Approved February 3, 1986
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Chairman Joe Knopp at
Chairperson

3:30 ~~a.m.~~/p.m. on January 30, 1986 in room 313-S of the Capitol.

All members were present except:

Representative Duncan was excused.

Committee staff present:
Mike Heim, Legislative Research Department

Jan Sims, Committee Secretary

Conferees appearing before the committee:
Rep. Dorothy Nichols
Dottie McCrossen
Shirleen Taylor
Bob Robertson, Social and Rehabilitation Services
Rev. Henry Robert
Honorable James Buchele
Marjorie Van Buren, Judicial Administrator's Office
David Litwin, Kansas Chamber of Commerce and Industry
Rep. Frank Buehler
Rep. Harold Guldner
Hal des Jardins
Mary Harper
Viola Dodge

HB 2157 - An act concerning domestic relations; relating to child support orders.

Rep. Dorothy Nichols appeared before the Committee and introduced conferees McCrossen, Taylor and Robert. She presented Attachments 1 and 2 to the Committee.

Dottie McCrossen appeared before the Committee and said that she is a teacher in the Ottawa High School. She addressed the problem of students over the age of 18 who are self supporting and the negative affect that situation has on their school performance. (Attachment 3)
Shirleen Taylor appeared before the Committee and stated that she is a single parent with a teenage son. Her ex-husband has informed her that when the son reaches 18 she will no longer receive child support from him. Her son will reach 18 before graduating from high school and because his support will cease he will not be able to participate in sports activities, etc. that he has participated in previously because he will have to seek employment for his support. Ms. Taylor pointed out to the Committee that it is because of Kansas law prohibiting a child from entering school before the age of 5 that many seniors in high school are 18 and over. (Attachment 4)

Rev. Henry Robert appeared before the Committee and presented Attachment 5 in support of HB 2157.

Jim Robertson, Senior Legal Counsel of the Department of Social and Rehabilitation Services appeared before the Committee in support of HB 2157. He stated that a child receiving SRS payments continues to receive payments beyond the 18th birthday provided he is in school and making satisfactory progress. He presented Attachment 6 to the Committee.

James Buchele, Judge of the Shawnee County District Court appeared before the Committee in support of HB 2157. He said that as of January 1, 1972 when Kansas reduced the age of majority from 21 to 18 a problem was created relating to the support of children over 18 but still in school. Many of the children in school beyond 18 are those with special problems and neither they nor their parents are in "normal" circumstances. The Court does not have the authority to make an order for payment of support beyond 18. It can only enforce the agreement of the parties in the divorce proceeding. While support is always under the control of the Court a child gets no vested rights unless ordered by the Court. Judge Buchele supports this bill but feels it does not go far enough. He would like to see the age extended to 21 or completion of college. He finds in many

cases in his court a couple who are both college educated have intended that their children attend college and have set aside funds for the children's college. At the time of the property settlement agreement one party will insist that the funds be divided and not kept as a college fund. This puts a child who is accustomed to the lifestyle a college education provides and who has intended to attend college on his own to obtain that education. Several members of the Committee said they agreed with Judge Buchele but feared that amendment would jeopardize the chances of passage of HB 2157 and that those provisions should be introduced as a separate bill.

HB 2658 - An act concerning support and visitation of certain parties; relating to orders for child support, maintenance and child visitation; concerning certain parentage actions.

Bob Robertson, Senior Legal Counsel of the Department of Social and Rehabilitation Services appeared before the Committee in support of HB 2658. He said that the provisions of this bill are all very technical in nature and are concerning income withholding orders. These provisions would give SRS the decisionmaking authority for distribution of funds rather than honoring orders on a first come first served basis. This parallels federal law. (Attachment 12)
Marjorie Van Buren spoke to the changes in lines 41 and 42.

The Chairman presented the fiscal report on this bill.

David Litwin of the Kansas Chamber of Commerce and Industry appeared before the Committee in support of this bill. He said that there is a tremendous amount of paperwork involved for employers and businesses in Kansas. The business community would prefer that they be told what to do pertaining to multiple withholding orders rather than be required to make discretionary decisions and open themselves up to liability as a result of their decisions. (Attachment 11)

HB 2639 - An act concerning divorce; relating to division of property.

Rep. Buehler appeared before the Committee and explained the factual situation leading to his introduction of this bill. (Attachment 7)

Hal des Jardins, an attorney in practice in Topeka appeared before the Committee in support of this bill. He said that the courts are now doing what this bill proposes anyway. The courts are holding that if assests subject to property settlement were not earned by both parties or came to the marriage by means other than joint efforts of the parties they are not subject to property settlement. Courts are doing this now under the language in current law giving the courts latitude in property settlement but the new language would specifically exclude inheritances from property settlement.

Rep. Guldner appeared before the Committee and stated that this situation is having an affect in his part of the state as pertains estate planning, especially in light of the poor farm economy. He presented Attachment 8 and mentioned that other states have enacted similar legislation.

Mary Harper appeared before the Committee and related a personal experience in their family that could have been avoided if this legislation had been in effect. (Attachment 9)

Viola Dodge appeared before the Committee in opposition to HB 2639. (Attachment 10)

The Chairman adjourned the meeting at 5:10 P.M.

1/30 72157

STATE OF KANSAS

DOROTHY NICHOLS
REPRESENTATIVE, FOURTEENTH DISTRICT
229½ S. MAIN
OTTAWA, KANSAS 66067
(913) 242-3394

TOPEKA

HOUSE OF
REPRESENTATIVES

ROOM 182-W 296-7585

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: LABOR AND INDUSTRY
MEMBER: LOCAL GOVERNMENT
COMMERCIAL AND FINANCIAL
INSTITUTIONS

Thank you, Mr. Chairman and committee members, for allowing me to appear before you and to explain HB 2157 dealing with extension of child support.

Now, child support in a divorce action terminates at the age of eighteen. This bill would extend that support until graduation from high school.

Many young people turn eighteen during their senior, and most important, year of high school. Losing financial support at this crucial time can be devastating.

This has become more of a problem since the legislature mandated that the age of six must be attained by September 1 to enter first grade in Kansas schools.

Lines 34 through 39 are new language giving the court the authority to extend support payments until high school graduation. I urge you pass HB 2157 and favorably.

Some of my constituents who have this problem and have brought it to my attention are here to testify. Here, also, are letters from Judge Donald White, of the Fourth Judicial District, and Judge James Buchele of the Third Judicial District. in support of this bill.

Thank you, again, for your time.

Attachment 1
House Judiciary
1-30-86

(2) 1/30 House

Fourth Judicial District of Kansas

MARGARET KNIGHT
CLERK OF THE DISTRICT COURT
P.O. BOX 549
LYNDON, KANSAS 66451
(913) 828-4713

DONALD L. WHITE
ASSOCIATE DISTRICT JUDGE
(913) 828-4632

LARRY L. COURSEN
DISTRICT MAGISTRATE JUDGE
(913) 828-4632

January 22, 1986

Honorable Dorothy N. Nichols
House of Representatives
State Capitol Bldg., 122 West
Topeka, KS 66612

Dear Representative Nichols:

I am writing to you with concern of House Bill No. 2157. As a judge, I hear approximately 75 percent of the domestic cases filed in the Fourth Judicial District. There are cases where 18-year-old high school seniors with academic ability have been denied financial support by their parents for the reason that they had reached the age of majority. Most of these students are living on a low income from minimum wages earned by their working mothers.

It would definitely be in the best interest of children if our law would require parents to support their childen through four years of high school, or at least through their eighteenth year.

Many of these kids have academic ability and want to go into high tech fields. In order for them to pursue such an interest in college, they must have the high school requisites. These classes uaually take a lot of out-of-school time for study. A kid can't do that and earn enough to support himself at the same time. In one particular case that I know of, the young man finally gave it up and joined the Navy.

I urge you to support this bill.

Respectfully yours,

DONALD L. WHITE
Associate District Judge

jb

Attachment 2
House Judiciary
1-30-86

1/30 McCrossen (3)

January 30, 1986

I would like to speak in behalf of House Bill 2157. My name is Dottie McCrossen. I am an English teacher in U.S.D. #290, Ottawa, KS. I have been teaching at Ottawa High School for the past ten years. Last year OHS began requiring four years of English for all students, so because of this new requirement, I developed a senior English class for non-college-bound students, students who basically disliked English, and who, therefore, lacked many skills necessary for success on the job market.

In trying to motivate these students to care about their writing and reading skills, I found myself faced with a new problem: the teenager so tired from his/her job, that focusing upon a skill was nearly impossible.

It is true that many students hold part-time jobs, working ten or fifteen hours a week, earning money to help with car payments or to buy better clothes; these, however, are not the students who need our attention. I'm referring to students who work thirty and forty hours a week.

One students stocks shelves at a local grocery store from midnight to whenever he finishes -- often 6:00 or 7:00 a.m. He may sleep an hour before school. He always sleeps in my first hour class. After several discussions, I learned that he is the sole support for himself. His parents are divorced and he seems to be a pawn between the two, thus receiving no support from either.

Out of curiosity I handed out a questionnaire to all 58 of my students. Of those present, six are completely on their own. Five of them are eighteen; the other is nineteen. One girl is also responsible for her child, receiving no child support from the baby's father. These students live either by themselves or with friends. They are not problem

Attachment 3
House Judiciary 1-30-86

students as far as I can tell. Of course I have no way of knowing exactly what happens in the home.

Eleven students stated that they were partially responsible for themselves. They are provided with shelter, but that is all. They must furnish their own school materials, all clothing, and their own food. In each of these cases, the students have either one parent, or a natural parent, and a step-parent.

Because these students could have dropped out of school at age 16, unless their parents are receiving welfare, I believe that most of them earnestly desire an education. The fact that all of these students are working at least twenty-five hours a week, and most of them between thirty and forty, greatly interferes with their ability to do well in school. For most of these students high school will be their terminal educational influence. I urge you to take action in making parents responsible for their children. They must not be used as pawns in the struggle of divorced or divorcing adults.

Taylor 1-30 (4)

1127 Maple
Ottawa, Kansas 66067
913-242-8845

January 29, 1986

Representative Dorothy Nichols
House of Representatives
Room 182-W
State Capitol
Topeka, Kansas

Re: H.B. #2157

Dear Dorothy:

On behalf of the many custodial parents who will be forced to contribute full support, or make their high school age children go to work to support themselves, I would like to state the many reasons why K.S.A. 60-1610 should be amended to read "the child reaches 18 years of age before completing the child's high school education, in which case the support shall not terminate, unless otherwise ordered by the court, until the end of the school year during which the child became 18 years of age if the child is making normal progress toward the completion of the child's high school education."

Many of our high school seniors reach age 18 before graduation. The senior year of high school is one of the most expensive years of a child's life. It is an unfair burden for the custodial parent to carry all the expenses after a child turns 18 until graduation from high school. And it is even more unfair to expect an 18 year old who hasn't even been given the opportunity of a high school education to support himself, just because he happened to be unlucky enough to be born into a divored family, and on a date which restricted him by state law from beginning kindergarten at age 5.

Even though law declares a child an adult at age 18, it is very difficult for that child to support himself and still be able to actively participate in high school academic and sport activities. There are very few jobs available for 18 year olds who can work full time, let alone those who have to structure their hours around academic and sport commitments. All children should be given the same opportunities to take advantage of the extra curricular activities offered by the schools, but current law states that upon turning 18, that child becomes an adult and takes on the responsibility for his own support; thus keeping a large majority from being able to participate in any school activities, and in some cases may even force that student to drop out of school to earn enough money to live on.

Therefore I recommend that this law be ammended to provide for the support of those children turning 18, until they have been given an equal opportunity to receive a high school education.

Sincerely,

Shirlene Taylor

Shirlene Taylor

Attachment 4
House Judiciary
1-30-86

WESTMINSTER PRESBYTERIAN CHURCH

13th and Maple
Ottawa, Kansas 66067

Phone
913-242-1824

Henry A. Roberts, Jr.
Pastor

January 29, 1986

Representative Dorothy Nichols
House of Representatives
Room 182 - West
State Capital
Topeka, Kansas

Dear Dorothy:

I am writing to encourage the amendment of K.S.A. 60-1610 particularly as it pertains to minor child - child support/education. Because of a child's birthday, moving into the state from another state where beginning school has different qualifications, repeating a grade due to social or learning adjustments/difficulties, or for other reasons, a child may become 18 prior to graduation from high school. Under current law, child support would stop regardless of whether or not the child has completed high school. I believe this places an undue burden upon the custodian parent. Therefore, I recommend that this statute be amended to provide for such circumstances containing a provision that child support would continue to be paid to the custodian parent/guardian even if the child reaches 18 years of age until completion of high school assuming the minor child is in the care of the custodian parent and that the minor child is making satisfactory progress in school.

Sincerely

Henry A. Roberts, Jr.

har/r

PRESBYTERIAN CHURCH (USA)

Attachment 5
House Judiciary
1-30-86

1/30 Robertson (6)

TESTIMONY CONCERNING
H.B. 2157

Submitted by: Jim Robertson
CSE Senior Legal Counsel
Department of Social and
Rehabilitation Services
(913) 296-3410

The Department of Social and Rehabilitation Services supports this proposed amendment to K.S.A. 60-1610 as being in the best interests of thousands of Kansas children who turn 18 years of age at some point during their senior year in high school. Numerous children fall into this category because of birth date requirements established by schools concerning when a child may begin kindergarten or first grade, because of school transfers, or because of joint decisions by both parents to hold a child back one year.

Since the State of Kansas provides aid to dependent children assistance beyond the age of 18 to persons who will graduate from high school prior to their 19th birthday (ADC is paid until the person graduates), it seems only proper that parents have a legal obligation to support their child until the end of the school year in which they turn age 18. If taxpayers of this state provide public assistance to such persons, surely the parents should have a similar responsibility.

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Attachment 6
House Judiciary
1-30-86

STATE OF KANSAS

FRANK BUEHLER
REPRESENTATIVE, ONE HUNDRED THIRTEENTH DISTRICT
BARTON COUNTY
P.O. BOX 317
CLAFLIN, KANSAS 67525

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER AGRICULTURE AND LIVESTOCK
JUDICIARY
PUBLIC HEALTH AND WELFARE

JANUARY 30, 1986

TESTIMONY

House Bill 2639

This legislative proposal has come about because of information brought to me resulting from an incident near the end of the 1983 Legislative Session. Since this time I have found much interest in an effort to correct the existing problem. At the end of the 1983 Legislative Session and during the interim following, our staff assembled information for me from Oklahoma statutes and case history from Oklahoma courts. In addition, I visited with some of the professional associations and practicing attorneys who serve in the Legislature who might give me the benefit of their opinions on this proposal. Because of input from these professional associations and attorneys, I changed my original draft to provide new language which would give the courts more in final determination in verdicts pertaining to awards. Then I held it until this session when, after sharing with Representative Guldner and others, at which time Rep. Guldner co-sponsored House Bill 2639 with me. We decided that the proposal was generous enough but still definite enough in making known intent. We then pre-filed House Bill 2639.

I had arranged for a young man who is involved in the incident that I mentioned at the start of my testimony to come before you today. However, he called yesterday and because of illness he is unable to appear.

Let me relay to you the story that he told me. The incident that prompted this proposal follows. For some 17 yearsI have been acquainted with a family in Western Kansas that because of the result of hard work and cooperative family teamwork, had accumlated some degree of affluency. One of the ambitions of the parents of this family was to provide for their heirs. Several months after the father died I learned that the wife of one of the sons, and this would be the person who I had planned to have relay his story to you, when he returned home that night he found a note to meet his wife at the attorneys office that she wanted a divorce. That she had taken the two children they had and wanted to divorce.

Attachment 7
House Judiciary
1-30-86

The proceedings started and during the time of the settling of the estate they learned that he along with the rest of the family would inherit about 1/3 of the total assets of the family. About this time it was learned that the mother also was terminally ill and after some months the wife returned, and this was before the will was probated, and asked if the husband would take her back that she had made a mistake that the children were homesick and wanted to live with him. And of course he agreed to take them back. She then proceeded to tell her friends in the community where they live that she was only going to live with him until his mother died and then she would share in the other 2/3 of the estate. She had let the divorce proceedings expire on the previous divorce action and planned to refile for divorce aftr the death of the mother. I asked the young man if his previous wife did get some of the property from the divorce settlement and he informed me that she did not. However, all of his share of the property was considered to be assets in the final settlement and that in addition to their home which she got, she also got $500 a month as a property settlement for the next 10 years. In addition she got $500 a month for alimony for 10 years and child support for one child that she took at $250 per month. It was my opinion that the inherited property should not have been included in the settlement and under House Bill 2639 may not have been.

I am satisfied that our divorce statutes pertaining to property are intended to award each spouse what is justly theirs, but not to see how much they can punish the other spouse or the other members of their family, and it would appear to me that our statutes should protect the interest of those who give to or otherwise pass to their heirs, that which would be their possessions.

Finally as a means of finding the correct language in this proposal we are offering the amendments shown on the baloon in your information packet.

Without doubt there are incidents that are problems that should be decided under special circumstances and HB 2639 adequately provides for these exceptions.

We respectfully request your support in passing HB 2639 from this committee and with the offered amendments, ask that you send this out favorable for passage and also seek your support for HB 2639 on the House floor. Thank you.

erty; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; and ~~such~~ *any* other factors ~~as~~ *that* the court considers necessary to make a just and reasonable division of property. ~~*If either spouse in the spouse's own right has acquired property by gift, descent, devise or bequest, it shall be presumed that the property is*~~ *the sole and separate property of the spouse who acquired it, to be awarded to that spouse and excluded from consideration in making the division of property, unless the court determines that the result would be manifestly unjust and unreasonable, considering all relevant factors.*

Notwithstanding the provisions of subsection (b) of K.S.A. 23-201 and amendments thereto, any property acquired by either spouse, in the spouse's own right, by descent, devise or bequest, and the rents, issues, profits or proceeds thereof, or by gift from any person except the other spouse, shall be presumed to be

(2) *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, conditioned 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 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

§ 1278. Disposition of property—Restoration of wife's maiden name—Alimony

When a divorce is granted, the wife shall be restored to her maiden or former name if she so desires. The court shall enter its decree confirming in each spouse the property owned by him or her before marriage and the undisposed-of property acquired after marriage by him or her in his or her own right. Either spouse may be allowed such alimony out of real and personal property of the other as the court shall think reasonable, having due regard to the value of such property at the time of the divorce. Alimony may be allowed from real or personal property, or both, or in the form of money judgment, payable either in gross or in installments, as the court may deem just and equitable. As to such property, whether real or personal, which has been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. The court may set apart a portion of the separate estate of a spouse to the other spouse for the support of the children of the marriage where custody resides with that spouse.

Amended by Laws 1975, c. 350, § 1, eff. Oct. 1, 1975; Laws 1976, c. 154, § 1.

Section 2 of Laws 1975, c. 350, provided for the effective date.

Law Review Commentaries

Alimony and the division of jointly acquired property. 14 Okl.Law Rev. 422 (Aug. 1961).

Annual Survey of Oklahoma Law:
Domestic relations—
Alimony. Theresa L. Bohman. 3 Okl.City U.L.Rev. 213 (1978).
Alimony enforcement. Stephen J. Korotash and Lawrence A. Swenson. 2 Okl. City U.L.Rev. 238 (1977).
Alimony termination. Stephen J. Korotash and Lawrence A. Swenson. 2 Okl. City U.L.Rev. 241 (1977).
Antenuptial agreements contemplating divorce. James V. Barwick. 3 Okl.City U.L.Rev. 237 (1978).
Challenging divorce. Stephen J. Korotash and Lawrence A. Swenson. 2 Okl. City U.L.Rev. 235 (1977).
Family Law—Property division. 5 Okl. City U.L.Rev. 242 (1980).
Interpretation of "means" in awarding attorney fees in divorce actions. James V. Barwick. 3 Okl.City U.L.Rev. 236 (1978).
Property division. Theresa L. Bohman. 3 Okl.City U.L.Rev. 218 (1978).
Property settlement. Stephen J. Korotash and Lawrence A. Swenson. 2 Okl. City U.L.Rev. 236 (1977).
Termination of support alimony on remarriage. 5 Okl. City U. L.Rev. 235 (1980).
Family Law—Alimony. 6 Okl. City U.L.Rev. 187 (1981).
Joint tenancy—Termination by divorce. Donald W. MacPherson. 2 Okl. City U.L.Rev. 452 (1977).

