:

(a) Each of the parents are fit and proper persons to have the responsibility of the care and custody of the minor child. The parties should be and are hereby awarded the joint legal custody of the minor child.

(b) The residence of the child shall be with the natural mother during the period of one week before school is to commence and one week after school has terminated and the natural mother shall have the primary day to day responsibility for the guidance and upbringing of the minor child.

(c) That the residence of the child shall be with the natural father during the summer months and he shall have the primary day to day responsibility for the guidance and upbringing of the child during that period.

(d) Both parents have the right to make major decisions affecting the child including but not exclusively limited to authorization for major medical, mental, institutional, psychiatric, or other cares; schooling and educational placement; to inspect and receive records; and to inspect and receive medical records. The parents having the residential care of the minor child shall at the time of that residence take responsibility for meeting medical and dental emergencies, and in an emergency the permission of both parents shall not be necessary.

(e) During the school or fall and spring residence, the natural father shall pay to the natural mother the sum of $—, a month child support. During the summer residence the support shall be reduced to $— a month. There shall be no further child support paid by either party to the other. The natural father shall pay the necessary medical, school expenses, clothing, and other expenses agreed to in the separation agreement heretofore approved by the court.

(f) That neither parent shall remove the physical custody of the minor child from the jurisdiction of the court without authority, vacations, and other type of activity, being except.

(g) Any dispute or disagreements regarding the terms and conditions of the joint custody shall be initially taken to ——, (Child Custody Investigator) (Court Services Office) (other) and if the parties are unable to come to an agreement, the matter may be brought back to court as is provided by law.

(h) When the child is living with one resident parent, the other parent shall have liberal visitation privileges as mutually agreed upon by the parties. The following shall

ple, the order should set out the daily residence of the child by specifically spelling out the days the child spends with each parent, including holidays, birthdays and vacations. Any future change in circumstances should also be anticipated, such as remarriage, death or a change in residence of the parents. To avoid child snatching problems,[253] the or-

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be considered a minimum visitation to which the parent not in residence shall be entitled:

(1) Two weekends per month, commmencing at 6:00 p.m. on Friday until 7:00 p.m. on Sunday.

(2) A coke visit during the hours of 6:00 p.m. until 9:00 p.m. on each Thursday evening when weekend visitation is not permitted.

(3) In years ending in an odd digit:

(i) The night before or the day after each child's birthday;

(ii) New Year's Holiday from 5:00 p.m. on December 31 until 7:00 p.m. on January 1;

(iii) Memorial Day weekend from 5:00 p.m. on Friday until noon on Tuesday;

(iv) Independence Day from 5:00 p.m. on July 3 until noon on July 5;

(v) Thanksgiving Holiday from 5:00 p.m. on Wednesday until 7:00 p.m. on Sunday;

(vi) The entire period of the school Christmas Holiday with exception of that provided in (4)(v) below;

(4) In years ending in an even digit;

(i) Each child's birthday;

(ii) Easter weekend;

(iii) Labor Day weekend from 5:00 p.m. on Friday until noon on Tuesday;

(iv) Halloween evening or weekend; if applicable;

(v) Christmas Holiday from 5:00 p.m. on December 23, until 7:00 p.m. on December 29.

(5) Every year on the non-residential parents birthday and/or Mother's or Father's Day applicable to the non-residential parent.

(6) It shall be the responsibility of the non-residential parent to pick the child up at the time specified and to return him at the time specified, and it shall be the responsibility of the residential parent to have the child ready for visitation at the times they are to be picked up and to be present at the time to receive the child at the time he is returned.

(7) The non-residential parent shall give the residential parent three days prior notice if he or she does not intend to exercise his or her visitation unless an emergency situation exists, in which case he or she will give such notice as is possible under the circumstances.

(8) Each of the parties shall supply the other with his or her correct address and telephone number and shall advise the other of any changes that may occur.

Outline of Judge Herbert W. Walton, Kan. B.A. Family Law Update, Appendix B (Sept. 1982).

253. One problem with a joint custody order is the unenforceability of the child snatching provisions found in KAN. STAT. ANN. §§ 21-3422, 21-3422(a) (1981). According to State v. Al Turck, 220 Kan. 557, 552 P.2d 1375 (1976), parents who have equal custody rights to their child cannot be prosecuted under the child snatching provisions. Because of this problem, the FLAC members suggested amending KAN. STAT. ANN. §§ 21-3422, 21-3422(a) at their December 10, 1982 meeting. According to the proposed amendment, parents could be prosecuted for violating KAN. STAT. ANN. §§ 21-3422, 21-3422(a) if they take the child in violation of the residency requirement of a custody decree. For example, if the court awards joint custody, but also orders the physical custody of the child to the father, the mother could be prosecuted for child snatching if she concealed the child from the father.

The proposed amendment and the FLAC comment which will be introduced to the 1983 Legislature, are as follows:

KAN. STAT. ANN. § 21-3422

Interference with parental custody. Interference with parental custody is leading, taking, carrying away, decoying or enticing away a child under the age of 14 years, with the intent *either (1)* to detain or conceal such *the* child from its *the child's* parent, guardian, or other person having lawful charge of such *the* child, *or (2) to refuse or impede the return of the child in violation of the residency provisions of a custody decree.*

KAN. STAT. ANN. § 21-3422a

Aggravated interference with parental custody. ~~(1)~~ Aggravated interference with parental custody is *(1)* hiring someone to commit the crime of interference with parental

der should provide that it is a violation of the custody order for either party to conceal the child or remove the child from the jurisdiction of the court without prior court approval.[254] Transportation arrangements for changing custody should be set out specifically. Other important provisions include the right of the resident parent to seek immediate medical or dental treatment in emergencies and the determination of tax ramifications of joint custody.[255] For example, parents can take the dependent deduction on alternate years or the court can award one parent the deductions if he or she provides more than fifty percent of the support. Finally, the order may provide for mediation if differences of opinions should arise.[256] Usually the mediator is a neutral party, such as a child custody investigator or a court services officer. If mediation is unsuccessful, either party can bring the matter before the court.

In summary, the factors the court should consider in awarding joint custody can never be applied with rigidity or certainty. Because

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custody, as defined by K.S.A. 21-3422, or *(2)* committing interference with parental custody, as defined by K.S.A. 21-3422, ~~when done with the intent to deprive of custody such child's parent, guardian, or other person having the lawful charge or custody of such child, and~~ when:

(a) Committed by a person who has previously been convicted of interference with parental custody, as defined by K.S.A. 21-3422;

(b) committed by a person for hire;

(c) committed by a person who takes the child outside the state without the consent of either the person having custody or the court;

(d) committed by a person who, after lawfully taking the child outside the state while exercising visitation *or custody* rights, refuses to return the child at the expiration of such rights; or

(e) committed by a person who, at the expiration of visitation *or custody* rights, outside the state, refuses to return or impedes the return of such child.

Aggravated interference with parental custody is a class E felony.

~~(2)~~ *(3)* This section shall be a part of and supplemental to the Kansas Criminal Code.

Family Law Advisory Committee Comment

These two criminal statutes have been amended to include the prosecution of a parent who takes a child in violation of specific custody provisions of a divorce decree even though both parents have been granted joint legal custody. For example, if the custody order prohibits the parents from changing the child's permanent residence without prior court approval, parents who violate this provision could be criminally prosecuted even though the parent has joint legal custody of the child. It should be noted, however, that if the custody order is unrestricted, a parent who has been granted joint custody can remove the child at will without risking prosecution under this amended section. *See* State v. Al-Turck, 220 Kan. 557, 552 P.2d 1375 (1976).

254. One commentator advises against a provision restricting the parents from removing the child from the jurisdiction of the court,

> [f]reedom to move has become an expectation common to all segments of society; consequently, a great many parents disobey restraints on moving and punitive deprivations of custody. Apprehensive of possible sanctions, including seizure of the children by police, parents leave in secret and conceal their whereabouts. As has been noted, predeparture rearrangements of visiting schedules, aided by court counseling, would in many cases prevent such occurrences.

Bodenheimer, *Progress Under the Uniform Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 1009 (1977).

255. For a discussion on the tax ramifications of joint custody, *see* Miller, *supra* note 219, at 395-96.

256. The Family Law Advisory Committee is studying the feasibility of a statute that authorizes and regulates mediation in domestic relations actions.

joint custody is successful when the arrangement is flexible and accommodates the needs of all the parties, it cannot be standardized or predictable.[257] On the other hand, it is this flexibility that makes joint custody an attractive alternative to parents who wish to remain active participants in their child's life. The court should seriously consider the feasibility of joint custody in each case, particularly because joint custody more closely resembles the predivorce parent-child relationship than any other form of custody.