Annulment controversy: Revival of prior alimony payments. Bradley Paul Forst. 13 Tulsa L.J. 127 (1977).

Attorney fees in divorce and ancillary proceedings. Howard K. Berry, Jr. 48 Okl.Bar J.Quarterly 14 (Winter 1977).

Contributions to spouse's education: Search for compensation when marriage ends. Nancy J. Kendered. 5 Okl. City U.L.Rev. 409 (1980).

Decisions of interest pertaining to real property. R. Clark Musser. 50 Okl.B.J. 383, 1616 (1979).

Divorce:
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Property settlements: Divisible assets. 32 Okl.L.Rev. 724 (1979).

Domestic relations:
Adjudication of property rights in actions for separate maintenance. 32 Okl.L.Rev. 210 (1979).
Retroactive modification of divorce decree. 34 Okl.L.Rev. 411 (1981).
Role of joint industry in determination of what is jointly acquired property. 32 Okl.L.Rev. 214 (1979).

Effect of third party cohabitation on alimony payments. 15 Tulsa L.J. 772 (1980).

Enforcement of property division alimony by contempt proceedings—change of opinion? J. Bradford Griffith. 53 Okl.B.J. 511 (1982).

Garnishment: State garnishment of benefits. 32 Okl.L.Rev. 539 (1979).

Husband and wife: Antenuptial contract in Oklahoma. 32 Okl.L.Rev. 220 (1979).

Income tax planning at divorce or separation. Barbara B. Lewis. 5 Okl. City U.L.Rev. 445 (1980).

Judicial identification of "Penal Laws" in conflict of laws. Peter B. Kutner. 31 Okl.L.Rev. 590 (1978).

Oklahoma's troublesome covesture property concept. Criey R. Lilly, Jr. 11 Tulsa L.J. 1 (1975).

Pensions as property subject to equitable division upon divorce in Oklahoma. 14 Tulsa L.J. 158 (1978).

Property division between meritricious partners: An analysis of Marvin v. Marvin. Fred Orcutt. 50 Okl.B.J. 902 (1979).

rate funds or property derived therefrom to be owned equally by parties as cotenants, though items were acquired independent of any direct contribution by husband, wife was entitled to reconsideration of her interest in those items by trial court. Palmer v. Palmer, Okl., 465 P.2d 156 (1969).

9.2 —— Inherited property

In divorce action, divisional equality in property sought by trial court's judgment did not improperly include inherited and separate property of husband and was not clearly against weight of evidence. Phillips v. Phillips, Okl., 556 P.2d 607 (1976).

Where sum wife had invested in note came to her by inheritance, it was not "jointly-acquired" property within meaning of divorce statute requiring such property to be divided in kind or set apart to one of the parties with just compensation one from the other, and was not subject to division under statute. Palmer v. Palmer, Okl., 465 P.2d 156 (1969).

10. Division of jointly acquired property

Under Oklahoma law, wife has vested interest in property acquired by joint effort during the marriage, which she may exercise or not as she may see fit in the event of marital discord; but that right, if exercised, is further dependent upon divorce court's discretion in effecting required equitable distribution. West v. U. S., D.C.Tex., 332 F.Supp. 1102 (1971), affirmed 477 F.2d 568.

Though Oklahoma law requires court to make equitable distribution of jointly acquired property upon divorce, it is not required that the wife be awarded an equal or significant portion of such property in every case. Id.

In no event should increase in value of separate property, attributed to intlation, be divided by court in divorce case as "jointly acquired property," except where there is joint ownership, in which event property could be subject to division only to extent of inflationary increase attributable to separately owned fractional share, and present value of separate property is only material as financial circumstance to determine whether owner is financially able to pay support alimony. Bowman v. Bowman, Okl.App., 639 P.2d 1257 (1981).

Increase in value of separate property is not even an issue in divorce case except where coupled with proof of significant repairs which materially enhance life expectancy of asset, improvements made which materially contribute to increase in value and increase in equity since marriage, and in all cases the value increase is only pertinent when attributed to expenditure of either jointly acquired funds or separate funds of party claiming the right to property division of the asset. Id.

Trial court did not err in determining that court rendering final divorce decree was without authority to make a division of property out of former husband's "future acquired property" in contravention of this section. Ettinger v. Ettinger, Okl., 637 P.2d 63 (1981).

Trial court has inherent authority under statute to order jointly acquired homestead sold, the marital debts paid and the balance of the money divided between the parties to divorce proceeding, or used to pay their attorney fees and other expenses of their divorce action. Pierce v. Pierce, Okl.App., 605 P.2d 1172 (1979) corrected and affirmed 609 P.2d 732.

For increased value of husband's business to be properly considered as part of joint marital estate, wife was obliged to prove that net worth of business increased during marriage and that such increase resulted in substantial part from her efforts, and even on proof of such two elements she would still have been required to justify equity of giving her all or substantially all of marital estate. Hutto v. Hutto, Okl. App., 602 P.2d 1053 (1979).

Fairness requires, in event of a bankrupt marriage, that there be an equitable division of jointly acquired liabilities as well as assets between parties. Allen v. Allen, Okl.App., 601 P.2d 750 (1979).

Property acquired during marriage as result of industry, economy and business ability is jointly acquired property subject to equitable division in divorce proceeding. May v. May, Okl., 596 P.2d 536 (1979).

Interspousal gift operates as transfer to donee of separate property interest. Id.

Enhancement in value of separate estate of one spouse, attributable to personal efforts or labor by other spouse, constitutes jointly acquired property subject to division in divorce proceeding. Id.

Requirement for equitable division of property in divorce proceedings does not require equal division. Tigert v. Tigert, Okl.App., 595 P.2d 815 (1979)

Where joint debt underlying decree-imposed obligation of husband was "commercial note," jointly signed by husband and wife, "to go into business," and the business came to be terminated before the parties were divorced, obligation imposed on the husband by divorce decree to pay the debt had no relation to wife's "alimony, support or maintenance," and thus the obligation was dischargeable in bankruptcy proceedings. Davis v. Davis, Okl., 593 P.2d 88 (1979).

In divorce action, trial court mistakenly considered that furnishings were included in house appraisal for purpose of determining division of marital assets. Brown v. Brown, Okl.App., 586 P.2d 83 (1978).

In a divorce proceeding, the net marital estate need not necessarily be equally divided to be an equitable division. Stansberry v. Stansberry, Okl., 585 P.2d 147 (1978).

Where property settlement incorporated by reference in divorce decree divided all assets in properties acquired during marriage and directed that all property not specifically awarded in agreement was to be given to husband, fact that wife failed to execute instruments of conveyance to husband did not entitle her to judgment in her suit against former husband's estate seeking stay of disposition of property pending determination as to property held in joint tenancy, for divorce decree terminated joint tenancy of the parties. Tiger v. Akers' Estate, Okl.App., 554 P.2d 1213 (1976).

A joint owner's right to partition is absolute. Wilson v. Hartman, Okl., 541 P.2d 742 (1976).

Where husband's conveyance of land acquired during coverture and held in husband's name was made to his father before the filing of divorce action against wife and where such conveyance was supported by valuable consideration and did not involve fraud, rights of grantee-father vested and were not divested by claims to property subsequently asserted by wife in

Yukola PALMER, Plaintiff in Error,

v.

Gibson L. PALMER, Administrator of the Estate of Gibson Palmer, Deceased, Defendant in Error.

No. 42809.

Supreme Court of Oklahoma.

Nov. 12, 1969.

Rehearing Denied March 3, 1970.

Divorce action. The District Court, Pontotoc County, Lee R. West, J., awarded wife a divorce, effected division of property and awarded child support, and wife appealed from property award. The Supreme Court, Blackbird, J., held that several items declared by trial court to be owned equally by parties as cotenants were acquired independent of any direct contribution by husband and should be reconsidered and that trial court's vesting of title to real estate in parties as cotenants was contrary to statutory requirement that property be divided in kind or by setting property apart to one of parties with requirement of payment of proper sum to effect fair and just division.

Affirmed in part, reversed in part and remanded with directions.

McInerney, J., dissented in part.

1. Divorce ⇐287

Where trial court declared items of property that were either wife's separate funds or property derived therefrom to be owned equally by parties as cotenants, though items were acquired independent of any direct contribution by husband, wife was entitled to reconsideration of her interest in those items by trial court.

2. Divorce ⇐252

Trial court did not free jointly-owned property from possessory rights of either party to divorce by attempting to make parties tenants in common and mentioning in decree that parties might subsequently apply for partition, and did not grant plaintiff wife remedy of true division of property in kind that she was entitled to by statute. 12 O.S.1961, § 1278.

3. Divorce ⇐252

Tenancy in common, where one tenant may only own a life estate while other owns his part in fee simple, with its unity of possession and co-equal possessory rights in each tenant, does not conform to requirement of divorce statute that jointly-acquired property shall be divided in kind or all set apart to one with proper compensation to the other. 12 O.S.1961, § 1278.

4. Divorce ⇐287

Generally, where trial court has not correctly applied statute relating to division of property between parties to divorce proceeding, Supreme Court would effect a complete adjudication of the cause. 12 O.S. 1961, § 1278.

5. Divorce ⇐287

Where record in divorce case was insufficient to provide means for determining equitable division of property between parties, cause would be remanded for partial new trial. 12 O.S.1961, § 1278.

6. Divorce ⇐252

On division of property between parties, divorced wife would be entitled to interest in farm her father had given her before marriage and value of residence which she owned prior to marriage for which parties were later given trade-in allowance on jointly-purchased property. 12 O.S.1961, § 1278.

7. Divorce ⇐249(3)

Where sum wife had invested in note came to her by inheritance, it was not "jointly-acquired" property within meaning of divorce statute requiring such property to be divided in kind or set apart to one of the parties with just compensation one from the other, and was not subject to division under statute. 12 O.S.1961, § 1278.

See publication Words and Phrases for other judicial constructions and definitions.

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Bob E. Bennett
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Appeal from the District Court of Pontotoc County; Lee R. West, Judge.

Affirmed in part, reversed in part and remanded with directions.

Deaton & Gassaway, Ada, for plaintiff in error.

Bob E. Bennett, Ada, for defendant in error.

BLACKBIRD, Justice.

This appeal arose out of a divorce action instituted by plaintiff in error, hereinafter referred to as "plaintiff", against Gibson Palmer (who died after the briefs were filed herein, resulting in revivor in the name of the defendant in error), hereinafter referred to by his trial court designation of "defendant". The decree plaintiff herein challenges dissolved her marriage to defendant, awarded her custody of the parties' approximately 15-year-old daughter, Katie (the only child born of their marriage), and child support of $100.00 per month, and purported to effect a division of the parties' property, both personal and real. Plaintiff attacks only that part of the decree which awards defendant an interest in certain items or parcels of the property that were acquired during the couple's marriage.

When the parties married in 1949 and established a home at Madill, plaintiff owned a home on East 8th Street in Ada and a Creek County farm her father had given her. After they sold the Dairy Bar business he had established before their marriage, as well as other Madill property they acquired thereafter, and moved from there to Ada in 1954, they acquired a large residence on East 7th Street there, known as the "Bell property", by trading in on it her Ada residence for an allowance of $6,500.00 and paying an additional amount in cash. After the Bell property had been converted into four apartments, largely through the labor and expenditures of defendant, and the couple had lived in one of the apartments and collected rentals on the other three for more than a year, they sold the property to Ada Missionary Baptist Church for $12,500.00 and used the Church's down payment of $4,000.00 to apply on the $9,500.00 price of an acreage referred to as the "Pete Morris property", title to which they acquired as joint tenants, with respective rights of survivorship. The only dwelling then situated on the Pete Morris property was referred to as the "Log Cabin". Defendant made improvements on it and it has been renting for $50.00 per month.

During the same year, and in 1957, the couple developed other building sites on the Pete Morris tract. One of these on which defendant, assisted by his father, who was also a carpenter, constructed a house referred to as the "Crown Point Drive" property, was sold at a $3,000.00 profit. Thereafter, the couple constructed two other houses on the Pete Morris tract. Their street addresses became 1005 and 1011 E. Central Boulevard, respectively, and, for several years, they were rented.

In 1958, plaintiff's mother died, and thereafter, in 1959, when her mother's and father's estates were probated, she was distributed therefrom approximately $20,000.00 in cash, and an undivided 1/5th interest in a 385-acre pecan farm her father had placed in a 20-year trust for his heirs. This property was referred to as the "Pecan Grove Trust".

With her cash inheritance, plaintiff invested in U.S. Bonds worth $10,000.00. She also contributed $3,922.00 to the purchase of a promissory note referred to as the "Brown note", together with the real estate mortgage securing it. Defendant contributed $800.00 to this purchase. The rest of plaintiff's cash inheritance was thereafter expended for a Hammond Organ, for furnishings that went into the couple's home, and for items that she was reluctant to ask defendant to buy.

In February, 1963, the parties' aforementioned property at 1005 East Central Boulevard was sold to a Mr. and Mrs. Brunkow, and $10,300.00 of the property's price was paid with a note secured by a mortgage on the property, which note and

mortgage plaintiff purchased from defendant by cashing her aforementioned U.S. Bonds. This real estate was apparently later resold to a Mr. Paul Alford for $11,500.00, and the aforementioned note and mortgage, owned by plaintiff, is now the obligation of a Mr. and Mrs. Joy M. Houston. The monthly installments on this note are $65.00 each. Fifteen hundred dollars of the ten thousand dollars plaintiff paid defendant for the aforementioned Brunkow, now Houston, note and mortgage was used to pay the difference between the trade-in allowance of the parties' old family automobile and the price of an air conditioned, used Rambler Sedan that was purchased in 1963, when plaintiff accepted a position obtained through the University of Oklahoma Medical Center. Later, this Rambler was apparently traded in on a 1966 Model Chevrolet for her, but, before its warranty period had expired, it was traded in on her present 1967 Model Chevrolet, which the parties borrowed $1,731.60 to buy. Title to this car was taken in plaintiff's name, and she has fully paid the indebtedness on it out of her earnings in the above mentioned position, which she held until about six weeks after filing this action for divorce in July, 1967.

Before the parties moved out of the apartment house they sold Ada Missionary Baptist Church in 1956, as aforesaid, they set aside a space on the Pete Morris tract for a homestead, large enough for eight lots, and then, on that site, constructed a home, whose street address became: "1038 South Francis". Defendant not only drew the plans for this home, but expended $14,000.00, not counting the value of his own services, in constructing it. When it was finished, the couple and their daughter moved into it from their apartment in the aforementioned former Bell property.

Finally, in the Fall of 1964, the aforementioned property at 1011 East Central Boulevard was sold to a Mr. and Mrs. Don LaSalle, for $20,000.00. The LaSalles made a down payment of only $500.00 and executed and delivered to plaintiff and defendant their note in the principal sum of $19,500.00, secured by a real estate mortgage on the premises. The monthly payments on this obligation are $115.00 each, and defendant has been receiving them.

At the trial it appeared that other property (besides that already mentioned) which either, or both, of the parties acquired during their marriage, consisted of an unimproved cabin site in Freeport, Texas, purchased by plaintiff for approximately $1,300.00 in 1966, some stock in Atkinson Enterprises, for which she paid $120.00, some U.S. Savings Bonds purchased out of her salary, some cemetery lots plaintiff purchased for $545.00 to provide a burial place for her and Katie, and which she is paying for by installments, and a Chevrolet Pick-up Truck purchased for defendant.

It also appeared at the trial that, about two years previously, plaintiff had ceased depositing funds in the parties' joint bank account, and had opened a separate checking account in Ada's First National Bank & Trust Company. She testified that she had $700.00 or $800.00 in that account. She also testified that she had "a little over three thousand dollars" in a separate savings account in said Bank. She further testified, in substance, that she had deposited, in this savings account, checks she had received from producing royalty from her separate mineral interests, as well as funds representing payments on the Brunkow-Houston note, that she had transferred from her savings account at Ada's Home Savings & Loan Association.

It further appeared, among other things, that, at the time of the trial, defendant was employed in two occupations, namely, as the operator of a rug cleaning machine for the Rogers' Carpet & Upholstering Cleaners, since April 1, 1967, and as both such an operator, and as a night custodial foreman and watchman for the E. H. Rogers Company at the Robert S. Kerr Research Center since July 1st of that year.

Defendant testified that he had always deposited the payments he had received on the LaSalle note in the parties' joint bank account, but that after plaintiff

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"pulled off and quit" this account two years before, and he got his next statement from the bank on said account, he "was hit for seven hundred dollars". He further testified that (at the time of the trial) there was only "nine dollars and forty some odd cents—" in that account, and that he had no other bank account, or bonds, or securities, or other assets of that character.

In the divorce decree herein complained of, the trial court specifically set apart to plaintiff, as her separate property, her aforementioned 1967 Chevrolet automobile, and all of the furnishings in the parties' home at 1038 South Francis, together with all of the mineral interests, and the interest in the Pecan Grove Trust, she inherited from her parents' aforementioned estates, as well as the Houston note and mortgage. The only item of the parties' real and personal property that was set apart to defendant, as his separate property, was the hereinbefore mentioned pick-up truck.

The rest of the parties' property was "declared to be owned equally by the parties * * * as co-tenants"; and the decree further provided: "In the event either or both of the parties hereto desires they may apply to this Court within six months for a partition of such property". After "this part" of the decree, the following items of the parties' property were designated as "subject" to it: (1) The hereinbefore mentioned savings account in the name of plaintiff at Home Savings & Loan Association, (2) the parties' hereinbefore mentioned checking accounts in the First National Bank & Trust Company, (3) the U.S. Savings Bonds in plaintiff's name, (4) the Freeport, Texas, lot, (5) the hereinbefore mentioned LaSalle note and mortgage, (6) the hereinbefore mentioned cemetery lots, and (7) that part of the Pete Morris property still owned by the parties, and consisting of their hereinbefore mentioned homestead at 1038 South Francis and the "Log Cabin" (Street No. "1017") property. As to these latter residential properties, the decree declared that the parties' joint tenancy was "hereby severed * * * the parties to hereinafter own" them "as tenants in common".

In argument under her first and third propositions, plaintiff contends that the court erred in vesting the items of property referred to above as "(1)" to "(4)", both inclusive, and item "(6)", in both parties as co-tenants, and in not setting apart to plaintiff, as her separate property, the aforementioned savings account in the First National Bank and the entire balance due on the Brown note, because the evidence shows that these items were either her separate funds, or constituted property derived therefrom. She points to testimony showing that she furnished $3,922.00, and that defendant contributed only $800.00, to the purchase of the Brown note.

[1] As hereinbefore indicated, the undisputed testimony shows that, about two years before the trial, plaintiff quit depositing her income and earnings in the parties' joint accounts, and started separate ones; and there can be little doubt that the balance in those accounts at the time of the trial ($3,000.00 in her savings account, and $700.00 in her checking account, in the First National Bank, and $400.00 in her account at Home Federal Savings & Loan Association) were all accumulated there from her salary as an employee of the O.U. Medical Center and from other individual income. Nor can there be any doubt but that the nine U.S. Savings Bonds that she purchased for $18.75 each out of her salary, the cemetery lots she was buying for a price of $545.00, and the stock in Atkinson Enterprises she had purchased for $120.00, were independent of any direct contribution by defendant. Nor does defendant claim that he contributed anything to plaintiff's purchase of the Freeport, Texas, (cabin site) lot for $1,300.00. All of these items should have a reconsideration by the trial court.

Plaintiff maintains that, in its decree, the court should have set aside to her the four-thousand-dollar down payment that the evidence shows the Ada Missionary Baptist

Church made on its purchase of the East 7th Street, former Bell, property (which defendant remodeled into apartments, as aforesaid) because it is an undisputed fact that the East 8th Street home she owned before the parties married was traded in (at a value of $6,500.00) on this property. She also says that since she contributed $3,922.00 to the purchase of the Brown note, as compared to the $800.00 defendant contributed to its purchase, the court should have awarded to her such pro rata part of the balance due on said note, which she says is $4,638.84 (defendant having received 86 installments of $53.94 each, or $4,638.84, already paid on it).