Nonparental Custody

A conflict remains if the divorce court finds the parents unfit, places the child with nonparents and refers the case to the juvenile court, and the juvenile court then determines the parents are fit and places the child back with the parents. According to the new divorce code section, the juvenile court order "shall supersede any order under this paragraph." Thus, the juvenile court order placing the children with the parents is the controlling order. However, if the juvenile court terminates its jurisdiction, then the divorce court would be restored the power to modify the juvenile court order if there is a material change in circumstances. Consequently, if the divorce court is insistent on placing the child with nonparents, it can circumvent the juvenile court order through a subsequent modification. It is uncertain whether conflicting court orders will be a problem under the new code. The drafters believed that referring the cases to juvenile court would create uniformity and result in an order from a court with expertise in handling parental rights cases. Therefore, the divorce court should give great deference to the juvenile court finding of fitness and it should not modify the juvenile court order unless the subsequent finding of unfitness is well supported by a material change in circumstances.[258]

258. The FLAC members have proposed an amendment to the nonparental custody section. According to the proposal, the divorce court *could not* award permanent custody of the child to a

nonparent. If the divorce court found the parents unfit, the court could only place the child in the temporary custody of a nonparent while the case is referred to the County or District Attorney. The County or District Attorney is required to bring a proceeding in juvenile court under the Code for the Care of Children. Under the new FLAC proposal, only the juvenile court would have the power to permanently place the child in the custody of third persons and this custody order would be made according to the provisions of the Code for the Care of Children. The FLAC proposal and Comment, which are presently before the 1983 legislature as Kan. H.B. 2131 (Kan. Leg. Sess. 1983) are as follows:

Kan. Stat. Ann. 60-1610)a)(4)

(D) *Non-parental custody. If during the proceedings* the court finds *determines that there is probable cause to believe that the child is a child in need of care as defined by subsections (a)(1), (2) or (3) of K.S.A. 1982 Supp. 38-1502 or amendments thereto or* that neither parent is fit to have custody, the court may award *temporary* custody of the child to another person or agency if the court finds the award of custody to the other person or agency is in the best interests of the child. The court may make any *temporary* orders for care, support, education and visitation that it considers appropriate. *Temporary custody orders are to be entered in lieu of temporary orders provided for in K.S.A. 1982 Supp. 38-1542 and 38-1543, and amendments thereto, and shall remain in effect until there is a final determination under the Kansas code for care of children.* An award of *temporary* custody under this paragraph shall not be a severance of parental rights nor give the court the authority to consent to the adoption of the child. ~~A nonparent or agency custodian shall be deemed to have the same powers concerning the child as a parent. The court may refer a transcript of the proceedings to the county or district attorney for consideration with regard to the best interests of the child, with the costs to be paid from the county general fund. Any finding of unfitness under this paragraph shall not be binding with regard to any proceedings under article 8 of chapter 38 of the Kansas Statutes Annotated, and any order under that article shall supersede any order under this paragraph.~~ *When the court enters orders awarding temporary custody of the child to an agency or a person other than the parent, the court shall refer a transcript of the proceedings to the county or district attorney. The county or district attorney shall file a petition as provided in K.S.A. 1982 Supp. 38-1531 and amendments thereto and may request termination of parental rights pursuant to K.S.A. 1982 Supp. 38-1581 and amendments thereto. The costs of the proceedings shall be paid from the general fund of the county. When a final determination is made that the child is not a child in need of care, the county or district attorney shall notify the court in writing and the court, after a hearing, shall enter appropriate custody orders pursuant to this section. If the same judge presides over both proceedings, the notice is not required. Any disposition pursuant to the Kansas code for care of children shall be binding and shall supersede any order under this section.*

Family Law Advisory Committee Comment

Subsection (D) now provides for non-parental custody where the court finds that neither parent is fit to have custody, but such custody placement does not permanently deprive the parents of their parental rights nor give the court authority to consent to the adoption of the child. The present provision makes it permissive as to whether the court refers a transcript of the proceedings to the county or district attorney for further consideration and likewise makes it permissive as to whether or not the county or district attorney will file proceedings to determine whether the child is in need of care or to file proceedings to determine parental fitness. The present provision gives the court power to place children with a person other than the parent for an indefinite period of time, possibly years, without follow-up evaluation or effort to reintergrate [sic] the child in the parental home. This situation could leave children in an untenable position where they are placed outside the custody of their parents without being adoptable and with no required plan for reintergration [sic] back into the home. The Committee has concluded that the present provision allows a finding of unfitness by the court hearing the divorce case without appropriate and fundamental due process.

The Kansas Code for Care of Children provides the necessary and appropriate due process safeguards to determine the question of parental fitness. Some general provisions in the Kansas Code for Children which insure fundamental fairness and due process of law are: (1) Provision for the county or district attorney to proceed under the parens patriae interests of the State. (2) Provision for the appointment of an attorney and guardian ad litem for the child and the appointment of an attorney for the parent or guardian if indigent. (3) Provision for appropriate notice to the parties, confidentiality of proceedings, rules of evidence for the adjudicatory hearing and provision for investigation and preparation of evaluations and social reports. (4) Provision setting forth specific factors for the court to consider in determining whether the child is in need of care and

factors for the court to consider in determining the question of parental fitness. (5) Provision for "clear and convincing" burden of proof on the part of the State.

When a child is found to be in "need of care" under the Kansas Code for Care of Children, appropriate protections for the child and the parents are provided such as: (1) Provision for evaluation and development of the needs of the child and an evaluation of parenting skills. (2) Provision for placing the child with the parent subject to terms and conditions, including supervision of the child and parent by the court services officer. (3) Provision where the court may require the child and parent to participate in appropriate programs and the court may require treatment and care necessary for the child's physical and emotional health.

When the child is placed with an agency or persons other than a parent, the Kansas Code for Care of Children provides: (1) A *plan* must be presented to the court for reintergration [sic] into the parental home within 60 days after the placement order. (2) Written reports of progress of the child and parents are required at least every six months. (3) Specific criteria are set out for consideration of permanent parental severance if parents fail to carry out a reasonable plan or otherwise fail to assume the reasonable duties and responsibilities of a parent.

The proposed revision makes mandatory the referral of the divorce transcript by the court to the county or district attorney and the institution of proceedings by the county or district attorney to appropriately ascertain whether the "child is in need of care". The decision of the county or district attorney to request parental severance is discretionary. The proposed revision empowers the court hearing the divorce matter to place the children in the temporary custody of an agency or person other than the parent if the court finds probable cause to believe that the child is in need of care or that the parents are unfit. This temporary order is in lieu of the provisions of the Kansas Code for Care of Children which requires a probable cause temporary custody hearing and the temporary placement order is in effect only until the final determination. The proposed revision provides for further orders of the district court hearing the divorce matter if the child is found "not to be in need of care" and the parents are "found not to be unfit".

Maintenance

There are several inconsistencies in this new section on the reinstatement of maintenance. First, it is not clear when a recipient can request reinstatement of maintenance. One sentence states the court has jurisdiction to *hear* a motion for reinstatement *upon the expiration* of previously ordered maintenance payments.[310] Under this provision, the recipient could file the motion prior to the expiration date, but the hearing could not be scheduled until *after* the payments ended. Consequently, if a recipient filed before the payments expired, there would be no interruption in the payments if the hearing was held immediately after the expiration of the prior order. Although this result appears to

306. Alimony originally was awarded in divorce actions because the wife had no right to property acquired during the marriage. H. CLARK, *supra* note 82, § 14.1, at 420-21. However, because both spouses now have a right to an equitable division of the marital property, FLAC took the position that if the property is divided equally thereby dissolving the economic partnership, the parties should not expect further support arising out of the partnership. *See supra* notes 15 & 33. This position has been criticized because it does not take into consideration the numerous marriages in which little or no property has been acquired. For example, a study of divorces in San Francisco and Los Angeles reported the average value of all marital property owned by a divorcing couple was $10,000 in 1979. Thirty-nine percent of the divorcing couples owned less than $5,000 in marital property. *See* L. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Support Awards*, 28 UCLA L. REV. 1181, 1189 (1981). As a result, the husband's earning potential is the only real asset in a traditional marriage where the parties have accumulated little property. Therefore, maintenance may be the only fair method of compensating the parties' joint efforts of furthering the husband's vocational status. It is also unrealistic, particularly in marriages of long duration, to expect a traditional homemaker who is nearing retirement age to "rehabilitate" herself. *Id.*

307. I.R.C. § 71(c)(2).

308. The drafters had considered a shorter period of time for limiting maintenance, but decided the court should have the power to order payments that would meet the Internal Revenue Code presumption. *See supra* notes 15 & 33.