In, and under, her second proposition, plaintiff advances the further argument that the trial court's vesting of the title to the parties' presently-owned real estate in them, as co-tenants, is contrary to the property division authorized, or contemplated, in the following provision of Tit. 12 O.S.1961, § 1278:

> "* * *
>
> As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property *in kind*, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof." (Emphasis added.)

In support of her argument, plaintiff quotes this Court's opinions in Blount v. Blount, Okl., 425 P.2d 474, and Lawson v. Lawson, Okl., 295 P.2d 769, which defendant says are not applicable.

[2, 3] We must agree that the purported "division" of property ordered in the decree appealed from is not the sort of division contemplated in Section 1278, supra. In attempting to make the parties tenants in common in the Ada real estate they still owned at the time of the trial, the trial court freed none of it from the possessory rights, or claims, of either party. As showing that the creation of such a co-tenancy is not the division referred to in said Section, we quote the following from Lawson v. Lawson, supra:

> "To comply with the statute, the entire title with right of possession to part of the property should have been given to one and the entire title with right of possession to the remainder should have been given to the other. Neither should have been required to account to the other for what he or she did with the property or the income derived therefrom. If one party thereby was awarded property in excess of what the trial court thought he or she was equitably entitled to, a lien could be established thereon securing the payment of such sum as the court thought necessary to adjust the equities. In other words, the property awarded to each should be free from the claims or domination of the other."

While it may be that the trial court's decree (purporting to change the parties' interests from joint tenancies to tenancies in common) might be deemed sufficient as a "severance of the common title" plaintiff and defendant acquired in this real estate, by their joint tenancy deed—in a tenancy in common, one tenant may own only a life estate, while the other owns his part in fee simple. See American Bank & Trust Co. v. Continental Inv. Corp., 202 Okl. 341, 342, 213 P.2d 861, 863, quoting Tilton v. Vail, N.Y., 42 Hun., 638. That kind of a tenancy, with its unity of possession, and co-equal possessory rights in each tenant, was specifically rejected as not conforming to our Statute in Kupka v. Kupka, 190 Okl. 392, 124 P.2d 389. Notice also 27B C.J.S. "Divorce" § 292(1), p. 269, footnote 23.5.

[4, 5] While the trial court's recognition of the parties' rights to a true division of the property in kind (by mentioning in its decree they might apply for partition

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in six months) was commendable, it did not afford plaintiff the remedy she insists upon, and is entitled to, under Sec. 1278, supra. As said court erred in not correctly applying that statute to the facts of this case, its decree cannot stand. See Bouma v. Bouma, Okl., 439 P.2d 198, 201. As a rule, when this occurs, this Court will "effect a complete adjudication of the cause" (Moyers v. Moyers, Okl., 372 P.2d 844, 846), but here the evidence in the record is insufficient to enable us to do that. This, of necessity, will be the task of the trial court upon a partial new trial of this case.

[6] However, upon such new trial, all items of property which they owned at the time of their marriage, or credit therefor equivalent in value, should, to the extent possible, be given to each of the parties respectively in a new and different division of their jointly acquired property. As to plaintiff, this would include any excess in the value of the fee in her Creek County farm, over the value of said farm's minerals remaining in her, if, by any acceptable and approximately accurate method, such excess can be determined or measured. Such division should also include the value of her pre-marital Ada residence, for which the parties were later given a trade-in allowance of $6,500.00 on the Bell property.

[7] It is also our opinion that the share of the parties' jointly acquired property awarded to plaintiff in a new division of such property should include the sum of $3,922.00, with interest at the same rate that such sum would have drawn if it had been on deposit in a savings account at Ada's Home Savings & Loan Association. This sum that plaintiff invested in the Brown note, having come to her by inheritance and "[being] acquired by her in her own right" (Coleman v. Coleman, 180 Okl. 574, 72 P.2d 369, 1st syll.), was not "jointly acquired" property within the meaning of Sec. 1278, supra, and was not subject to division under said Statute. In this connection, notice Honeywell v. Honeywell, Okl., 344 P.2d 589, 591, and Williams v. Williams, Okl., 428 P.2d 218, 219, 222. Measuring the appreciation of her said investment in the Brown note, as herein decreed, will render it immune to defendant's argument that said sum was "enhanced" by his efforts in inducing her investment in said note.

In view of the foregoing, the order and/or judgment of the trial court overruling plaintiff's motion for a new trial is hereby affirmed to the extent that it leaves the parties' divorce decree undisturbed as to the property therein decreed to be plaintiff's separate property. It is hereby reversed as it concerns the Brown note and other items, of which plaintiff is to receive the benefit, as above indicated, in a new division of the parties' jointly acquired property; and this cause is remanded to the trial court for a partial new trial in accordance with the views herein expressed.

IRWIN, C. J., BERRY, V. C. J., and WILLIAMS, JACKSON, HODGES and LAVENDER, JJ., concur.

McINERNEY, J., concurs in part and dissents in part.

John B. DURFEE, Plaintiff in Error,
v.
Lowana M. DURFEE, Defendant in Error.
No. 42923.

Supreme Court of Oklahoma.
Dec. 16, 1969.
Rehearing Denied March 3, 1970.

Divorce proceeding. The District Court of Tulsa County, Fred Nelson, J., granted each party divorce from the other on ground of incompatibility, and husband appealed from portion of decree ordering

which an indictment for adultery may be returned. Section 4951 [§ 609.36] bars a prosecution unless commenced within one year after the commission of the offense, but if such prosecution be commenced by the institution of proper proceedings before an examining magistrate within the year, the indictment may be returned at any time within the three years prescribed by section 5313."

Thereafter, in *Dlugi*, supra, the Minnesota Court held that if no prosecution had been commenced within one year from the date upon which the indictment charged that the offense was committed, a motion to set aside the indictment upon that ground would lie.

[3] It is evident that the limitations provisions of § 609.36 and those of § 628.26 were intended to serve two entirely different public purposes. The purpose of § 628.26 was to establish a general limitations provision for all criminal proceedings founded on indictments. The limitations provisions of § 609.36 were intended to implement the public policy of Minnesota that no person other than the injured husband or wife should complain of the wrong done, [*State v. Brecht*, 41 Minn. 50, 42 N. W. 602] and that the injured husband or wife must make such complaint within one year. *State v. Dlugi*, supra.

We hold that under the applicable laws of the State of Minnesota the statute of limitations peculiar to the offense with which petitioner might be charged has run. There is no legal possibility of a criminal prosecution arising from petitioner's conduct in Minnesota which would entitle him to the Fifth Amendment privilege against self incrimination.

Petitioner has also suggested the potential of federal prosecution. Nothing in the pleadings nor any questions propounded to petitioner as a witness raised factual questions which would suggest potential criminal liability under federal law. Should such facts arise or such questions be asked, petitioner might at that time assert the privilege to refuse to answer questions related thereto.

Original jurisdiction assumed; Writ of Habeas Corpus and Writ of Prohibition and /or Mandamus denied.

WILLIAMS, C. J., HODGES, V. C. J., and DAVISON, BERRY, LAVENDER, SIMMS and REYNOLDS, JJ., concur.

BARNES, J., not participating.

DOOLIN, J., having certified his disqualification, the Honorable LESTER A. REYNOLDS, Presiding Judge of the Court of Appeals, Div. 1, was appointed in his stead.

Dorothy Mae PHILLIPS, Appellee,

v.

Jean L. PHILLIPS, Appellant.

No. 48260.

Supreme Court of Oklahoma.

Nov. 9, 1976.

Wife brought suit for divorce. The District Court, Oklahoma County, Floyd L. Martin, J., granted wife a divorce for the fault of her husband, divided their property and required the husband to pay $13,500 of the wife's $20,000 attorney fee. The Court of Appeals, Division No. 2, affirmed, but modified the judgment as to both property division and attorney fee and wife filed petition for certiorari. The Supreme Court, Lavender, J., held that the divisional equality in property sought by the trial court's judgment did not improperly include the inherited separate property of the husband and the judgment was not clearly against the weight of the evidence;

that an award of attorney fee to the wife was not limited to an economic need for securing competent legal help; and that the attorney fee awarded was not an abuse of discretion.

Certiorari granted; opinion of Court of Appeals withdrawn; decision of trial court affirmed without modification.

Hodges, V. C. J., dissented.

1. Judgment ⇐191

Judgment is "rendered" when pronounced by court.

See publication Words and Phrases for other judicial constructions and definitions.

2. Divorce ⇐252, 253

In divorce action, divisional equality in property sought by trial court's judgment did not improperly include inherited and separate property of husband and was not clearly against weight of evidence.

3. Divorce ⇐252

In granting divorce, court has wide latitude in determining what part of jointly acquired property shall be given to each party.

4. Divorce ⇐221

Award of attorney fee in divorce suit is not limited to wife's economic need for securing competent legal help.

5. Divorce ⇐227(1), 286(4)

In awarding attorney fee in divorce case, court should consider parties and all circumstances in case, including means and property of respective parties under property division; and before such award will be reversed, it must clearly appear that trial court abused its discretion.

6. Divorce ⇐223

In divorce action, trial court did not abuse its discretion in requiring husband to pay $13,500 of wife's $20,000 attorney fee.

CERTIORARI TO THE COURT OF APPEALS, DIVISION NO. 2.

Appeal from the District Court of Oklahoma County; Honorable Floyd L. Martin, Trial Judge. A divorce action. The husband appealed judgment as to division of property and assessment of attorney's fees. The Court of Appeals, Division No. 2 affirmed but modified the judgment as to both issues. Appellee wife filed her petition for certiorari.

CERTIORARI GRANTED; OPINION OF THE COURT OF APPEALS WITHDRAWN; DECISION OF THE TRIAL COURT AFFIRMED WITHOUT MODIFICATION.

James W. Bill Berry, Howard K. Berry, Jr., Berry, Nesbitt & Berry, Oklahoma City, for appellee.

John M. Sheehan, McClelland, Collins, Sheehan, Bailey & Bailey, Jerry L. Mash, Oklahoma City, for appellant.

LAVENDER, Justice:

Dorothy Mae Phillips (wife) brought suit for divorce against Jean L. Phillips (husband) September 5, 1972. Some twenty-eight months later the matter was heard on its merits January 10 and 17, 1975. Trial judge announced his judgment on conclusion of the second hearing. That judgment granted wife a divorce for the fault of the husband. It also made division of their property. Thereafter a hearing was held and determination made as to attorney's fee. The trial court required husband to pay $13,500 of a $20,000 attorney fee of the wife's. The husband appealed as to the division of property and payment of attorney's fees.

The marriage had been of some 38 years duration. He was a capable and well-trained business man. He had been president of a bank. At time of the divorce, he was approximately 63 years old, and was in fair health. She had been employed in the earlier years of the marriage for about

fifteen years. This ended in 19
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The Court of Appeals opinion t
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was considerable commingling o
in various areas and because
really possible, I thought, *to ha*
of accounting, dollar and cent pre
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seem that it has been * * *

fifteen years. This ended in 1955. She was approximately 58 years old when the divorce was granted. He was judicially found at fault.

The Court of Appeals opinion took as a basis for division of the property a "Statement of Assets" prepared by the wife's CPA and introduced by her into evidence, as Exhibit #15. That statement set forth values as to items of property. If values were in conflict under the evidence, the average was used. It showed assets of nearly $550,000. Included was a one-fifth interest in 169 acres inherited by the husband with a value in the exhibit of $82,250. The opinion concluded that item was included in the trial judge's stated effort to evenly divide the property. Its inclusion was found in error under *Palmer v. Palmer*, Okl., 465 P.2d 156 (1969). It removed that value from consideration in the division. The opinion sought to equalize the value by modifying the trial court's judgment in removing from the wife's award of property noted as "Fifth Street Property-Yukon" with a value in the exhibit of $35,000 and a reduction of cash to her in a savings account of $8,293.11. This resulted in a total adjustment or reduction of the property award to the wife of $43,293.11.

In seeking certiorari, the wife's principal arguments concern themselves with demonstrating the basic exhibit of assets used in the Court of Appeals opinion did not include assets liquidated by the husband during the twenty-eight months from the time the divorce action was filed and the trial court's judgment. Nor had the liquidations been strictly accounted for by the husband.

In response, the husband argued the principal transactions were included in a cash flow exhibit (No. 16) as to the husband and introduced into evidence by the wife as prepared by her CPA. No effort or explanation is made as to the effect the cash flow exhibit has on the items and values included in the statement of assets (Exhibit No. 15).

[1] If the journal entry of judgment is considered alone, it could support the Court of Appeals conclusion the trial court sought to include in the division of property the separate inherited property of the husband. We conclude otherwise by the "rendered" judgment as pronounced by the trial court at the end of the second hearing.[1] A judgment is "rendered" when

1. "Then, gentlemen, I think I am ready to announce judgment in this case.

"Gentlemen, before announcing my judgment I think I should say for the record that I have spent really considerable time in reviewing the evidence in this case, reviewing the file, as you would notice, I did notice those things, I have been through this case in some detail.

"I have attempted in this judgment to divide this property in an equitable way almost *evenly in value after putting my values on it. I have not* in every case *followed the value of any particular witness*, but have made my own decisions about some of these matters.

"I should also inform you *because there was considerable commingling of the cash* in various areas and because *it was not really possible*, I thought, *to have the kind of accounting, dollar and cent precision in it*, that it may be that at first it will not seem that it has been * * * done that carefully, but I thought that I should explain that for the record.

"Also, I have attempted to *take into consideration* here the various items that are in *evidence of expenditures in some cases from joint funds, some cases from private funds, and adopt adjustments in the division of property based on that evidence.*

"Gentlemen, it is the order and judgment of the Court that the plaintiff will have and be awarded that portion of the homestead property identified as the 94.3 acres on Defendant's Exhibit 1.

"* * * let me first deal with the plaintiff's award in its entirety.

* * * * *

"* * *: I have also determined that the plaintiff should have the office building in Yukon; the note receivable from the farm sale that I believe was referred to as the Brown note; the 1966 Mercury automobile; all of the bank accounts, both checking and savings now held in her name.

pronounced by the court. *Taliferro v. Batis,* 123 Okl. 59, 252 P. 845 (1927). This is the same judgment, rendered through the trial court's pronouncement, relied upon by the Court of Appeals opinion for divisional equality.

The judgment rendered January 17, 1975, shows the trial court did not use or base his judgment of values exclusively on the exhibit used by the Court of Appeals. He did not follow the values of any particular witness. He made division in an equitable way and almost evenly in values as determined by him under the evidence. Because of considerable commingling of cash, including expenditures from joint accounts and private funds, there could be no exact accounting. He adopted adjustments in the division of property to compensate for that lack of exact accounting.

The judgment gave the wife the homestead property (less acreage requested by the husband), an office building in Yukon, the Brown note, an automobile and the bank accounts in her name. The defendant was "awarded *all of the other property of the parties* including the joint checking account" at a bank.

[2, 3] We hold the divisional equality sought by the trial court's judgment did not include the inherited and separate property of the husband. That division was not intended equal to the dollars and cents. Its equality included consideration of the trial court's value found under the evidence and adjustments caused in commingling of funds, particularly in liquidation of property during the twenty-eight month period between the filing of the action and the rendering of judgment. The record was reviewed. We agree with the trial court that it is not possible to have the kind of accounting with dollars and cents precision in it. The judgment is not clearly against the weight of the evidence. In granting a divorce, the court has wide latitude in determining what part of jointly acquired property shall be given to each party. *Roemer v. Roemer,* Okl., 373 P.2d 55 (1962).

[4–6] The rationale, in the Court of Appeals opinion, for reversing the trial court's award of $13,500 of the wife's total attorney fee of $20,000 against the husband would limit the trial court's award to an economic need for securing competent legal help. No authorities are cited. In *McCoy v. McCoy,* Okl., 429 P.2d 999 (1967) this court said the trial court was vested with a wide discretion. It should consider the parties, and all of the circumstances in the case, including the means and property of the respective parties under the property division. Before such an order will be reversed, it must clearly appear that the trial court abused its discretion. No such abuse is found in this case.

Certiorari is granted. The opinion of the Court of Appeals is withdrawn and the decision of the trial court is affirmed without modification.

WILLIAMS, C. J., and DAVISON, IRWIN, BERRY, BARNES, SIMMS and DOOLIN, JJ., concur.

HODGES, V. C. J., dissents.

"The defendant is hereby awarded all of the other property of the parties including the joint checking account at Citizens National Bank in Oklahoma City." (Emphasis added.)

Richmond SANDER
Sanders, A
v.
The STATE of Okl
No. F-7
Court of Criminal Ap
Nov. 3,

Defendant was c
Court, Oklahoma, Cou
feh, J., of murder in t
sentenced to death, an
Court of Criminal A
held that circumstanti
ficient to sustain conv
the first degree; that
support instructions o
ond degree, manslaug
gree and manslaughte
gree; that method u
jury was not shown t
jury biased in favor
that trial court did no
participating in voir d
the death penalty on
ment was not within
tion.

Sentence modifie

1. Homicide ⇐22(2)
Essential element
first degree are a
without authority of
tated design to effect
son killed and perpetr
mission of an arme
Supp.1973, § 701.1.

2. Homicide ⇐253(2)
Circumstantial ev
had the only gun at
pointed it at decedent
last time being a mon
ing, was sufficient
for murder in the f
Supp.1973, § 701.1; 2
O.S.1971, §§ 702, 703.

TESTIMONY BEFORE JUDICIARY COMMITTEE ON HOUSE BILL 2639

Mr. Chairman and members of the committee:

I want to visit with you about an estate planning problem that I hear more and more about from the people in my area. I can see this problem building a wall between members of families, brick by brick, as people are getting mad enough to talk more openly about the consequences of property settlements in these days of frequent divorce.

Let me give you a case scenario of what I am hearing. I'll bet most of you have heard something similar.

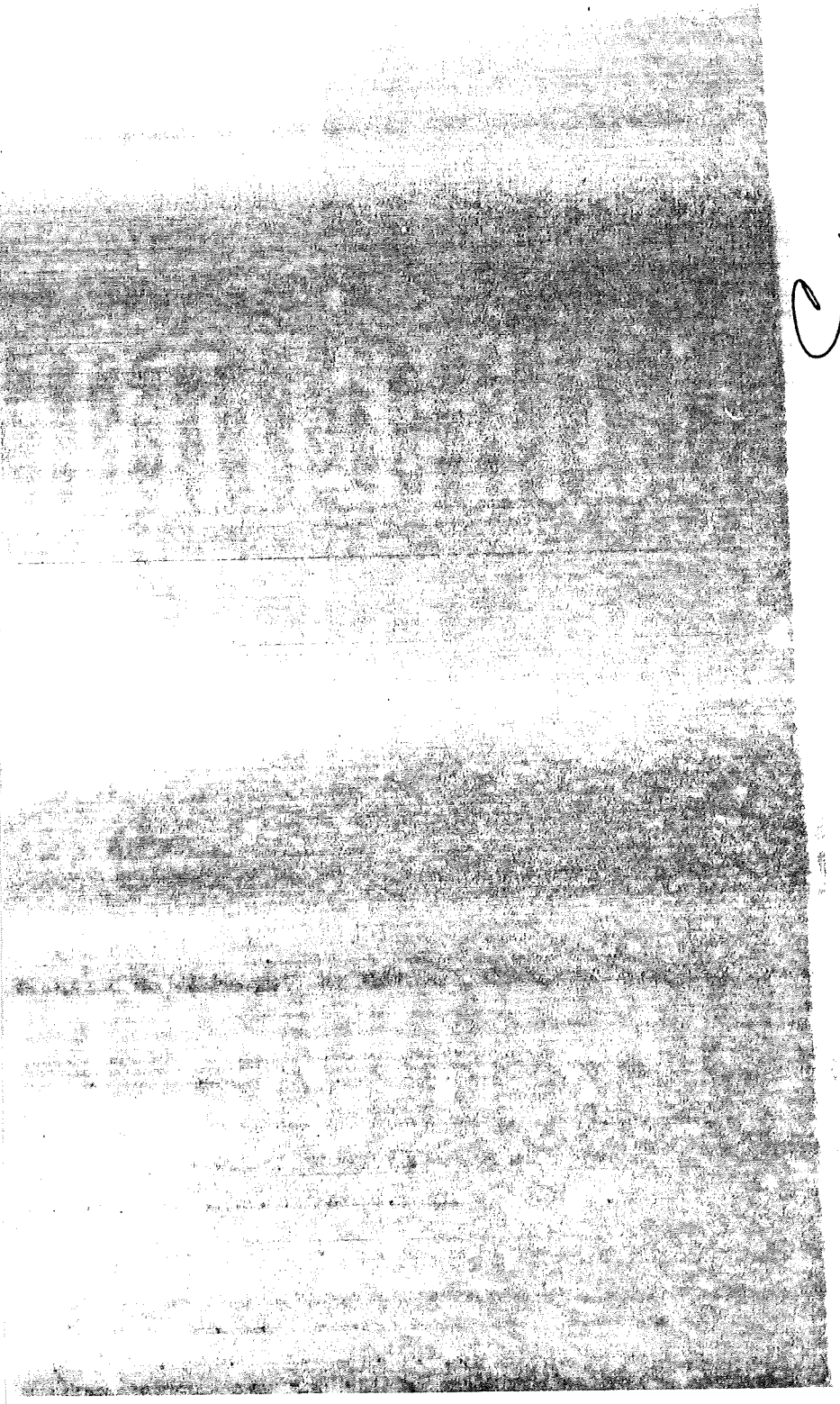
"When the kids got married a few years ago, Mom and I moved to town and let them move into our house on the farm. Since I intended to leave part of the farm to them anyway, I thought I would start by giving them the home quarter in my estate planning. Next thing I know, the kids are divorced, and the place that has been in my family for two generations belongs to the ex-son-in-law or daughter-in-law whichever the case may be."