309. *See supra* notes 15 & 33.

310. The pertinent sentence states, "[t]he court, upon the expiration of the stated period of time for maintenance payments to be made, shall have jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments." KAN. STAT. ANN. § 60-1610(b)(2) (Supp. 1982).

be reasonable, two sentences later the statute says a recipient may *file* subsequent motions for reinstatement *at the expiration* of previous orders, but subsequent orders reinstating maintenance cannot exceed 121 months.[311] This sentence appears to restrict the recipient from *filing* for reinstatement until *after* the prior payments have ended, resulting in an interruption of payments until the court can hear the motion and reinstate maintenance. The FLAC members did not intend this result and drafted the second provision only as a restriction on the power of the court to order maintenance beyond 121 months in any subsequent motion; it was not intended to interrupt maintenance payments by not allowing the recipient to file for reinstatement until after the prior order had expired.[312] Courts should allow attorneys to file motions to reinstate maintenance before the previous order expires, so that a hearing date can be set immediately after payments end. This procedure will avoid the risk of interrupting payments in those cases in which a continuation of maintenance is warranted.[313]

The second inconsistency results from the statutory prohibition against the court modifying maintenance "if it has the effect of increasing or accelerating the liability for unpaid maintenance beyond what was prescribed in the original decree."[314] This provision is inconsistent with the power of the court to reinstate alimony beyond the original decree. Clearly, the reinstatement of the maintenance after the payments in the original decree have expired does increase "the liability of unpaid maintenance beyond the original decree." Although the last sentence states "[n]othing in this paragraph shall limit the right of the recipient" to seek reinstatement of maintenance, this provision fails to explain how reinstatement of alimony does not have the effect of increasing the payor's obligation beyond the original decree.

One way to interpret these two contradictory provisions is to allow the court to reinstate maintenance only if the court has reserved the power to do so in the original decree. The court would not be increasing the liability for unpaid maintenance beyond the original decree if the original decree reserves this power.[315] This is the only interpreta-

311. The pertinent sentence states: "The recipient may file subsequent motions for reinstatement of maintenance at the expiration of subsequent periods of time for maintenance payments to be made, but no single period of reinstatement ordered by the court may exceed 121 months." *Id.*

312. *See supra* notes 15 & 33.

313. FLAC decided to change the confusing language by redrafting this section at the September 17, 1982 meeting. The new draft, which is Kan. H.B. 2131 (Kan. Leg. Sess. 1983), *requires* the recipient to file a motion for reinstatement of maintenance *prior* to the expiration of the prior order. Therefore, if the recipient does not file the motion to reinstate maintenance before the prior order expires, the court will *not* have jurisdiction to reinstate maintenance. *See* KAN. STAT. ANN. § 60-1610(b)(2) (Supp. 1982).

314. *Id.*

315. This is the interpretation favored by the FLAC. At the September 17, 1982, meeting of FLAC, the maintenance provision was redrafted to incorporate, specifically, this interpretation. The redrafted provision, which will be presented to the 1983 Legislature, is as follows:

tion that makes the two provisions compatible.[316]

A tax question also results from the 121 month limit on court ordered maintenance. According to *Commissioner v. Lester,*[317] if alimony and child support are combined in one payment so the amount of alimony cannot be specifically determined, the entire amount is treated as alimony. This means the payor of alimony can claim the total sum as a deduction and the payee must treat the payment as income. Under the new code, the court will have to be cautious in ordering combined support payments that take advantage of the *Lester* holding, because the payments *must* expire after 121 months, leaving the children without support. To avoid this result, the court should always reserve its power to reinstate maintenance if the maintenance is, in fact, a combined maintenance and child support payment. The reinstatements of maintenance would continue until the child reaches the age of majority, thereby protecting the child while giving the payor the benefit of deducting the entire payment as alimony.