I have visited with attorneys and judges who say that, by and large, most judges take into consideration where gifted property comes from, and try to distribute the property to the person who originally received the gift. My answer to this is: why are just <u>most</u> of the judges doing this? Why not <u>all of them</u>? I can see that 60-1610 gives a faint hint that the source of gifts should be considered, but I think a little stronger guidance in the statutes would be helpful to some judges, and I do not think we are taking any discretion from a judge to make his decision on a case by case basis. I think Lines 164, 165 and 166 gives this discretion.

What we are asking for in this bill is not unprecedented in other states. Besides what Representative Buehler gave you from Oklahoma, you will find in my material there is similar language in the Colorado, Missouri, Wisconsin and Illinois statutes. I am sure there are others, but these are states closer to ours that I found.

As I said at the outset of my presentation, this is something that is needed to promote better family relations in the process of estate planning.

Attachment 8
House Judiciary
1-30-86



(1)

Colorado

therein, there being no authority for the allowance of attorney's fees to the wife, the court was without authority to award such fees. Irwin v. Irwin, 150 Colo. 261, 372 P.2d 440 (1962); Newey v. Newey, 161 Colo. 395, 421 P.2d 464, 422 P.2d 641 (1967).

Also, the trial court, in determining the pecuniary provision for the wife upon granting a decree of divorce to her, has no right to disregard a previous agreement free from fraud, collusion, or compulsion, and fair to her, entered into between her and her husband in contemplation of a divorce, settling and adjusting all their property rights, including dower, alimony, and support. Newey v. Newey, 161 Colo. 395, 421 P.2d 464, 422 P.2d 641 (1967).

And where there was a self-operative trust agreement between the parties to a divorce action in settlement of their property rights, such agreement was binding upon the parties, and the court was without jurisdiction to set it aside, no showing of fraud, duress, or mistake appearing. Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955).

Formerly, an agreement between husband and wife which provided for alimony or property settlement in contemplation of divorce was presumptively fair, and the burden was on the wife to establish the contrary. Newey v. Newey, 161 Colo. 395, 421 P.2d 464, 422 P.2d 641 (1967).

A reference to a separation agreement and an approval thereof by the court is sufficient to make it a part of the decree. Berglund v. Berglund, 28 Colo. App. 382, 474 P.2d 800 (1970).

But formerly, where the stipulation and property settlement was approved by the courts, but the terms thereof were not set forth in a decree of divorce, the rights of the parties rested upon a contract, and not upon the decree, and were contractual and not decreed rights and obligations. Murphy v. Murphy, 138 Colo. 516, 335 P.2d 280 (1959); Cawley v. Cawley, 139 Colo. 439, 340 P.2d 122 (1959).

And where a trial court in a divorce action had no part in determining the property and financial rights of the parties, other than to approve and confirm an agreement purporting to settle all such financial and property rights, the incorporation of such agreement by references in the interlocutory or final decree in the action did not make the terms of such agreement an order or decree of the court, and was not a determination by the court of the respective rights of the parties, but was their voluntary adjustment of their differences, and unless the terms thereof are adopted by the court and fully and specifically set forth in the order or decree, the rights of the parties rest wholly upon the contract and not upon the decree of the court. Murphy v. Murphy, 138 Colo. 516, 335 P.2d 280 (1959).

The terms of any agreement must have been fully and specifically set forth in a decree. Murphy v. Murphy, 138 Colo. 516, 335 P.2d 280 (1959).

And if an executed agreement for a division of property was not incorporated in or made a part of an interlocutory and final decree of divorce, and was not reserved for future action, it was not merged in the divorce proceedings. Cawley v. Cawley, 139 Colo. 439, 340 P.2d 122 (1959).

And if the property rights and obligations of the parties to a divorce action who had entered into a settlement agreement were to rest upon the court decree, then any such agreement as to those rights should have been fully and specifically set forth in the decree in order that the duties and rights could be definitely ascertained from the decree itself. Taylor v. Taylor, 147 Colo. 140, 362 P.2d 1027 (1961).

Also, formerly where parties to a divorce action entered into a binding contract settling all their differences, the obligation of each to the other stemmed from the contract, and relief, if any, must have been based upon the rights of the parties under the contract. Irwin v. Irwin, 150 Colo. 261, 372 P.2d 440 (1962).

Formerly where parties to a divorce action entered into an agreement settling their property rights, which agreement it incorporated in the final decree, the court was thereafter without jurisdiction — no fraud in procuring the settlement appearing — to modify the terms of the decree concerning such property rights in the absence of consent of the parties. Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955); Magarrell v. Magarrell, 144 Colo. 22[illegible] 355 P.2d 946 (1960); Lay v. Lay, 162 Colo. 4[illegible] 425 P.2d 704 (1967); Berglund v. Berglund, 2[illegible] Colo. App. 382, 474 P.2d 800 (1970); Watso[illegible] v. Watson, 29 Colo. App. 449, 485 P.2d 9[illegible] (1971); Ingels v. Ingels, 29 Colo. App. 58[illegible] 487 P.2d 812 (1971).

14-10-113. Disposition of property. (1) In a proceeding for dissolution of marriage or for legal separation or a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property and shall divide the ma[illegible]

CONTINUED

(2)

tal property, without regard to marital misconduct, in such proportions as the court deems just after considering all relevant factors including:

(a) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;

(b) The value of the property set apart to each spouse;

(c) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children; and

(d) Any increases or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes.

(2) For purposes of this article only, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent;

(b) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation; and

(d) Property excluded by valid agreement of the parties.

(3) All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

(4) An asset of a spouse acquired prior to the marriage or in accordance with subsection (2) (a) or (2) (b) of this section shall be considered as marital property, for purposes of this article only, to the extent that its present value exceeds its value at the time of the marriage or at the time of acquisition if acquired after the marriage.

(5) For purposes of this section only, property shall be valued as of the date of the decree or as of the date of the hearing on disposition of property if such hearing precedes the date of the decree.

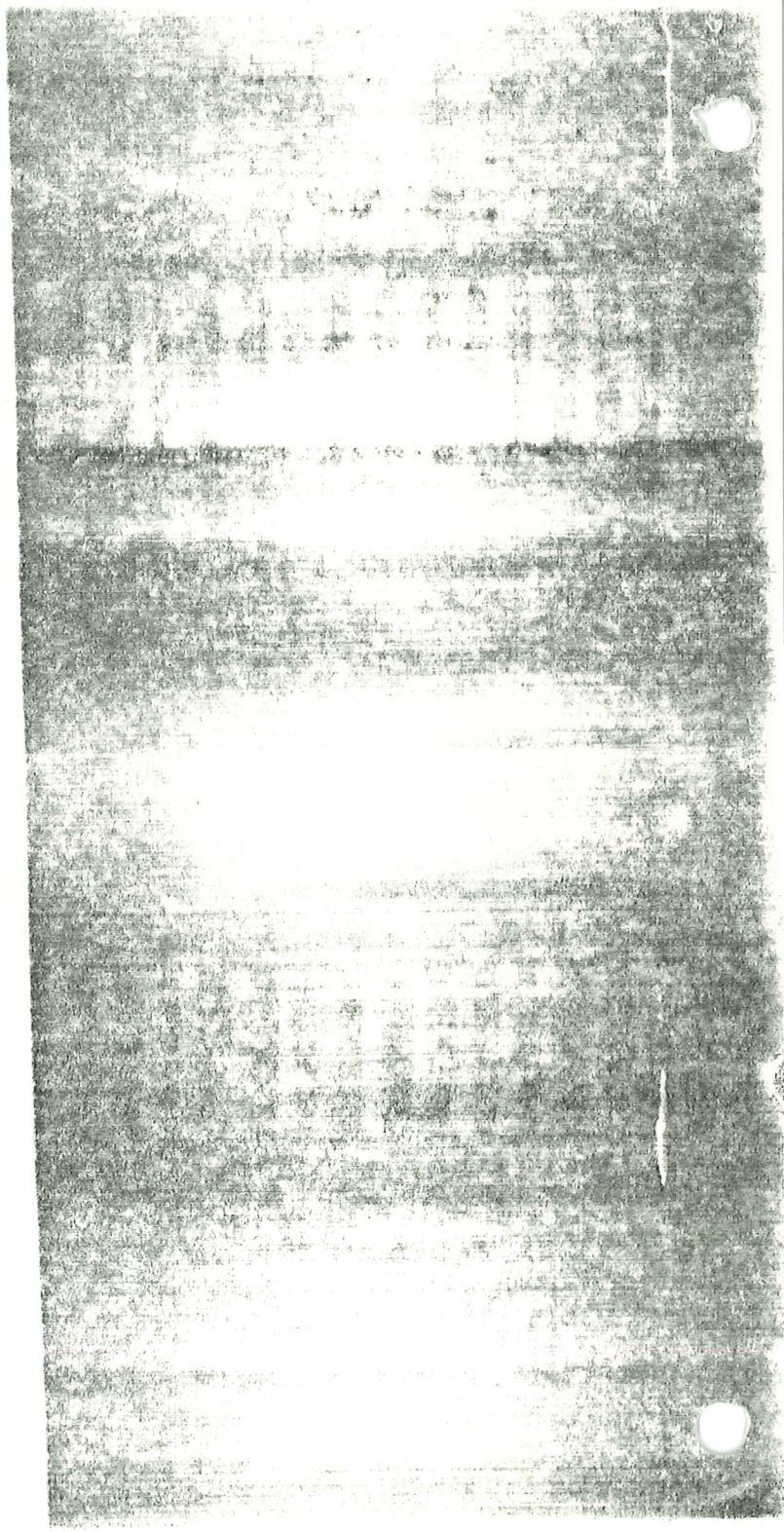
Source: R & RE, L. 71, p. 525, § 1; C.R.S. 1963, § 46-1-13; L. 73, pp. 553, 555, § § 6, 7, 12.

Am. Jur. See 24 Am. Jur.2d, Divorce and Separation, § § 925-934.

C.J.S See 27B C.J.S., Divorce, § § 291-298.

Annotator's note. Since § 14-10-113 is similar to repealed § 46-1-5(2), C.R.S. 1963, § 46-1-5, CRS 53, CSA, C. 56, § 8, and laws antecedent thereto, relevant cases construing these provisions have been included in the annotations to § 14-10-113.

The division of property in a divorce action is a matter within the sound discretion of the trial court, and its judgment will not be disturbed on review unless it is shown that the division made was an abuse of discretion. Granato v. Granato, 130 Colo. 439, 277 P.2d 236 (1954); Todd v. Todd, 133 Colo. 1, 291 P.2d 386 (1955); Britt v. Britt, 137 Colo. 524, 328 P.2d 947 (1958); Drake v. Drake, 138 Colo. 388, 33 P.2d 1038 (1959); Bell v. Bell, 150 Colo. 174, 371 P.2d 773 (1962); Cohan v. Cohan, 150 Colo. 249, 372 P.2d 149 (1962); Harvey v. Harvey, 150 Colo. 449, 373 P.2d 304 (1962); Liggett v. Liggett, 152 Colo. 110, 380 P.2d 673 (1963); Bell v. Bell, 156 Colo. 513, 400 P.2d 440 (1965); Larrick v. Larrick, 30 Colo. App. 327, 491 P.2d 1401 (1971); Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972); Jekot v. Jekot, — Colo. App. —, 507 P.2d 473 (1973).



Missouri

Note 8
make factual determination based on parties' economic circumstances. Clapper v. Clapper (App.1984) 674 S.W.2d 656.

452.330. Disposition of property, factors to be considered

1. In a proceeding for dissolution of the marriage or legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors including:

(1) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;

(2) The value of the property set apart to each spouse;

(3) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children; and

(4) The conduct of the parties during the marriage.

2. For purposes of sections 452.300 to 452.415 only, **"marital property"** means all property acquired by either spouse subsequent to the marriage except:

(1) Property acquired by gift, bequest, devise, or descent;

(2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(3) Property acquired by a spouse after a decree of legal separation;

(4) Property excluded by valid agreement of the parties; and

(5) The increase in value of property acquired prior to the marriage.

3. All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. Each spouse has a common ownership in marital property which vests not later than the time of commencement by one spouse against the other of an action in which a final decree is entered for dissolution of the marriage or legal separation, the extent of the vested interest to be determined and finalized by the court pursuant to this chapter. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection 2.

4. The court's order as it affects distribution of marital property shall be a final order not subject to modification.

5. A certified copy of any decree of court affecting title to real estate shall forthwith be filed for record in the office of the recorder of deeds of the county and state in which the real estate is situate by the clerk of the court in which the decree was made, and the filing fees shall be taxed as costs in the cause.

(Amended by L. 1981, p. 615, § 1.)

Law Review Commentaries

Confidential communications privilege of husband and wife: Application under Missouri Dissolution Statute. 43 Mo.L.Rev. 235 (1978).

Husband's "Vested" interest in retirement plan is divisible as marital property. 42 Mo.L. Rev. 143 (1977).

Wisconsin

767.255 Property division

Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02(1)(h), the court shall divide the property of the parties and divest and transfer the title of any such property accordingly. A certified copy of the portion of the judgment which affects title to real estate shall be recorded in the office of the register of deeds of the county in which the lands so affected are situated. The court may protect and promote the best interests of the children by setting aside a portion of the property of the parties in a separate fund or trust for the support, maintenance, education and general welfare of any minor children of the parties. Any property shown to have been acquired by either party prior to or during the course of the marriage as a gift, bequest, devise or inheritance or to have been paid for by either party with funds so acquired shall remain the property of such party and may not be subjected to a property division under this section except upon a finding that refusal to divide such property will create a hardship on the other party or on the children of the marriage, and in that event the court may divest the party of such property in a fair and equitable manner. The court shall presume that all other property is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering:

(1) The length of the marriage.

(2) The property brought to the marriage by each party.

(2r) Whether one of the parties has substantial assets not subject to division by the court.

(3) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(4) The age and physical and emotional health of the parties.

(5) The contribution by one party to the education, training or increased earning power of the other.

(6) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(7) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having custody of any children.

(8) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.

(9) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(10) The tax consequences to each party.

(11) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(12) Such other factors as the court may in each individual case determine to be relevant.

Historical Note

Source:

L.1977, c. 105, § 41.
St.1977, § 247.255.
L.1979, c. 32, §§ 50, 92(4), eff. July 20, 1979.
L.1979, c. 196, §§ 29, 30, eff. Aug. 1, 1980.

Prior Laws:

R.S.1849, c. 79, §§ 22, 24, 29.
R.S.1858, c. 111, §§ 1, 22, 24, 29.
R.S.1878, §§ 2364, 2371, 2372.
St.1898, §§ 2364, 2371, 2372.
L.1909, c. 323.
L.1919, c. 128.
L.1925, c. 4.
St. 1925, §§ 247.26, 247.34, 247.35.
L.1935, c. 379.
L.1945, c. 25.
L.1959, c. 595, §§ 66, 69.
L.1961, c. 406.
St.1969, § 247.35.
L.1971, c. 220, §§ 12, 16, 17.
L.1973, c. 12, § 37.
St.1975, §§ 247.26, 247.34.
L.1977, c. 105, § 50.

Applicability. L.1979, c. 196, § 49, provides:

"This act applies to all actions affecting marriage and to all motions concerning actions affecting marriage which are commenced or filed on or after the effective date of this act, including motions or actions for modification or enforcement of orders entered prior to the effective date of this act."

Effective date. L.1977, c. 105, § 62, provides:

"(1) This act applies to all actions affecting marriage, and to all actions for modification or enforcement of previously entered orders in actions affecting marriage, which are commenced on and after the effective date of this act.

"(2) This act shall take effect on the first day of the 4th month after its publication."

[Published October 15, 1977].

Legislative purpose. For a statement of the intent of the legislature in enacting L.1977, c. 105, relating to revision of the laws applicable to actions affecting marriage, see the note following W.S.A. § 767.01.

Cross References

Disclosure of assets, see § 767.27.
Disposition of assets prior to action, see § 767.275.
Enforcement of financial obligation, contempt, see § 767.305.

Source:
1983 Act 186, § 47, eff. Jan. 1, 1986.

Former Sections:
St.1981, § 766.15 was renumbered § 766.97(1) by 1983 Act 186, § 48, eff. Jan. 1, 1986; the section title was repealed by § 49 of the same act.

766.17. Variation by marital property agreement

Text of section eff. Jan. 1, 1986.

Except as provided in ss. 766.15, 766.55(4m), 766.57(3) and 766.58(2), a marital property agreement may vary the effect of this chapter.

Source:
1983 Act 186, § 47, eff. Jan. 1, 1986.

Law Review Commentaries
Marital agreements: An important financial planning tool. Linda Roberson and Richard J. Langer. 57 Wis.Bar Bull. 29 (July 1984).

766.31. Classification of property of spouses

Text of section eff. Jan. 1, 1986.

(1) All property of spouses is marital property except that which is classified otherwise by this chapter.

(2) All property of spouses is presumed to be marital property.

(3) Each spouse has a present undivided 50% interest in marital property, but the marital property interest of the nonemploye spouse in a deferred employment benefit plan terminates at the death of the nonemploye spouse if he or she predeceases the employe spouse.

(4) Income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property.

(5) Marital property transferred to a trust remains marital property.

(6) Property owned by a spouse at a marriage after the determination date is individual property.

(7) Property acquired by a spouse during marriage and after the determination date is individual property if acquired by any of the following means:

(a) By gift during lifetime or by a disposition at death by a 3rd person to that spouse and not to both spouses. A distribution from a trust ~~created by a 3rd person~~ to one spouse is the individual property of that spouse.

(b) In exchange for or with the proceeds of other individual property of the spouse.

(c) From appreciation of the spouse's individual property except to the extent that the appreciation is classified as marital property under s. 766.63.

(d) By a decree, marital property agreement, written consent or reclassification under sub. (10) designating it as the individual property of the spouse.

(e) As a recovery for damage to property under s. 766.70, except as specifically provided otherwise in a decree, marital property agreement or written consent.

(f) As a recovery for personal injury except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage.

(8) Except as provided otherwise in this chapter, the enactment of this chapter does not alter the classification and ownership rights of property acquired before the determination date.

(9) Except as provided otherwise in this chapter and except to the extent that it would affect the spouse's ownership rights in the property existing before the determination

Changes or additions in text are indicated by underline

finding that husband was able to pay amounts due under dissolution decree. In re Marriage of Ramos, App. 1 Dist.1984, 81 Ill.Dec. 214, 126 Ill.App.3d 391, 466 N.E.2d 1016.