Another question that is not answered in the new maintenance section involves the timeliness of a motion to reinstate alimony. Because the court has jurisdiction to hear reinstatement motions only after the prior court order has expired, there are no guidelines on when a motion

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Maintenance. The decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree. In any event, the court may not award maintenance for a period of time in excess of 121 months. *If the original court decree reserves the power of the court to hear subsequent motions for reinstatement of maintenance, and such a motion is filed prior to the expiration of the stated period of time for maintenance payments, the court shall have jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments.* Upon motion and hearing, the court may reinstate the payments in whole or in part for a period of time, conditional upon any modifying or terminating circumstances prescribed by the court, but the reinstatement shall be limited to a period of time not exceeding 121 months. The recipient may file subsequent motions for reinstatement of maintenance at *prior to* the expiration of subsequent periods of time for maintenance payments to be made, but no single period of reinstatement ordered by the court may exceed 121 months. Maintenance may be in a lump sum, in periodic payments, 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 maintenance originally awarded that has not already become due, but no modification shall be made without the consent of the party liable for the maintenance, if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree. Nothing in this paragraph shall limit the right of the recipient of the maintenance to request by motion that the court reinstate maintenance payments at the expiration of the duration of time set for the maintenance payments by the court.

Id. (emphasis added).

316. One other problem can result if the courts do not accept this interpretation and instead, allow recipients to request reinstatement of maintenance even though the court does not reserve the power to reinstate. This problem is one of retroactive application of the reinstatement provision which is supported by KAN. STAT. ANN. § 60-1618 (Supp. 1981). This section states "when applicable, statutory references to maintenance shall be construed to include alimony granted prior to the effective date of this act." *See infra* text accompanying notes 378-380.

317. 366 U.S. 299 (1961).

to reinstate maintenance becomes stale.[318] The most effective method of handling this issue is to apply the equitable principle of laches, which would not allow the recipient to bring a motion to reinstate maintenance if there has been an excessive delay in bringing the claim and the rights of the other party have been prejudiced by the delay.[319]

Effective Date as to Remarriage

334. Because the marriage is void if contracted during the time for appeal, unfair consequences can result even under the present statute. For example, if a recently divorced man moves to Missouri and marries during the time for an appeal, the marriage is void under the present statute, even if his first wife never appeals the judgment. Therefore, if the man establishes residency in Missouri in good faith and then dies, the void marriage will not be recognized in Kansas and his second wife would not be an heir under Kansas law.

The FLAC committee recognized this unfair result by proposing the following amendment and comment which is presently before the 1983 Kansas Legislature as Kan. H.B. 2131 (Kan. Leg. Sess. 1983):

(2) *~~Effective date~~. Effective date as to remarriage.* ~~Every decree of divorce shall contain a provision to the effect that the parties are prohibited from contracting marriage with any other persons within or without the state until the expiration of the time for appeal from the judgment of divorce or, if an appeal is taken, until the judgment of divorce becomes final.~~ Any marriage contracted *by a party, within or outside this state, with any other person* before the *a* judgment *of divorce* becomes final shall be ~~null and void, but any~~ *voidable until the decree of divorce becomes final. An* agreement which waives the right of appeal ~~and which is approved in the decree~~ *from the granting of the divorce and which is incorporated into the decree or signed by the parties and filed in the case* shall be effective to shorten ~~that~~ *the* period of time *during which the remarriage is voidable.*

Family Law Advisory Committee Comment

The amendment to this statute would change, from void to voidable, the status of marriages contracted before a divorce judgment becomes final. The change more accurately reflects the limited nature of this prohibited marriage. Under present law, the prohibited void marriage can be challenged at any time, by any person. Consequently, if one of the parties marries some other person before the time for appeal expires, the marriage can never be recognized as valid, even though no appeal is taken and the judgment becomes final. However, according to the amendment, the prohibited marriage would be voidable only during the time the judgment is not final and once a final judgment is entered, the prohibited marriage would become valid and unchallengeable.

XXV. Statutory References to Maintenance

The second to the last section in the new code states "[w]hen applicable, statutory references to maintenance shall be construed to include alimony granted prior to the effective date of this act."[378] This section was added because the term "alimony" was changed to "maintenance." It was believed that a statute was necessary to make it clear that "alimony" under the prior code is now referred to as "maintenance" under the new code.[379] Unfortunately, the language suggests a second meaning. The statute appears to apply the new maintenance provisions ret-

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party objects thereto because the counseling conflicts with sincerely held religious tenets and practices to which any party is adherent.