Testimony of former husband that very little was left after paying expenses was insufficient to sustain his burden of showing he was financially unable to make required payments under dissolution decree, where trial court could have found that husband had assets valued at as much as $20 million dollars, and it appeared that $790,900 passed through his hands in certain period, and thus finding that husband was in willful contempt for failure to pay was not contrary to manifest weight of the evidence. In re Marriage of Ramos, App. 1 Dist.1984, 81 Ill.Dec. 214, 126 Ill.App.3d 391, 466 N.E.2d 1016.

84. —— Coercion or duress, sufficiency of evidence

Unconscionability standard of this paragraph was properly applied to parties' separation agreement which trial court found not unconscionable after hearing evidence and considering circumstances surrounding execution of agreement to insure that agreement was not result of duress, fraud, misrepresentation or concealment of assets, and considering economic circumstances of parties to determine one-sidedness or oppressiveness of agreement. In re Marriage of Miller, 1981, 54 Ill.Dec. 439, 98 Ill.App.3d 1084, 424 N.E.2d 1342.

85. Review—In general

Standard governing judicial review of a property settlement agreement incorporated in a judgment of dissolution is whether, after considering economic circumstances of parties and any other relevant evidence produced by parties, property settlement can be said to be unconscionable. In re Marriage of Foster, App.5 Dist.1983, 71 Ill.Dec. 761, 115 Ill.App.3d 969, 451 N.E.2d 915.

On review of determination as to unconscionability of separation agreement, trial court's finding will stand unless it is against manifest weight of evidence. In re Marriage of Miller, 1981, 54 Ill.Dec. 439, 98 Ill.App.3d 1084, 424 N.E.2d 1342.

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view

Property settlement which was incorporated in judgment of dissolution and which consisted, in part, of allowing husband to retain 11.78 acres of land, a $15,000 mobile home encumbered with a $5,000 debt, a $15,000 barn encumbered with a $9,800 debt, and a $26,000 inventory of parties' business encumbered by a $27,500 debt, and allowing wife to retain two horses valued at $3,000, equipment and appliances valued at over $3,000, an automobile valued at $2,500, $20,000 in cash, and seven years' buying rights at ten percent over wholesale at parties' business was not totally one-sided and, hence, was not subject to being set aside as unconscionable. In re Marriage of Foster, App.5 Dist.1983, 71 Ill.Dec. 761, 115 Ill.App.3d 969, 451 N.E.2d 915.

Refusal to adjudicate husband's complaint against wife for declaratory judgment of rights of parties under agreed order incorporating partial marital settlement agreement on ground of possibility that dissolution of marriage proceedings might eventually have ensued was error. Stern v. Stern, 1982, 61 Ill.Dec. 567, 105 Ill.App.3d 805, 434 N.E.2d 1164.

91. —— Findings, review

On appeal from judgment awarding divorced wife damages as a result of divorced husband's willful violation of property settlement agreement incorporated in dissolution of marriage judgment, divorced husband was not barred from attacking trial court's finding that he had willfully violated the agreement on the ground that such finding was based on a prior hearing, the transcript of which was not in the record, since the prior order was not a final order but an interim finding and divorced wife did not stand on that earlier finding at subsequent hearing but introduced evidence pertinent to the issue at that time. Anthony v. Anthony, 1981, 50 Ill.Dec. 227, 94 Ill.App.3d 827, 419 N.E.2d 94.

Trial court's finding that husband willfully violated property settlement agreement incorporated in dissolution of marriage decree by rejecting third party's offer to purchase the marital home was against manifest weight of evidence, since house had been placed on the market within time provided in agreement, and husband, after rejecting third party's offer to purchase the house, offered to buy out wife's interest for as much as or more than she would have received under the rejected offer. Id.

503. Disposition of property

§ 503. Disposition of property. (a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, legacy or descent;

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse;

(6) property acquired before the marriage;

(cont.)

(1)

(7) the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

(b) For purposes of distribution of property pursuant to this Section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.

(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

(1) When marital and non-marital property are commingled by contributing one estate of property into another resulting in a loss of identity of the contributed property, the classification of the contributed property is transmuted to the estate receiving the contribution, subject to the provisions of paragraph (2) of this subsection; provided that if marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection.

(2) When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to non-marital property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation; provided, that no such reimbursement shall be made with respect to a contribution which is not retraceable by clear and convincing evidence, or was a gift, or, in the case of a contribution of personal effort of a spouse to non-marital property, unless the effort is significant and results in substantial appreciation of the non-marital property. Personal effort of a spouse shall be deemed a contribution by the marital estate. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;

(2) the value of the property set apart to each spouse;

(3) the duration of the marriage;

(4) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(8) the custodial provisions for any children;

(9) whether the apportionment is in lieu of or in addition to maintenance;

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(11) the tax consequences of the property division upon the respective economic circumstances of the parties.

(e) Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action. Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.

(f) A transfer of marital property from one spouse to another in acknowledgment of their respective contributions to the accumulated marital estate, either by agreement or by order of court, is a division of the common ownership of marital property. Such a transfer is not a taxable event.

(g) The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent child of the parties.

(h) Unless specifically directed by a reviewing court, the court shall not on remand consider any increase or decrease in the value of any "marital" or "non-marital" property occurring since the assessment of such property at the original trial or hearing, but shall use only that assessment made at the original trial or hearing.

(i) The court may make such judgments affecting the marital property as may be just and may enforce such judgments by ordering a sale of marital property, with proceeds therefrom to be applied as determined by the court.

Amended by P.A. 82-566, § 1, eff. Jan. 1, 1982; P.A. 82-569, § 1, eff. Sept. 24, 1981; P.A. 82-668, § 1, eff. Jan. 1, 1982; P.A. 82-715, § 1, eff. July 1, 1982; P.A. 82-783, Art. III, § 23, eff. July 13, 1982; P.A. 83-129, § 1, eff. Aug. 19, 1983; P.A. 83-388, § 36, eff. Sept. 16, 1983; P.A. 83-563, § 1, eff. Jan. 1, 1984; P.A. 83-564, § 1, eff. Jan. 1, 1984; P.A. 83-1362, Art. II, § 49, eff. Sept. 11, 1984.

Supplement to Historical and Practice Notes

By Marshall J. Auerbach, Albert E. Jenner, Jr., and James H. Feldman

Public Act 83-129, effective August 19, 1983, substantially changed the rules for classifying and dividing property upon dissolution of marriage. The most substantive changes were made in subsection (a) regarding the classification of income and appreciation of property and in subsection (c) regarding the treatment of commingled property. As a result, non-marital property is protected from transmutation through commingling, and when one estate (i.e., the husband's non-marital estate, the wife's non-marital estate, or the marital estate) contributes property to another estate, the contributing estate may be compensated by a right to reimbursement. See § 503(a) and (c).

Public Act 83-129 awaits definitive interpretation by the courts, but a recent article sheds light on the legislature's intent in enacting this amendment and suggests guidelines for its interpretation. J. Feldman and C. Fleck, Taming Transmutation: A Guide to Illinois' New Rules on Property Classification and Division Upon Dissolution of Marriage, 72 Ill.B.J. 336 (1984).

SUBSECTION (a)

Subsection (a)(1) was amended by Public Act 83-388, effective September 16, 1983, which deleted the terms "bequest" and "devise" from the subsection and substituted the term "legacy." The ostensible purpose of this change in nomenclature is to coordinate the terminology with that

In view of our disposition in this case, we need not address the State's motion to supplement the record on appeal with defense counsel's certificate of compliance with Supreme Court Rule 604(d).

Reversed and remanded with directions.

GREEN, P. J., and TRAPP, J., concur.

61 Ill.App.3d 936
19 Ill.Dec. 177

Sandra Kay AYERS, Petitioner-Appellee,

v.

Billy Alan AYERS, Respondent-Appellant.

No. 14777.

Appellate Court of Illinois, Fourth District.

July 14, 1978.

The Circuit Court, Macon County, John L. Davis, J., entered decree dissolving marriage and disposing of property, and husband appealed. The Appellate Court, Green, P. J., held that: (1) if court erred in determining that real estate owned by husband and wife was all marital property and awarding realty to wife, husband was not injured in that nonmarital property would have been awarded to wife as matter of law; (2) evidence supported division of property in which all property was found to be marital property, husband was awarded all personal property including proceeds of previous sales of two vehicles and wife was awarded unimproved ten-acre tract of realty, and (3) court did not abuse discretion in denying husband's petition for rehearing on division of property.

Affirmed.

Trapp, J., dissented and filed opinion.

1. Divorce ⇐249(3)

Most property acquired by either marital partner during the marriage is marital property. S.H.A. ch. 40, § 503(a).

2. Divorce ⇐249(3)

If property is acquired by a marital partner as a result of a gift or before marriage or after a judgment of legal separation, the property is nonmarital, for purposes of division of property upon dissolution of marriage, as is property acquired in exchange for property acquired by gift or property acquired before marriage. S.H.A. ch. 40, § 503(a).

3. Divorce ⇐286(9)

If court in dissolution of marriage proceeding erred in determining that real estate which was owned by husband and wife in joint tenancy, which was purchased by payment of $5,000 given to wife by grandmother as down payment with balance of $5,000 financed by mortgage, and payments on which were made with marital funds, was all marital property, and awarding property to wife, husband was not injured in that nonmarital property would have been awarded to wife as matter of law. S.H.A. ch. 40, § 503(c).

4. Divorce ⇐253

Evidence in proceeding for dissolution of marriage supported trial court's division of property in which court found all property to be marital property, awarded husband all personal property, including proceeds of sale of two vehicles, and awarded wife unimproved ten-acre tract of realty. S.H.A. ch. 40, § 503(a, c).

5. Divorce ⇐151

Trial court did not abuse discretion in denying husband's petition for rehearing on division of property in dissolution of marriage proceeding. S.H.A. ch. 40, § 503(a, c).

Fuller, Hopp & Barr, P. C., Richard W. Hopp, Decatur, for respondent-appellant.

Rosenberg, Rosenberg, Bickes & Johnson, Chartered, Decatur, for petitioner-appellee; Wayne L. Bickes, Decatur, of counsel.

Case from Illinois

GREEN, Presiding Justice.

This case concerns the distribution of property under the new Illinois Marriage and Dissolution of Marriage Act (Ill.Rev. Stat.1977, ch. 40, pars. 101 through 802) which became effective October 1, 1977.

Prior to October 1, 1977, plaintiff Sandra Ayers brought suit in the circuit court of Macon County against defendant Billy Alan Ayers and the case was heard on the merits. On October 28, 1977, a decree was entered dissolving their marriage and disposing of the property of the parties in a manner purporting to follow the terms of the new Act. Defendant appeals, complaining only of the disposition of the property. The parties agree that the trial court applied the proper law in reaching its decision.

[1, 2] The new Act classifies the property of the parties of the marriage being dissolved as either marital property or nonmarital property (Ill.Rev.Stat.1977, ch. 40, par. 503(a)). Most property acquired by either marital partner during the marriage is marital property. However, if the property is acquired by a partner as a result of a gift or before marriage or after a judgment of legal separation, the property is nonmarital as is property acquired in exchange for property acquired by gift or property acquired before marriage (Ill.Rev.Stat.1977, ch. 40, par. 503(a)). Determination of the rights to appreciation in the value of property are more complicated.

The decree (1) found all of the parties' property to be marital property, (2) awarded all of the personal property except plaintiff's clothing to defendant, including the proceeds of previous sales of two vehicles, (3) awarded plaintiff an unimproved 10-acre tract of realty in Mt. Zion owned by the parties in joint tenancy, and (4) provided that these property awards were subject to the indebtedness standing as liens thereon which indebtedness the awardee was ordered to assume and hold the other spouse harmless thereon.

The parties agree that (1) the 10-acre tract was purchased in 1972 for $10,000, (2) $5000 was paid as a down payment with funds given to plaintiff by her grandmother, (3) the balance was financed by a $5000 mortgage payable in $100 monthly installments, (4) the mortgage payments were made with marital funds, and (5) at the time of the decree $1000 was still owing on the mortgage. No evidence was introduced at trial as to the then value of the tract.

Section 503(c) of the new Act (Ill.Rev. Stat.1977, ch. 40, par. 503(c)) states that in dividing marital property, the court shall disregard the fault of the parties and consider "all relevant factors" including "(1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit; (2) the value of the property set apart to each spouse; * * * (4) the relevant economic circumstances of each spouse when the division of property is to become effective, * * * (7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; * * * (9) whether the apportionment is in lieu of or in addition to maintenance; and (10) the reasonable opportunity of each spouse for future acquisition of capital assets and income."

[3] Defendant's theory is that the real estate was non-marital property belonging to plaintiff to the extent that she had provided the $5000 for the original down payment but that the court could not make an award of the balance of the property without evidence of the present value of the property and erred in doing so. If there was any error in the court's determination that the real estate was all marital property, defendant was not injured because the non-marital property would have been awarded to plaintiff as a matter of law (Ill.Rev.Stat.1977, ch. 40, par. 503(c)).

The heart of defendant's argument is that without knowing the value of the real estate, the court did not know the relative values of the awards made. He cites *Wilson v. Wilson* (1965), 56 Ill.App.2d 187, 205 N.E.2d 636; *Jackson v. Jackson* (1975), 34

Ill.App.3d 407, 339 N.E.2d 764, and *Jones v. Jones* (1964), 48 Ill.App.2d 232, 198 N.E.2d 195, all divorce cases where awards of property or money were set aside on review where no evidence was presented to support the decree. He also cites *Bergan v. Bergan* (1976), 42 Ill.App.3d 740, 1 Ill.Dec. 485, 356 N.E.2d 673, where a grant of child support and attorney's fees was set aside where the evidence was vague as to the assets and income of the parties and their needs and those of their children. Here, although there was no direct testimony of the present value of the land, the evidence indicated that its purchase had occurred about five years earlier. Ordinarily, in the absence of other evidence, such a sale would be some indication of value.

Moreover, the value of the properties of the parties is only one criterion for the court to consider in dividing the marital property. Here, the court could also consider that plaintiff had furnished the original $5000 for the purchase from money given her by her grandmother. Both plaintiff and her grandmother testified that their oral agreement with defendant was that it was not intended that defendant should have the real estate in the event of a divorce. Although defendant's testimony was at variance to this, the court could have believed plaintiff and her grandmother and concluded that plaintiff did not intend to make a gift placing the property in joint tenancy.

[4] Defendant was shown to be making $12,000 to $13,000 a year as a factory production line worker. Evidence of plaintiff's earning capacity was less certain. She was an X-ray technician and had worked part-time during the marriage. During the four months prior to the parties separation, she worked full-time at $150 per week which would equal an annual salary of less than $8000. She was awarded no maintenance (the new Act's substitute for alimony). Although the value, if any, of the personal property was not shown, defendant did receive $1600 from the sale of two vehicles. Assuming the real estate to have had only a normal inflationary appreciation in value from the time of its purchase and considering the criterion set forth in the new Act, the court's division of the property was supported by the evidence.

[5] Defendant filed a petition for rehearing contending that the real estate had a value of between $25,000 and $30,000 and that the court had abused its discretion in awarding property of such great value to plaintiff and of so little value to defendant. Attached to the petition were two documents. One purported to be a copy of a June 25, 1976 contract between the parties as vendors and another husband and wife as purchasers for the sale of the property for $25,000 with a down payment of $1000 with the balance to be paid within one year. The contract was conditioned upon the purchasers' ability to sell property of their own and was shown on its face to have been cancelled. Also attached was an offer of an individual stated to be for the purchase of the entire quarter section which contained the 10 acres. The price therein designated was $30,000. It was dated October 14, 1977, more than two weeks after the hearing.

Defendant concedes that his request does not come within the rule for the granting of a new trial because of newly discovered evidence. Nothing precluded the defendant from putting on evidence as to value of the tract. Even if he had proceeded upon the assumption that the case was to be decided under the old Act, evidence of value would have been expected as being relevant to proof of the extent of the parties' special equities in the tract. The contingent nature of the agreement shown in the contract attached to the petition for rehearing casts considerable doubt upon the likelihood of a sale for $25,000 having been obtainable by the parties. The second document is somewhat suspect because of the description of the property covered and its late date. Under all the circumstances, we do not conclude that the trial court abused its discretion in denying a rehearing.

Because we deem the court's disposition of the property to be justified by the evidence presented, we affirm.

Affirmed.

MILLS, J., concurs.

TRAPP, J., dissents.

TRAPP, Justice, dissenting:

The evidence on property rights was introduced some three weeks prior to the effective date of the Illinois Marriage and Dissolution of Marriage Act (Ill.Rev.Stat. 1977, ch. 40, par. 101 *et seq.*). Subsequent to such effective date, the trial court made its findings which were incorporated in a decree purporting to dispose of the property under the provisions of the subsequently effective statute (Ill.Rev.Stat.1977, ch. 40, par. 503). Such decree found and purported to dispose of all property as marital property.

Illinois Revised Statutes 1977, chapter 40, paragraph 503(c), includes as criteria for the disposition of marital property:

"It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or *appreciation* in value, of the *marital and non-marital property*, including the contribution of a spouse as a homemaker or to the family unit;

(2) the value of the property set apart to each spouse; * * *." (Emphasis supplied.)

At the time of the trial these criteria were not operative and evidence of value was not introduced. In effect there was some division in kind of personal property. At the time of the hearing, realty in joint tenancy would be left in that tenancy between the parties unless there was a showing of special equities, a conveyance was ordered in lieu of alimony, or partition was prayed and ordered. The trial court made no finding as to any of such dispositions but treated the joint estate as marital property. That treatment was necessarily made without any regard for the statutory criteria quoted.

The principal opinion appears to affirm upon an hypothesis that:

"If there was any error in the court's determination that the real estate was all marital property, defendant was not injured because the non-marital property would have been awarded to plaintiff as a matter of law (Ill.Rev.Stat.1977, ch. 40, par. 503(c))."

The record does not clearly show that the joint estate was of non-marital property as a matter of law. Upon the apparent facts the opposite conclusion is necessary for the joint tenancy was created subsequent to the marriage and the husband made some undetermined contribution toward the purchase of the property.

Since the trial court clearly did not follow the terms of the statute under which he undertook to dispose of the joint estate, I would conclude that it was an abuse of discretion to deny the motion to reopen for hearing evidence required under the statute. I would reverse and remand for further proceedings.

62 Ill.App.3d 49
19 Ill.Dec. 180

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Darrell T. KIRK, Defendant-Appellant.

No. 77-274.

Appellate Court of Illinois,
Third District.

July 19, 1978.

Following plea of guilty to charge of attempt rape and sentencing hearing, the Circuit Court, Peoria County, James D. Heiple, P. J., sentenced defendant to term of imprisonment of from five to 20 years, and defendant appealed. The Appellate Court, Stouder, P. J., held that consideration by court of references in psychiatrists' reports

TESTIMONY BEFORE JUDICIAL COMMITTEE ON HOUSE BILL 2639

Mr. Chairman and members of the Committee:

I am Mary Harper of Scott County. I come in support of House Bill 2639, Lines 0159 through 0166, regarding division of property in a divorce action. When property has been in the family and passed to heirs then is lost through divorce, it adds to the already traumatic situation.

We all believe this won't happen in our families. We want our children to have our property. When we manage our estates for orderly transition, it is quite necessary to give the property or to arrange for orderly buying by them.

We have known of several cases when children divorce and the property is awarded to the in-law and lost to the family. Sometimes it is not the fault of the in-law but attorneys see a golden opportunity. I know of a case where the father had died. Of the four sons, the youngest wanted to farm, so the mother managed to hold on until he was out of college. About that time, the oldest son and his wife were divorced in California and her attorney set out to get his share of the estate. That was when profits were better on the farm, and they managed to buy her off and saved the farm. It was totally unfair.

Another case I know, the daughter-in-law absolutely refused to sell the property she received to anyone in the family. It had been in the family for years and years.

In our own case, we could buy back land we had given our son and his wife. We are having to buy our own land a second time to save it. This isn't as bad as if it had been our home quarter which we inherited from my husband's parents--which is the case sometimes.

The provision here still gives the court the opportunity to determine a case on its own merits, but in these times of strife and upheaval, I would like to see this protection of family property. This may allow an heir and their children to continue with inherited property.

Thank you. Are there any questions?

Attachment 9
House Judiciary
1-30-86

(1) 1/30 Dodge

I am Viola Dodge from Olsburg, Kansas.

HB 2039 attempts to redefine marital property in the divorce court. The proper place to define this property is at its point of origin, which occurs within the marriage.

My organization, Kansas Agri-Women, believe that marriage is an economic partnership and shared property rights should be established during the marriage rather than by court order at the point of divorce or death.

We agree with the concept of this bill but it is the wrong approach. The bottom line of this bill still leaves the division of property to the discretion of the judge. To quote from the bill, "...unless the court determines that the result would be manifestly unjust and unreasonable, considering all relevant factors." In other words the judge could ignore the definition of marital property, as set out in this bill, and make the decision.

Kansas, at present, does not recognize marital or community property within the marriage. This property can only orginate in the marriage and here is where it should be defined. It is the property of the marriage. Only spouses can have marital property. It is a piecemeal approach to recognize marital or community property only at the end of the marriage.

This committee already has before it a bill which sets out the definition of marital property during the marriage, HB 2475, the Uniform Marital Property Act. It defines marital property as that which is acquired during the marriage except that which in owned prior to the marriage or that which is inherited, which would remain individual property. To put this bill being considered into perspective it would then be moot.

I have the greatest respect for the Commissioners on Uniform State Laws who have developed the Uniform Marital Property Act and have recommended that it be adopted by all the states.

I ask tnis committee that you have a good look at the UMPA before you seriously consider HB 2639.

I might add that if you have any questions concerning the UMPA that there are people from the National Conference of Commissioners who would welcome the opportunity to come and explain the act to you.

Attachment 10
House Judiciary
1-30-86

1/30 Attach 11

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

HB 2658

January 30, 1986

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Judiciary Committee

by

David S. Litwin

Mr. Chairman, members of the committee. I am David Litwin, representing the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to comment today in support of House Bill 2658.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

KCCI became involved in this matter during the passage last session of Senate Bill 51, to which HB 2658 would be amendatory. My involvement with that bill eventually

Attachment 11.
House Judiciary
1-30-86

led to appointment as a member of the Kansas Commission on Child Support, where I am one of two representatives of the business community. I became a member of the commission's Subcommittee on Forms, where we spent much time and energy working with representatives of the Department of Social and Rehabilitation Services and the Attorney General to simplify the originally voluminous forms, including those that would have to be handled by employers. Although I am a member of the Commission, I appear today solely on behalf of KCCI.

Many in the business community share the widespread concern that there is indeed a national crisis in the enforcement of child support orders, resulting in hardship for custodial parents and their children. On the other hand, since the employers who are called upon to fill out the forms and do the actual withholding, which is the guts of the entire scheme, are not in any sense responsible for the underlying problem of poor enforcement and do not stand to gain from enhanced enforcement any more than other members of the general public, our approach from the start has been to urge that employers be required to do the absolute minimum required by law and necessary to achieve adequate enforcement.

Moreover, in order to minimize legal risk to employers, we have also advocated that their discretion be eliminated or minimized and that they be told precisely what to do. To the extent that a withholding employer must try to figure out what to do or make discretionary decisions concerning withholding and remitting of wages, he or she is exposed to potential legal risk if he makes an incorrect decision, and in addition more of his time is taken up. This doesn't seem fair since employers are really strangers to the underlying problems of child support and nonenforcement thereof.

(Incidentally, I'm happy to share that the representatives of SRS and the Attorney General have been sensitive to employers' needs in the course of implementing SB 51.)

It is from this viewpoint that we approach HB 2658. We strongly endorse Sec. 4(b)(5) and Sec. 5(c), which would require withholding orders to specify a sum certain for both current support and satisfaction of arrearages, rather than the percentage of

wages that an employer may be required under current law to apply against the total wages subject to withholding.

Similarly, the proposed change in Section 5(b), which is permitted by a recent amendment to federal law, and which would give an employer 10 days from the obligor's pay day to remit, appears desirable in that it will allow some needed leeway. This would be particularly true with respect to the first withholding under an order, when an employer might legitimately need some additional time to gear up and implement withholding. We assume that the forms would be amended to clearly inform the employer whether to remit to the incoming withholding agency or to the court clerk or trustee.

Finally, for similar reasons we strongly endorse Secs. 6(c) and 5(g), which would address the situation where an employee is the subject or more than one wage withholding order served on his employer and the total to be withheld exceeds legal limits. Presently, the employer must in effect figure out for him or herself just what to do, evidently at his peril if he should err. This seems completely unfair, for reasons stated earlier. Moreover, this situation requires a very complex and intimidating form to be served on all employers, even though it would apply in only a small percentage of withholdings. The amendment would have the employer in effect turn resolution of the problem over to the income withholding agency. The bill adds various conditions to this procedure, and it will be vital that the forms be amended so that an employer is very clearly put on notice as to precisely what he or she must do in this situation. I believe that we will be able to work out such forms.

The remaining proposed changes are either technical in nature or beyond the scope of the direct concern of the business community, so we do not state an opinion on those sections.

Thank you again for the opportunity to testify. If there are any questions, I will try to answer them.

1/30 Robertson (12)

TESTIMONY CONCERNING
H.B. 2658

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The main purpose of H.B. 2658 is to amend certain provisions in S.B. 51 which was passed by the legislature last session. The recommended amendments are necessary to remedy conflicts and inconsistencies in verbage, incorporate a few relatively minor changes in the federal regulations which occurred after the end of the 1984-1985 legislative session and to generally "clean up" and make more workable the Kanas child support enforcement legislation which became effective July 1, 1985.

We are requesting that you consider a few additional amendments to H.B. 2658 in its current form and that an amendment to K.S.A. 39-709 be incorporated into the bill to insure that Kansas fully complies with a federal requirement that SRS provide support enforcement services to ex-recipients of aid to dependent children assistance for a period of at least five months after closure of their case.

Such an amendment would provide a valuable service to ex-ADC recipients at minimal or no cost and would help to insure that the custodial parent need not reapply for public assistance. To accomplish this end, K.S.A. 39-709 must be modified to continue the assignment of support rights for a period of five months after ADC cases close so that our attorneys or contractors would have the authority to take legal actions on behalf of the obligee. The proposed amendment makes it clear that any collections of support which represent arrearages which become due and owing after the date the ADC case closed must be forwarded to the obligee and that SRS cannot retain these sums to satisfy the state's claim for unreimbursed assistance (please see attachment #1 for the proposed amendment).

The following additional amendments are suggested:

line 41 To make it clear that district magistrates have the authority to issue support orders even if the amount in controversy exceeds $5,000.

line 68 To update statutory references and to allow magistrate judges to issue exparte orders of protective custody, orders of temporary custody and orders of disposition under the code for care of children.

line 111 Amends the Kansas URESA law to conform with the requirements in chapter 60 that support payments be made to the clerk of court or court trustee.

line 119 If a Title IV-D URESA case is transferred to another county, notice must be provided to the "proper official" in Kansas and in the state that requested the action. In Kansas the "proper official" is the head of the Centralized URESA Unit within SRS who has the responsibility of tracking and monitoring all interstate enforcement cases.

Attachment 12
House Judiciary
1-30-86

At this point, I would like to encourage you to incorporate the proposed URESA amendments as suggested in Attachment #2. These additional amendments are suggested to coordinate the language on lines 111 and 119 with the remainder of the URESA law.

The proposed amendment to K.S.A. 23-462 would change "state department of social welfare" to the "secretary of social and rehabilitation services."

The proposed amendments to K.S.A. 23-464 would require URESA petitions to be sent to the "proper official" of the responding jurisdiction. This change is needed because other states require pleadings to be sent to various officials other than the court. (i.e., if they have an administrative rather than judicial process or a centralized URESA unit.)

The proposed amendments to K.S.A. 23-469 would require the clerk of court to forward URESA pleadings to the "proper official" rather than directly to another court if the obligor is found to live in another county. The "proper official" in Kansas is the head of the Centralized URESA Unit of SRS who has the responsibility to monitor and refer all IV-D related interstate actions.

The proposed amendments to K.S.A. 23-474 merely require that copies of URESA support orders be sent to the "proper official" rather than the court in the initiating state. This change is suggested because in many states the court is not the proper place to send such orders. The proposed amendment to K.S.A. 23-482 makes it clear that is a IV-D URESA case is tranferred to another county, the paperwork should be sent throught the Centralized URESA Unit in Kansas.

The amendment to K.S.A. 23-487 requires actions to register foreign support orders in IV-D cases to be transmitted through the Centralized URESA Unit of SRS so that we can track and monitor case work progress and give status updates to the person seeking to register the order.

line 128 adds a title to the income withholding legislation passed last year for ease of reference.

lines 142 and 143 as provided for in section 2(e) of the current income withholding law, K.S.A. 39-718a judgments may be enforced by income withholding. A K.S.A. 39-718a judgment is often-times a lump-sum amount which reimburses the state for the amount of the child's share of the public assistance received. The amendments are needed to make it clear that such judgments do satisfy the criteria necessary to establish an income withholding order.

lines 145 and 146 - These amendments are needed to make it clear that a notice of delinquency must be sent the obligor and an affidavit must be filed with the court regardless of whether a conditional income withholding order is contained in the order of support. These amendments insure due process for the obligor and resolve a conflict in the wording of the statute.

lines 148 and 149 - The amendment corrects an error by striking "such an order" which, if read in conjunction with the rest of the section, refers to a conditional order. The amendment makes it clear that the order referred to is a withholding order and not a conditional order.

lines 156-159 - The amendment resolves wording conflict between various sections of the law by clarifying that the obligee must ask for a "specified amount" (rather than a percentage) to be withheld from the income of the debtor which would be applied to current support and the arrearage, if any. This amendment accurately expresses legislative intent of last year and simplifies the employer's role in computing the amount to be withheld.

lines 191-192 - the amendment resolves a conflict in existing statutory language between section 4(f) which does not refer to a 10 day grace period after a 30 day arrearage develops and section 4(a)(2) which does state that before a withholding order can be obtained, "all or part of at least one payment is more than 10 days overdue." To remedy the inconsistency, such language is inserted into subsection (f).

lines 229 and 230 - This amendment would add one question an employer or payor of income must answer if asked by a public office. In addition to the exclusive list of ten questions set forth in the current law, the employer could be asked "whether or not income is being withheld pursuant to this act."

The person planning to file an income withholding should be made aware of a potential multiple income withholding order situation so that payments sought may be appropriately adjusted. In certain cases, having knowledge that the obligor's income is subject to attachment by several withholding orders may prevent a needless filing.

lines 238-242 - This amendment gives the employer an extra ten days to forward the amount withheld to SRS (if there are multiple withholding orders which cannot be satisfied) or to the clerk of court.

lines 248, 249 and 255 - The amendment strikes references to the employer withholding a "percentage" rather than a definate dollar amount. The employer's responsibility in calculating the amount to be withheld is made easier by the elimination of any reference to withholding a percentage.

lines 277-281 - As required by federal regulation changes, existing provisions for dealing with multiple income withholding orders on a first-come-first-served basis are deleted. A more equitable method of distributing collections in multiple income withholding situations is provided for on lines 329-378.

lines 296 and 297 - Current law requires the payor to notify the clerk of court or court trustee if the obligor is terminated. The proposed amendment would require the same notice if the obligor is laid off. The person enforcing support should be made aware of the reason why support payments stop so that they may prepare other enforcement remedies.

lines 321-325 - The preference given to the collection of current support over arrearages is deleted here and incorporated into subsection (c) at line 364.

lines 329-378 - This amendment satisfies a late change in the federal regulations which requires the state, rather than the employer, to determine how to distribute the amount withheld in a multiple income withholding order situation. The language in this subsection was very carefully worked out by the interim committee this summer. Essentially, the amendment provides that if the payor can legally withhold enough income to satisfy all the income withholding orders, they should continue with normal disbursement as ordered. However, if the total amount required to be withheld in all the income withholding orders exceeds the amount which can legally be withheld according to the Consumer Credit Protection Act, the payor merely sends a form notice of multiple withholding orders and the total amount of income which can legally be withheld to SRS (the income withholding agency) within 10 days after the obligor is normally paid. SRS then sends copies of the notice to the clerk of each court issuing one of the orders and to each obligee.

The payor would have a continuing duty to notify SRS of any modification or termination of an income withholding order, of any other orders received or the termination of income payments to the obligor so that SRS could re-figure and adjust the amounts distributed to the obligees as determined by a statutorily prescribed formula.

If the obligor's income becomes subject to only one withholding order or if SRS gives notice that all the orders can be satisfied without exceeding CCPA limits, the payor would be required to send withheld amounts directly to the clerk of court or court trustee, as the court order specifies.

At line 359, SRS is given the authority to disburse the funds received from payors in multiple withholding situations. In determining how such funds should be divided, SRS must give priority to the payment of current support and use a formula.

The formula first compares the amount of current support asked for in each order with the total amount of support asked for in all orders to determine a ratio. (For example:)

Order "A" = $100 (1/3 of $300)
Order "B" = $200 (2/3 of $300)
Total asked for= $300

This ratio is then compared to the total amount actually withheld for current support to determine the amount to be distributed. (For example, if the amount actually withheld is $200, order "A" would receive 1/3 of $200 and order "B" would receive 2/3 of $200.)

Any withheld amount which exceeds the total amount of current support asked for would be distributed as arrearages by using the same formula as used for distribution of current support.

In summary, this amendment distributes amounts withheld in multiple withholding situations much more equitably among all the obligor's children than the current law while at the same time relieving employers of the burden of determining how funds should be distributed.

line 379 - The amendments in section 7 are all related to elimination of the obligee's ability to ask a payor/employer to withhold a percentage of income. (The employer must be ordered to withhold a specific dollar amount.) Since the obligee has a legal right to collect from 50%-65% of the obligor's earnings, the obligee should have a clear statutory right to obtain a modification in the court's order if the obligor's income increases. The obligee must also have the flexibility to obtain a modification, if the obligor's income decreases or if, for example, a bankruptcy court issues an order staying collection action, since the obligee could be held liable for improper or over withholding.

line 380 - The words "obligee or public office" are stricken from section (a) since a new subsection (b) concerning modification rights has been added.

line 385 - This sentence has been shifted to a new subsection (d) for emphasis and clarification.

lines 388-391 - Gives the obligee or public office the right to seek and obtain a modification in the amount of a withholding order so long as they have a legal right under the CCPA to collect the amount asked for.

lines 410-414 Establishes SRS as the income withholding agency in non-IV-D cases where multiple income withholding orders cannot be fully satisfied. SRS would have the responsibility of notifying the parties and distributing the amount which was withheld in accordance with the procedures and formula discussed in section 6(c) in both IV-D and non-IV-D cases.

lines 415-416 - An amendment is suggested to provide a more accurate citation.

lines 425-427 - Establishes the title of "interstate income withholding act." for procedures which concern interstate income withholding activity.

line 438 - Since, as the existing law provides, actual service of a notice of delinquency on the obligor cannot possibly be accomplished on the same date a support order is registered, the amendment requires that such service be made no later than 10 days after registration.

lines 476-477 - Deletes a reference to the statute of limitations in K.S.A. 23-4,137 because of the need for an amendment to that statute.

line 526 - Since, at the time the court issues an income withholding order, the other state cannot be notified precisely of when the actual withholding will begin, reference requiring such notice is deleted.

lines 529-553 - The amendments to section 13 are requested to satisfy a change in federal regulations concerning which state's statute of limitations applies in interstate income withholding cases. Current law states that the longest statute of limitations in the state requesting or the state establishing an income withholding order applies.

The recommended amendment provides that the law and procedures of the state where the obligor earns income will apply for all issues but when withholding must be implemented (which is controlled by the law of the state where the suport order was entered). The recommended amendment is, in my opinion, preferable since the attorneys with the responsibility of establishing interstate income withholding orders need not be familier with the varying law of all 50 states. (Kansas law would apply for all issues except for when the withholding should be established.)

lines 595-596 - Concerns the establishment of a lien on aircraft or vessels. The amendment was suggested by the Federal Aviation Administration so that sufficient information is provided to properly identify the obligor's property.

lines 608-616 - This amendment concerning the filing of liens was suggested by John Wine, Attorney for the Secretary of State. It provides guidance regarding how the lien should be processed.

lines 638-642 - Amends K.S.A. 39-755 to correspond with the statute of limitations for establishing the parentage of a child as found in the Kansas Parentage Act.

6334C

Attachment #1

Sec. 43. K.S.A. 1984 Supp. 39-709, as amended by 1985 Senate Bill No. 131, is hereby amended to read as follows: 39-709. (a) *General eligibility requirements for assistance for which federal moneys are expended.* Subject to the additional requirements below, assistance in accordance with plans under which federal moneys are expended may be granted to any needy person who:

(1) Has insufficient income or resources to provide a reasonable subsistence compatible with decency and health. Where a husband and wife are living together the combined income or resources of both shall be considered in determining the eligibility of either or both for such assistance unless otherwise prohibited by law. The secretary, in determining need of any applicant for or recipient of assistance shall not take into account the financial responsibility of any individual for any applicant or recipient of assistance unless such applicant or recipient is such individual's spouse or such individual's minor child or minor stepchild if the stepchild is living with such individual. The

secretary in determining need of an individual may provide such income and resource exemptions as may be permitted by federal legislation.

(2) Is a citizen of the United States or is an alien lawfully admitted to the United States and who is residing in the state of Kansas. If any person transfers or assigns property without adequate consideration or for the purpose of becoming eligible for assistance (A) within the two-year period immediately preceding the application if the value of the property so transferred or assigned is $12,000 or less or (B) within a period of time in excess of two years, as established by rules and regulations of the secretary, if the value of the property so transferred or assigned is in excess of $12,000, such person shall thereby become ineligible to receive assistance for such period of time as the value of the property assigned or transferred would have reasonably maintained such person at a standard compatible with decency and health. If any person without the consent of the secretary assigns or transfers property without adequate consideration while on the assistance rolls, after making application for assistance or while receiving assistance, such person shall thereby become ineligible to receive assistance for such period of time as the value of the property assigned or transferred would have reasonably maintained such person at a standard compatible with decency and health.

(b) *Assistance to families with dependent children.* Assistance may be granted under this act to any dependent child, or relative, subject to the general eligibility requirements as set out in subsection (a), who resides in the state of Kansas or whose parent or other relative with whom the child is living resides in the state of Kansas. Such assistance shall be known as aid to families with dependent children.

(c) ~~*Applying for or receiving*~~ *Aid to families with dependent children* ~~*constitutes an automatic*~~*; assignment of support rights and limited power of attorney.* By applying for or receiving aid to families with dependent children such applicant or recipient shall be deemed to have assigned to the secretary on behalf of the state any accrued, present or future rights to support from any other person such applicant may have in such person's own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid. *In any case in which an order for child support has been established and the legal custodian and obligee under the order surrenders physical custody of the child to a caretaker relative without obtaining a modification of legal custody and the caretaker relative's sup-*

port rights are assigned pursuant to this section, the surrender of physical custody and the assignment shall transfer, by operation of law, the child support obligation under the order to the secretary on behalf of the state. Such assignment shall be of all accrued, present or future rights to support of the child surrendered to the caretaker relative. The assignment of support rights shall automatically become effective upon the date of approval for or receipt of such aid without the requirement that any document be signed by the applicant ~~or~~, recipient *or obligee*. The assignment shall remain in full force and effect so long as such person is an applicant *for* or recipient of such aid or ~~until such other time as the secretary and the applicant or the recipient of such aid may agree~~ *a caretaker relative no longer has physical custody of the child and aid to dependent children is discontinued.* Upon the discontinuance of such aid, the assignment shall remain in effect as to unpaid support obligations due and owing at the time of the discontinuance of such aid until the claim of the secretary of social and rehabilitation services for repayment of the unreimbursed portion of such aid is satisfied. By applying for or receiving aid to dependent children assistance, *or by surrendering physical custody of a child to a caretaker relative whose support rights are assigned,* the applicant ~~or~~, recipient *or obligee* is also deemed to have appointed the secretary, or the secretary's designee, as an attorney in fact to perform the specific act of negotiating and endorsing all drafts, checks, money orders or other negotiable instruments representing support payments received by the secretary in behalf of any person applying for, receiving or having received such assistance *or in behalf of an obligee whose child receives or has received aid to dependent children because of the child's placement with a caretaker relative.* This limited power of attorney shall be effective from the date the secretary approves the application for aid and shall remain in full force and effect as to the respective support rights assigned to the secretary under this subsection (c). The secretary retains the power to endorse all drafts, checks, money orders or other negotiable instruments representing support to which the secretary retains a partial claim pursuant to subsection (c) of K.S.A. 39-754 and amendments thereto.