(b) *Costs*. The costs of the counseling shall be taxed to either party as equity and justice require.

KAN. STAT. ANN. § 60-1617 (Supp. 1982).

377. Recommended Amendments, *supra* note 7, Proposed Statute § 60-1617, Comment, at 45.

The Committee felt that in cases where there are particularly difficult problems of custody and visitation, the single most hopeful resolution of the problem is not repeated hearings on those issues, but rather the intervention of a third party behavioral scientist for the purpose of counseling with the parties and their children. The goal is to improve the relationship between the parties and their children before or after the parties' marital status is altered. The Act permits the court to seek the advice of professional personnel without the stipulation of the parties.

Id.

378. KAN. STAT. ANN. § 60-1618 (Supp. 1982).

379. *See supra* note 101.

roactively to all prior orders of alimony. The statute could be misinterpreted to mean that prior orders of alimony are subject to reinstatement or modification under the new maintenance provision. However, this clearly was *not* the intent of the legislators and the statute should not be interpreted this way.[380] This statute is for definitional clarification only.

XXVI. Separate Maintenance Definition

The final section under the new divorce code[381] was added after the legislators requested a definition of separate maintenance from the Revisor of Statutes office.[382] The new language does not define separate maintenance, but instead creates a new ground for separate maintenance in Kansas — desertion for ninety days. Under the new provision, a separate maintenance action can be brought if "a person has a cause of action for divorce or has been deserted and the desertion has continued for 90 consecutive days."[383] Although Kansas law recognizes that grounds for divorce are also grounds for separate maintenance, the ninety day definition of desertion has never before been recognized in Kansas. Kansas required the abandonment to continue for one year before a party could bring a separate maintenance action for desertion.[384]

There is one other question concerning the interpretation of the separate maintenance provision. The last sentence of the statute states that "the court shall make provisions for the support and education of the minor children and may award maintenance to either party, in the same manner as in an action for divorce."[385] The statute, however, is silent about the power of the court to divide the property of the parties. It is clear the legislators were merely requesting a definition of separate

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380. *See supra* notes 61, 63 & 101. The FLAC members, at their December 10, 1982 meeting, recommended that the 1983 legislature repeal the confusing language of Kan. Stat. Ann. § 60-1618 (Supp. 1982) and enact the following language: "For purposes of interpretation, the terms alimony and maintenance are synonymous." *Id.* This recommendation is Kan. H. B. 2131. (Kan. Leg. Sess. 1983).

381. The new provision reads as follows:

> When a person has a cause of action for divorce or has been deserted and the desertion has continued for 90 consecutive days, the person, without petitioning for divorce, may maintain in the district court an action against the person's spouse for separate maintenance. In an action for separate maintenance, the court shall make provisions for the support and education of the minor children and may award maintenance to either party, in the same manner as in an action for divorce.

Kan. Stat. Ann. § 60-1619 (Supp. 1982).

382. "Senator Eldredge moved to amend the bill to include a definition of separate maintenance; Senator Burke seconded the motion, and the motion carried." *Minutes of the Senate Committee on Judiciary* 1 (Mar. 31, 1982—morning session).

The language presented by the Revisor of Statutes office was the Nevada Separate Maintenance statute Nev. Rev. Stat. § 125.190 (1981). Interview with Bruce Hurd, Revisor of Statutes, staff member, in Topeka (May 27, 1982).

383. Kan. Stat. Ann § 60-1619 (Supp. 1982).

384. *See* Kan. Stat. Ann. § 60-1601(a)(1) (Supp. 1981).

385. Kan. Stat. Ann. § 60-1619 (Supp. 1982).

maintenance and did not intend to change the substantive law.[386] Therefore, because other sections[387] of the code allow the court to divide the property of the parties in an action for separate maintenance, the proper interpretation would be to recognize this power in the court. Because the court can divide property upon request of a party even though *no* grounds exist for the requested relief,[388] it would be anomalous to interpret this statute to restrict the court's power to divide the property when separate maintenance grounds *do* exist.[389]