(~~d~~) (e) *Eligibility requirements for general assistance, the cost of which is not ~~participated in~~ shared by the federal government.* (1) General assistance may be granted to eligible persons who do not qualify for financial assistance in a program in which the federal government participates and who satisfy the additional requirements prescribed by or under this subsection (~~d~~). (e)

Except as provided in subsection (d),

(d) For a period of five calendar months after a recipient's final aid to families with dependent children payment, the secretary of social and rehabilitation services shall continue to provide all appropriate support enforcement services for the persons who were receiving assistance, unless the former recipient requests that support enforcement services be discontinued. Before the end of the five month period, the secretary shall send notice to the former recipient that support enforcement services pursuant to this subsection will continue unless a request to discontinue the services is received. The notice shall summarize the services available, any fees charged, and policies for cost recovery and collection distribution. During the period services are being provided pursuant to this subsection, the assignment and limited power of attorney provided in subsection (c) shall continue in full force and effect, except that the secretary's claim for repayment of the unreimbursed portion of aid to families with dependent children previously provided shall not be satisfied from support obligations which accrue after the final assistance payment, however, nothing in this subsection shall affect or limit any assignment of support rights pursuant to subsection (c) which occurs after the final assistance payment to the recipient.

(A) To qualify for general assistance in any form a needy person must have insufficient income or resources to provide a reasonable subsistence compatible with decency and health and, except as provided for transitional assistance, be unable to engage in employment. The secretary shall adopt rules and regulations prescribing criteria for establishing whether a person is able to engage in employment, including such factors as age or physical or mental condition. Eligibility for general assistance, other than transitional assistance, is limited to an adult or family in which all legally responsible family members meet the criteria established by such rules and regulations of the secretary. Where a husband and wife are living together the combined income or resources of both shall be considered in determining the eligibility of either or both for such assistance unless otherwise prohibited by law. The secretary in determining need of any applicant for or recipient of general assistance shall not take into account the financial responsibility of any individual for any applicant or recipient of general assistance unless such applicant or recipient is such individual's spouse or such individual's minor child or a minor stepchild if the stepchild is living with such individual. In determining the need of an individual, the secretary may provide for income and resource exemptions.

(B) To qualify for general assistance in any form a needy person must be a citizen of the United States or an alien lawfully admitted to the United States and must be residing in the state of Kansas.

(2) General assistance in the form of transitional assistance may be granted to eligible persons who do not qualify for financial assistance in a program in which the federal government participates and who satisfy the additional requirements prescribed by or under this subsection (d), but who do not meet the criteria prescribed by rules and regulations of the secretary relating to inability to engage in employment.

(3) In addition to the other requirements prescribed under this subsection (d), the secretary shall adopt rules and regulations which establish community work experience program requirements for eligibility for the receipt of general assistance in any form and which establish penalties to be imposed when a work assignment under a community work experience program requirement is not completed without good cause. The secretary may adopt rules and regulations establishing exemptions from any such community work experience program requirements. A first-time failure to complete such a work assignment requirement shall result in ineligibility to receive general assistance for

a period fixed by such rules and regulations of not more than three calendar months. A subsequent failure to complete such a work assignment requirement shall result in a period fixed by such rules and regulations of ineligibility of not more than six calendar months.

(4) If any person transfers or assigns property without adequate consideration or for the purpose of becoming eligible for any form of general assistance (A) within the two-year period immediately preceding the application if the value of the property so transferred or assigned is $12,000 or less or (B) within a period of time in excess of two years, as established by rules and regulations of the secretary, if the value of the property so transferred or assigned is in excess of $12,000, such person shall thereby become ineligible to receive any form of general assistance for such period of time as the value of the property assigned or transferred would have reasonably maintained such person at a standard compatible with decency and health. If any person without the consent of the secretary assigns or transfers property without adequate consideration while on the assistance rolls after making application for assistance or while receiving assistance, such person shall thereby become ineligible to receive assistance for such period of time as the value of the property assigned or transferred would have reasonably maintained such person at a standard compatible with decency and health. If any person is found guilty of the crime of theft under the provisions of K.S.A. 39-720 *and amendments thereto*, such person shall thereby become *forever* ineligible to receive any form of general assistance under the provisions of this subsection (d) *unless the conviction is the person's first conviction under the provisions of K.S.A. 39-720 and amendments thereto or the law of any other state concerning welfare fraud. First time offenders convicted of a misdemeanor under the provisions of such statute shall become ineligible to receive any form of general assistance for a period of 12 calendar months from the date of conviction. First time offenders convicted of a felony under the provisions of such statute shall become ineligible to receive any form of general assistance for a period of 60 calendar months from the date of conviction.* If any person is found guilty by a court of competent jurisdiction of any state other than the state of Kansas of a crime involving welfare fraud, such person shall thereby become *forever* ineligible to receive any form of general assistance under the provisions of this subsection (d) *unless the conviction is the person's first conviction under the law of any other state concerning welfare fraud. First time offenders con-*

victed of a misdemeanor under the law of any other state concerning welfare fraud shall become ineligible to receive any form of general assistance for a period of 12 calendar months from the date of conviction. First time offenders convicted of a felony under the law of any other state concerning welfare fraud shall become ineligible to receive any form of general assistance for a period of 60 calendar months from the date of conviction. (f)

~~(e)~~ *Requirements for medical assistance for which federal moneys or state moneys or both are expended.* When the secretary has adopted a medical care plan under which federal moneys or state moneys or both are expended, medical assistance in accordance with such plan shall be granted to any person who is a citizen of the United States or who is an alien lawfully admitted to the United States and who is residing in the state of Kansas, whose resources and income do not exceed the levels prescribed by the secretary. In determining the need of an individual, the secretary may provide for income and resource exemptions and protected income and resource levels. The secretary shall exempt principal and interest held in irrevocable trust pursuant to subsection (c) of K.S.A. 16-303 and amendments thereto from the eligibility requirements of applicants for and recipients of medical assistance. Such assistance shall be known as medical assistance. (g)

~~(f)~~ *Eligibility for medical assistance of resident receiving medical care outside state.* A person who is receiving medical care including long-term care outside of Kansas whose health would be endangered by the postponement of medical care until return to the state or ~~whose health would be endangered~~ by travel to return to Kansas, may be determined eligible for medical assistance if such individual is a resident of Kansas and all other eligibility factors are met. Persons who are receiving medical care on an ongoing basis in a long-term medical care facility in a state other than Kansas and who do not return to a care facility in Kansas when they are able to do so, shall no longer be eligible to receive assistance in Kansas unless such medical care is not available in a comparable facility or program providing such medical care in Kansas. For persons who are minors or who are under guardianship, the actions of the parent or guardian shall be deemed to be the actions of the child or ward in determining whether or not the person is remaining outside the state voluntarily. (h)

~~(g)~~ *Medical assistance; assignment of rights to medical support and limited power of attorney. By applying for or receiving medical assistance under a medical care plan in which federal*

funds are expended, any accrued, present or future rights to medical support and any rights to payment for medical care from a third party of an applicant or recipient and any other family member for whom the applicant is applying shall be deemed to have been assigned to the secretary on behalf of the state. The assignment shall automatically become effective upon the date of approval for such assistance without the requirement that any document be signed by the applicant or recipient. Upon the discontinuance of such assistance, the assignment shall remain in effect as to unpaid obligations due and owing at the time of the discontinuance of such assistance until the claim of the secretary for repayment of the unreimbursed portion of such assistance is satisfied. By applying for or receiving medical assistance the applicant or recipient is also deemed to have appointed the secretary, or the secretary's designee, as an attorney in fact to perform the specific act of negotiating and endorsing all drafts, checks, money orders or other negotiable instruments, representing payments received by the secretary in behalf of any person applying for, receiving or having received such assistance. This limited power of attorney shall be effective from the date the secretary approves the application for assistance and shall remain in full force and effect as to the respective rights assigned to the secretary under this subsection. The secretary retains the power to endorse all drafts, checks, money orders or other negotiable instruments representing support to which the secretary retains a partial claim pursuant to subsection (c) of K.S.A. 39-754 and amendments thereto. The assignment of any rights to payment for medical care from a third party under this subsection shall not prohibit a health care provider from directly billing an insurance carrier for services rendered if the provider has not submitted a claim covering such services to the secretary for payment. (i)

(h) Placement under code for care of children or juvenile offender code; assignment of support rights and limited power of attorney. In any case in which the secretary of social and rehabilitation services pays for the expenses of care and custody of a child pursuant to K.S.A. 1984 Supp. 38-1501 et seq. or 38-1601 et seq., and amendments thereto, including the expenses of any foster care placement, an assignment of all past, present and future support rights of the child in custody possessed by either parent or other person entitled to receive support payments for the child is, by operation of law, conveyed to the secretary. Such assignment shall become effective upon place-

ment of a child in the custody of the secretary or upon payment of the expenses of care and custody of a child by the secretary without the requirement that any document be signed by the parent or other person entitled to receive support payments and shall remain in full force and effect so long as such expenses are paid or the child remains in the custody of the secretary. When the payment of expenses by the secretary ceases or the secretary is relieved of custody of the child, the assignment shall remain in effect as to unpaid support obligations due and owing for the child who was in custody at the time payments for expense of care and custody or custody of the child are discontinued until the claim of the secretary of social and rehabilitation services has been satisfied. Such claim under this subsection is limited to an amount not exceeding the amount of assistance provided to the child. When the secretary pays for the expenses of care and custody of a child or a child is placed in the custody of the secretary, the parent or other person to whom support is ordered paid in a previously existing order for support is also deemed to have appointed the secretary, or the secretary's designee, as attorney in fact to perform the specific act of negotiating and endorsing all drafts, checks, money orders or other negotiable instruments representing support payments received by the secretary on behalf of any parent or other person otherwise entitled to receive support payments pursuant to the assignment of support rights. This limited power of attorney shall be effective from the date the assignment to support rights becomes effective and shall remain in full force and effect as to the respective support rights assigned to the secretary under this subsection. The secretary retains the power to endorse all drafts, checks, money orders or other negotiable instruments representing support to which the secretary retains a partial claim pursuant to K.S.A. 39-754 and amendments thereto.

Attachment #2

23-462. Officials to represent obligee. If this state is acting as an initiating state the prosecuting attorney upon the request of the court or the ~~state department of social welfare~~ secretary of social and rehabilitation services shall represent the obligee in any proceeding under this act. If the prosecuting attorney neglects or refuses to represent the obligee the attorney general may order him to comply with the request of the court or may undertake the representation.

History: L. 1970, ch. 132, § 12; July 1.

23-464. Duty of initiating court. If the initiating court finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property it shall so certify and cause three copies of the petition and its certificate and one copy of this act to be sent to the proper official of responding ~~court~~ jurisdiction. Certification shall be in accordance with the requirements of the initiating state. If the name and address of the responding court is unknown and the responding state has an information agency comparable to that established in the initiating state it shall cause the copies to be sent to the state information agency or other proper official of the responding state, with a request that the agency or official forward them to the proper court and that ~~the court of~~ Delete the responding state acknowledge their receipt to the initiating court.

History: L. 1970, ch. 132, § 14; July 1.

23-469. Further duties of court and officials in the responding state. (a) The prosecuting attorney on his own initiative shall use all means at his disposal to locate the obligor or his property, and if because of inaccuracies in the petition or otherwise the court cannot obtain jurisdiction the prosecuting attorney shall inform the court of what he has done and request the court to continue the case pending receipt of more accurate information or an amended petition from the initiating court.

(b) If the obligor or his property is not found in the county, and the prosecuting attorney discovers that the obligor or his property may be found in another county of this state or in another state he shall so inform the court. Thereupon the clerk of the court shall forward the documents received from the court in the initiating state to ~~a court in the other county or to a court in the other state or to the information agency or other~~ the proper official ~~of the other state~~ with a request that the documents be forwarded to the proper court. All powers and duties provided by this act apply to the recipient of the documents so forwarded. If the clerk of a court of this state forwards documents to another ~~court he shall forthwith notify~~ the initiating court.

(c) If the prosecuting attorney has no information as to the location of the obligor or his property he shall so inform the initiating court.

History: L. 1970, ch. 132, § 19; July 1.

23-474. Responding court to transmit copies to initiating court. The responding court shall cause a copy of all support orders to be sent to the ~~initiating court~~ proper official of the initiating jurisdiction.

History: L. 1970, ch. 132, § 24; July 1.

23-482. Interstate application. This act applies if both the obligee and the obligor are in this state but in different counties. If the court of the county in which the petition is filed finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and finds that a court of another county in this state may obtain jurisdiction over the obligor or his property, the clerk of the court shall send the petition and a certification of the findings to the court of the county in which the obligor or his property is found. The clerk of the court of the county receiving these documents shall notify the prosecuting attorney of their receipt. The prosecuting attorney and the court in the county to which the copies are forwarded then shall have duties corresponding to those imposed upon them when acting for this state as a responding state.

History: L. 1970, ch. 132, § 32; July 1.

or, if the action is brought pursuant to part D of title IV of the federal social security act (42 U.S.C. § 651 et seq.), to the department of social and rehabilitation services.

23-487. Registration procedure; notice. (a) An obligee seeking to register a foreign support order in a court of this state shall transmit to the clerk of the court (1) three certified copies of the order with all modifications thereof, (2) one copy of the reciprocal enforcement of support act of the state in which the order was made, and (3) a statement verified and signed by the obligee, showing the post-office address of the obligee, the last known place of residence and post-office address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution, and a list of the states in which the order is registered. Upon receipt of these documents the clerk of the court, without payment of a filing fee or other cost to the obligee, shall file them in the registry of foreign support orders. The filing constitutes registration under this act.

(b) Promptly upon registration the clerk of the court shall send by certified or registered mail to the obligor at the address given a notice of the registration with a copy of the registered support order and the post-office address of the obligee. He shall also docket the case and notify the prosecuting attorney of his action. The prosecuting attorney shall proceed diligently to enforce the order.

History: L. 1970, ch. 132, § 37; July 1.

or, if the action is brought pursuant to part D of title IV of the federal social security act (42 U.S.C. § 651 et seq.), to the department of social and rehabilitation services.

Session of 1986

HOUSE BILL No. 2658

By Special Committee on Judiciary

Re Proposal No. 61

12-17

AN ACT concerning support and visitation of certain parties; relating to orders for child support, maintenance and child visitation; concerning certain parentage actions; amending K.S.A. 1985 Supp. 20-302b, 23-473, 23-4,105, 23-4,107, 23-4,108, 23-4,109, 23-4,111, 23-4,118, 23-4,125, 23-4,130, 23-4,131, 23-4,132, 23-4,137, 23-4,146 and 39-755 and repealing the existing sections.

See attachment #1 for proposed K.S.A. 39-709 amendment.

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

Section 1. K.S.A. 1985 Supp. 20-302b is hereby amended to read as follows: 20-302b. (a) A district magistrate judge shall have the jurisdiction, power and duty, in any case in which a violation of the laws of the state is charged, to conduct the trial of traffic infractions or misdemeanor charges and the preliminary examination of felony charges. In civil cases, a district magistrate judge shall have concurrent jurisdiction, powers and duties with a district judge, except that, unless otherwise specifically provided in subsection (b), a district magistrate judge shall not have jurisdiction or cognizance over the following actions:

(1) Any action in which the amount in controversy, exclusive of interests and costs, exceeds $5,000, except that in actions of replevin, the affidavit in replevin or the verified petition fixing the value of the property shall govern the jurisdiction; nothing in this paragraph shall be construed as limiting the power of a district magistrate judge to hear any action pursuant to the Kansas probate code *or to issue support orders as provided by subsection (a)(6)*;

(2) actions against any officers of the state, or any subdivisions thereof, for misconduct in office;

(3) actions for specific performance of contracts for real estate;

(4) actions in which title to real estate is sought to be recovered or in which an interest in real estate, either legal or equitable, is sought to be established, except that nothing in this paragraph shall be construed as limiting the right to bring an action for forcible detainer as provided in the acts contained in article 23 of chapter 61 of the Kansas Statutes Annotated, and any acts amendatory thereof or supplemental thereto; and nothing in this paragraph shall be construed as limiting the power of a district magistrate judge to hear any action pursuant to the Kansas probate code;

(5) actions to foreclose real estate mortgages or to establish and foreclose liens on real estate as provided in the acts contained in article 11 of chapter 60 of the Kansas Statutes Annotated, and any acts amendatory thereof or supplemental thereto;

(6) actions for divorce, separate maintenance or custody of minor children, except that nothing in this paragraph shall be construed as limiting the power of a district magistrate judge to (A) hear any action pursuant to the Kansas code for care of children or the Kansas juvenile offenders code; (B) establish, modify or enforce orders of support pursuant to the Kansas parentage act, K.S.A. 23-451 *et seq.*, 39-718a, 39-755 or 60-1610~~, K.S.A. 1984 Supp. 38-1542, 38-1543 or 38-1563, K.S.A. 1985 Supp. 23-4,105 through 23-4,118 or K.S.A. 1985 Supp. 23-4,125 through 23-4,137~~ *or K.S.A. 1985 Supp. 23-4,105 through 23-4,118, 23-4,125 through 23-4,137, 38-1542, 38-1543 or 38-1563,* and amendments thereto; or (C) enforce orders granting a parent visitation rights to the parent's child;

(7) habeas corpus;

(8) receiverships;

(9) change of name;

(10) declaratory judgments;

(11) mandamus and quo warranto;

(12) injunctions;

(13) class actions;

(14) rights of majority; and

(15) actions pursuant to the protection from abuse act.

(b) Notwithstanding the provisions of subsection (a), in the absence, disability or disqualification of a district judge or associate district judge, a district magistrate judge may:

(1) Grant a restraining order, as provided in K.S.A. 60-902 and amendments thereto;

(2) appoint a receiver, as provided in K.S.A. 60-1301 and amendments thereto;

(3) make any order authorized by K.S.A. 60-1607 and amendments thereto; and

(4) grant any order authorized by the protection from abuse act.

(c) In accordance with the limitations and procedures prescribed by law, and subject to any rules of the supreme court relating thereto, any appeal permitted to be taken from an order or final decision of a district magistrate judge shall be tried and determined *de novo* by a district judge or an associate district judge, except that in civil cases where a record was made of the action or proceeding before the district magistrate judge, the appeal shall be tried and determined on the record by a district judge or an associate district judge.

Sec. 2. K.S.A. 1985 Supp. 23-473 is hereby amended to read as follows: 23-473. If the responding court finds a duty of support it may order the obligor to furnish support or reimbursement therefor and subject the property of the obligor to the order. Any such support order shall be accompanied by the conditional order for withholding of income required by K.S.A. 1985 Supp. 23-4,107 *and amendments thereto.* Support orders made pursuant to this act shall require that payments be made to the clerk of ~~the~~ court *or court trustee* of the responding state. The court and prosecuting attorney of any county in which the obligor is present or has property have the same powers and duties to enforce the order as have those of the county in which it was first issued. If enforcement is impossible or cannot be completed in the county in which the order was issued, the prosecuting attorney shall send a certified copy of the order to the prosecuting attorney of any county in which it appears that proceedings to enforce

the order would be effective *and, if the action is brought pursuant to part D of title IV of the federal social security act (42 U.S.C. §651 et seq.), as amended, shall notify the proper official of this state and the initiating jurisdiction of the activity requested.* The prosecuting attorney to whom the certified copy of the order is forwarded shall proceed with enforcement and report the results of the proceedings to the court first issuing the order.

Incorporate additional URESA amendments in Attachment #2 here.

Sec. 3. K.S.A. 1985 Supp. 23-4,105 is hereby amended to read as follows: 23-4,105. *(a) The title of K.S.A. 1985 Supp. 23-4,105 through 23-4,118, and amendments thereto, shall be the income withholding act.*

(b) The purpose of K.S.A. 1985 Supp. 23-4,105 through 23-4,118, *and amendments thereto,* is to enhance the enforcement of all support obligations by providing a quick and effective procedure for withholding income to enforce orders of support.

Sec. 4. K.S.A. 1985 Supp. 23-4,107 is hereby amended to read as follows: 23-4,107. (a) Any new or modified order for support entered on or after January 1, 1986, shall include a provision for the withholding of income to enforce the order of support. Unless the order provides that income withholding will take effect immediately, withholding shall take effect only if: (1) There is an arrearage in an amount equal to or greater than the amount of support payable for one month, (2) at least all or part of one payment is more than 10 days overdue; and (3) there is compliance with the requirements of this section.

, or if a judgment is granted pursuant to K.S.A. 39-718a, a lump sum due and owing;

or a lump sum judgment

(b) ~~In any proceeding in which~~ *If* the court has issued an order for support ~~but has not issued~~, *with or without* a conditional order requiring income withholding as provided by subsection (a), the obligee or a public office may apply for ~~such~~ an order *for withholding* by filing with the court an affidavit stating: (1) That an arrearage exists in an amount equal to or greater than the amount of support payable for one month; (2) that all or part of at least one payment is more than 10 days overdue; (3) that a notice of delinquency has been served on the obligor in accordance with subsection (f) and the date and type of service; (4) that the obligor has not filed a motion to stay service of the income

withholding order; and (5) a ~~percentage of the income or support order~~ *specified amount* which shall be withheld by the payor to ~~be applied toward liquidation of arrearages~~ *satisfy the order of support and to defray any arrearage*. Upon the filing of the affidavit, the court shall issue an order requiring the withholding of income without the requirement of a hearing, amendment of the support order or further notice to the obligor.

For purposes of this subsection, an arrearage shall be computed on the basis of support payments due and unpaid on the date the notice of delinquency was served on the obligor.

(c) An order issued under this section shall be directed to any payor of the obligor and shall require the payor to withhold from any income due, or to become due, to the obligor a specified amount sufficient to satisfy the order of support and to defray any arrearage, subject to the limitations set forth in K.S.A. 1985 Supp. 23-4,109 *and amendments thereto*. The order shall include notice of and direction to comply with the provisions of K.S.A. 1985 Supp. 23-4,108 and 23-4,109, *and amendments thereto*.

(d) An order issued under this section shall be served on the payor and returned by the officer making service in the same manner as an order of attachment.

(e) An income withholding order issued under this section shall be binding on any existing or future payor on whom a copy of the order is served and shall require the continued withholding of income from each periodic payment of income until further order of the court. If the obligor changes employment or has a new source of income after an income withholding order is issued by the court, the new employer or income source, if known, must be served a copy of the income withholding order without the requirement of prior notice to the obligor.

(f) No sworn affidavit shall be filed with the court issuing the support order pursuant to subsection (b) unless it contains a declaration that the obligee or public office has served the obligor a written notice of delinquency because an arrearage exists in an amount equal to or greater than the amount of support payable for one month, *that all or part of one payment is more than 10 days overdue* and that the notice was served on the

obligor by certified mail, return receipt requested, or in the manner for service of a summons pursuant to article 3 of chapter 60 of the Kansas Statutes Annotated at least seven days before the date the affidavit is filed. If service is by certified mail, a copy of the return receipt shall be attached to the affidavit. The notice of delinquency served on the obligor must state: (1) The terms of the support order and the total arrearage as of the date the notice of delinquency was prepared; (2) the amount of income that will be withheld; (3) that the provision for withholding applies to any current or subsequent payors; (4) the procedures available for contesting the withholding and that the only basis for contesting the withholding is a mistake of fact concerning the amount of the support order, the amount of the arrearage, the amount of income to be withheld or the proper identity of the obligor; (5) the period within which the obligor must file a motion to stay service of the income withholding order and that failure to take such action within the specified time will result in payors' being ordered to begin withholding; and (6) the action which will be taken if the obligor contests the withholding.

In addition to any other penalty provided by law, the filing of an affidavit with knowledge of falsity of the declaration of notice is punishable as a contempt. The obligor may, at any time, waive in writing the notice required by this subsection.

(g) On request of an obligor, the court shall issue a withholding order which shall be honored by a payor regardless of whether there is an arrearage.

Sec. 5. K.S.A. 1985 Supp. 23-4,108 is hereby amended to read as follows: 23-4,108. (a) It shall be the affirmative duty of any payor to respond within 10 days to written requests for information presented by the public office concerning: (1) The full name of the obligor; (2) the current address of the obligor; (3) the obligor's social security number; (4) the obligor's work location; (5) the number of the obligor's claimed dependents; (6) the obligor's gross income; (7) the obligor's net income; (8) an itemized statement of deductions from the obligor's income; (9) the obligor's pay schedule; ~~and~~ (10) the obligor's health insurance coverage*; and (11) whether or not income owed the obligor*

is being withheld pursuant to this act. This is an exclusive list of the information that the payor is required to provide under this section.

(b) It shall be the duty of any payor who has been served an order for withholding under this act to deduct and pay over income as provided in this section. The payor shall deduct the amount designated in the order for withholding beginning with the next payment of income due the obligor after 14 days following service of the order on the payor. ~~At~~ *Within 10 days of* the time the obligor is normally paid, the payor shall pay the amount withheld to the *income withholding agency as required by subsection (c) of 1985 Supp. K.S.A. 23-4,109 and amendments thereto, otherwise to the* clerk of court or court trustee as directed by the order for withholding.

(c) If the withholding is to collect current support and an arrearage, the payor shall be required to withhold an amount of income equal to the order for support plus an additional sum, set out in the affidavit provided for in subsection (b) of K.S.A. 1985 Supp. 23-4,107 ~~as a percentage of the amount of the income owed the obligor~~ *and amendments thereto*, to be applied towards liquidation of arrearages. The payor shall withhold and pay over an amount sufficient to pay the current periodic support obligation. The additional amount to be applied toward liquidation of arrearages shall be withheld from each pay period. If the withholding is to collect an arrearage only, the payor shall be required to withhold an amount of income equal to ~~a percentage~~ *the amount* of income set out in the affidavit provided for in subsection (b) of K.S.A. 1985 Supp. 23-4,107 *and amendments thereto*.

(d) The payor shall continue to withhold income to be applied toward liquidation of arrearages until notice to discontinue that portion of the withholding attributable to arrearages is received from the court. After arrearages are paid in full, a withholding order requiring withholding for current support shall continue in the amount of the support order until further order of the court.

(e) From income due the obligor, the payor may withhold

and retain to defray the payor's costs a cost recovery fee of $5 for each pay period for which income is withheld or $10 for each month for which income is withheld, whichever is less. Such cost recovery fee shall be in addition to the amount withheld as support.

(f) Any payor subject to withholding orders for more than one obligor may combine the withheld amounts in a single payment to each clerk of court or court trustee requesting the withholdings if the payor separately identifies the portion of the single payment which is attributable to each individual obligor.

~~(g) If more than one order for withholding requires withholding from the same source of income of a single obligor, the payor must comply on a first-come first-served basis and must honor all withholding orders, subject to the consumer credit protection act limitations as provided by subsection (h).~~

~~(h)~~ *(g)* The entire sum withheld by the payor, including the cost recovery fee, shall not exceed the limits provided for under section 303(b) of the consumer credit protection act (15 U.S.C. 1673(b)). An income withholding order issued pursuant to this act shall not be considered a wage garnishment as defined in subsection (b) of K.S.A. 60-2310 and amendments thereto. If amounts of earnings required to be withheld in accordance with this act are less than the maximum amount of earnings which could be withheld according to the consumer credit protection act, the payor shall honor garnishments filed by other creditors to the extent that the total amount taken from earnings does not exceed consumer credit protection act limitations.

~~(i)~~ *(h)* The payor shall promptly notify the clerk of the district court or the court trustee of the termination of the obligor's employment or other source of income, *or the layoff of the obligor from employment*, and provide the obligor's last known address and the name and address of the individual's current employer, if known.

~~(j)~~ *(i)* Payment as required by an order for withholding issued under this act shall be a complete defense by the payor against any claims of the obligor or the obligor's creditors as to the sums paid.

~~(k)~~ *(j)* If any payor violates the provisions of this act, the court shall enter a judgment against the payor for the total amount which should have been withheld and paid over and may enter judgment against the payor to the extent of the total arrearage owed.

~~(l)~~ *(k)* Any payor who intentionally discharges, refuses to employ or takes disciplinary action against an obligor solely because of a withholding order issued under this act shall be subject to a civil penalty not exceeding $500 and such other equitable relief as the court considers proper.

Sec. 6. K.S.A. 1985 Supp. 23-4,109 is hereby amended to read as follows: 23-4,109. (a) An income withholding order issued under this act shall have priority over any other legal process under state law against the same income. Withholding of income under this section shall be made without regard to any prior or subsequent garnishments, attachments, wage assignments or other claims of creditors.

~~(b) Withholding of income under this section for an obligee or a public office to enforce current support shall have priority over the withholding of income for an obligee or public office seeking to collect assigned arrearages only.~~

~~(c)~~ *(b)* Except as provided by this act, any state law which limits or exempts income from legal process or the amount or percentage of income that can be withheld shall not apply to withholding income under this act.

(c) If more than one order for withholding requires withholding from the same source of income of a single obligor, the payor shall withhold and disperse as ordered the total amount required by all income withholding orders if such amount does not exceed the limits of subsection (g) of K.S.A. 1985 Supp. 23-4,108 and amendments thereto, as shown in the withholding order which specifies the highest percentage of income allowed to be withheld. If the total amount required by all income withholding orders exceeds such limits, the payor shall send a notice of multiple withholding orders, together with the total funds permitted to be withheld under such limits, to the income withholding agency within 10 days after the obligor is normally

paid. Copies of the notice of multiple withholding orders shall be sent by the income withholding agency to the clerk of each court issuing one of the orders and to each obligee under the orders.

The payor shall have an ongoing duty to notify the income withholding agency of any modification or termination of an existing income withholding order, the receipt of any additional income withholding orders pertaining to the obligor or the termination of income payments to the obligor.

The payor shall continue to send the funds withheld to the withholding agency until the obligor becomes subject to only one withholding order or until the income withholding agency notifies the payor that the total amount required to be withheld by all such orders does not exceed the limits of subsection (g) of K.S.A. 1985 Supp. 23-4,108 and amendments thereto, at which time the payor shall send funds withheld as directed by the remaining withholding order or orders to the clerk of court or court trustee.

Upon receipt of the notice of multiple withholding orders and the total funds withheld by the payor for a single obligor, the withholding agency shall have the authority to disburse the funds to the clerk of court or court trustee designated in each income withholding order.

In determining the amounts to be disbursed, the withholding agency shall give priority to current support over amounts to be applied as arrearages. The withholding agency shall disburse to the court or court trustee designated in each income withholding order:

(1) An amount for current support which bears the same ratio to the aggregate amount withheld for current support as the amount designated for current support in such order bears to the aggregate of all amounts designated for current support in all the withholding orders; and

(2) if all withholding orders for current support are satisfied, an amount to defray any arrearage which bears the same ratio to the aggregate amount remaining as the amount designated for arrearages in such order bears to the aggregate of all

amounts designated for arrearages in all the withholding orders.

Sec. 7. K.S.A. 1985 Supp. 23-4,111 is hereby amended to read as follows: 23-4,111. (a) At any time, an obligor~~, obligee or public office~~ may petition the court to: (1) Modify or terminate the order for withholding because of a modification or termination of the underlying order for support; or (2) modify the amount of income withheld to reflect payment in full of the arrearage by income withholding or otherwise. ~~If support payments are undeliverable to the obligee, any such payments shall be held in trust by the court until the payments can be delivered.~~

(b) On request of the obligee or public office, the court shall issue an order which modifies the amount of income withheld, subject to the limitations of subsection (g) of K.S.A. 1985 Supp. 23-4,108 and amendments thereto.

~~(b)~~ *(c)* The obligor may petition the court to terminate the withholding of income because payments pursuant to the order for withholding have been made for at least 12 months and all arrearages have been paid. Upon receipt of a petition under this subsection, the court may suspend the order for withholding unless it finds good cause for denying the petition because of the obligor's payment history or otherwise. If a withholding order is terminated for any reason and the obligor subsequently becomes delinquent in the payment of the order for support, the obligee or public office may obtain another order for withholding by complying with all requirements for notice and service pursuant to this act.

(d) If support payments are undeliverable to the obligee, any such payments shall be held in trust by the court until the payments can be delivered.

~~(c)~~ *(e)* The clerk of court shall cause to be served on the payor a copy of any order entered pursuant to this section that affects the duties of the payor.

Sec. 8. K.S.A. 1985 Supp. 23-4,118 is hereby amended to read as follows: 23-4,118. The department of social and rehabilitation services is designated as the state income withholding agency in title IV-D cases *and in all instances where the total amount of multiple income withholding orders for any one*

obligor exceeds the ~~limit of subsection (b) of K.S.A. 1985 Supp. 23-4,108 and amendments thereto,~~ regardless of the IV-D status of the cases involved. For the purpose of keeping adequate records to document, track and monitor support payments in title IV-D cases and for the purpose of initiating the income withholding process in such cases, the department may contract for the performance of all or a portion of the withholding agency function with existing title IV-D contractors or any newly created entity capable of providing such services.

Sec. 9. K.S.A. 1985 Supp. 23-4,125 is hereby amended to read as follows: 23-4,125. *(a) The title of K.S.A. 1985 Supp. 23-4,125 through 23-4,137, and amendments thereto, shall be the interstate income withholding act.*

(b) The purpose of K.S.A. 1985 Supp. 23-4,125 through 23-4,137, *and amendments thereto,* is to enhance the enforcement of support obligations in cases being processed pursuant to title IV, part D, of the federal social security act (42 U.S.C. § 651 *et seq.*), as amended, by providing a quick and effective procedure for the withholding of income derived in this jurisdiction to enforce support orders of other jurisdictions and by requiring that income withholding to enforce the support orders of this jurisdiction be sought in other jurisdictions.

Sec. 10. K.S.A. 1985 Supp. 23-4,130 is hereby amended to read as follows: 23-4,130. (a) ~~On~~ *No later than 10 days after* the date a support order is entered pursuant to K.S.A. 1985 Supp. 23-4,129 *and amendments thereto,* the agency shall serve upon the obligor, a notice of delinquency as provided for in subsection (f) of K.S.A. 1985 Supp. 23-4,107 *and amendments thereto.* The notice shall also advise the obligor that income withholding was requested on the basis of a support order of another jurisdiction. As appropriate, the agency shall then file the affidavit provided for in subsection (b) of K.S.A. 1985 Supp. 23-4,107 *and amendments thereto* to establish an income withholding order. If, in accordance with subsection (b) of K.S.A. 1985 Supp. 23-4,110 *and amendments thereto,* the obligor contests the establishment of an income withholding order, the court must hold a hearing and render a decision within 45 days of the date of service of the

limits provided for under section 303 (b) of the consumer credit protection act (15 U.S.C. 1673(b))

notice of delinquency on the obligor.

(b) If the obligor seeks a hearing to contest the proposed income withholding, the agency shall immediately notify the requesting agency of the date, time and place of the hearing.

Sec. 11. K.S.A. 1985 Supp. 23-4,131 is hereby amended to read as follows: 23-4,131. (a) At any hearing contesting proposed income withholding based on a support order entered under K.S.A. 1985 Supp. 23-4,129 *and amendments thereto*, the entered order, accompanying sworn or certified statement, and a certified copy of the income withholding order or notice, if any, still in effect shall constitute prima facie proof, without further proof or foundation, that the order is valid, that the amount of current support payments and arrearages is as stated, and that the obligee would be entitled to income withholding under the law of the jurisdiction which issued the support order.

(b) Once a prima facie case has been established, the obligor may raise only the following:

(1) A mistake of fact that is not res judicata concerning the amount of current support owed or arrearage that had accrued, mistaken identity of the obligor or the amount of income to be withheld;

(2) that the court or agency which issued the support order entered under K.S.A. 1985 Supp. 23-4,129 *and amendments thereto* lacked personal jurisdiction over the obligor;

~~(3) that the statute of limitations under K.S.A. 1985 Supp. 23-4,137 precludes enforcement of all or part of the arrearages~~.

The burden shall be on the obligor to establish these defenses.

(c) If the obligor presents evidence which constitutes a full or partial defense, the court, on the request of the obligee or agency, shall continue the case to permit further evidence relative to the defense to be adduced by either party, except that, if the obligor acknowledges liability sufficient to entitle the obligee to income withholding, the court shall require income withholding for the payment of current support payments under the support order and of so much of any arrearage as is not in dispute, while continuing the case with respect to those matters still in dispute. The court shall determine those matters still in dispute

as soon as possible and, if appropriate, shall modify the withholding order to conform to its resolution of those matters.

(d) In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses in another state, including the parties and any of the children, by deposition, by written discovery, by photographic discovery such as videotaped depositions or by personal appearance before the court by telephone or photographic means. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which, and the terms upon which, the testimony shall be taken.

(e) A court of this state may request the appropriate court or agency of another state to hold a hearing to adduce evidence, to permit a deposition to be taken before the court or agency, to order a party to produce or give evidence under other procedures of that state and to forward to the court of this state certified copies of the evidence adduced in compliance with the request.

(f) Upon request of a court or agency of another state the courts of this state which are competent to hear support matters may order a person in this state to appear at a hearing or deposition before the court to adduce evidence or to produce or give evidence under other procedures available in this state. A certified copy of the evidence adduced, such as a transcript or videotape, shall be forwarded by the clerk of the court to the requesting court or agency.

(g) A person within this state may voluntarily testify by statement of affidavit in this state for use in a proceeding to obtain income withholding outside this state.

Sec. 12. K.S.A. 1985 Supp. 23-4,132 is hereby amended to read as follows: 23-4,132. If the obligor does not request a hearing in the time provided in subsection (a) of K.S.A. 1985 Supp. 23-4,110 *and amendments thereto* or if a hearing is held and it is determined that the obligee has or is entitled to income withholding under the local law of the jurisdiction which issued the support order, the court shall issue an income withholding order under subsection (b) of K.S.A. 1985 Supp. 23-4,110 *and*

amendments thereto. ~~The agency shall notify the requesting agency of the date upon which withholding will begin.~~

Sec. 13. K.S.A. 1985 Supp. 23-4,137 is hereby amended to read as follows: 23-4,137. ~~(a) The law of this state shall apply in all actions and proceedings concerning the issuance, enforcement and duration of income withholding orders issued by a court of this state, which is based upon a support order of another jurisdiction entered pursuant to K.S.A. 1985 Supp. 23-4,120, except as provided in subsections (b) and (c).~~

~~(b) The law of the jurisdiction which issued the support order shall govern the following:~~

~~(1) The interpretation of the support order entered under K.S.A. 1985 Supp. 23-4,120, including the amount, form of payment and duration of support.~~

~~(2) the amount of support arrearages necessary to require the issuance of an income withholding order; and~~

~~(3) the definition of what costs, in addition to the periodic support obligation, are included as arrearages which are enforceable by income withholding, including but not limited to interest, attorney fees, court costs and costs of paternity testing.~~

~~(c) The court shall apply the statute of limitations for maintaining an action on arrearages of support payments of either the law of this state or of the state which issued the support order entered under K.S.A. 1985 Supp. 23-4,120, whichever is longer.~~

Except with respect to when withholding must be implemented, which is controlled by the law of the state where the support order was originally issued, the law and procedures of the state in which the absent parent derives income shall apply.

Sec. 14. K.S.A. 1985 Supp. 23-4,146 is hereby amended to read as follows: 23-4,146. (a) Whenever there is an arrearage in payment of an order of support in an amount equal to or greater than the amount of support payable for one month, the obligee, the secretary of social and rehabilitation services or the secretary's contractors, if the right to support has been assigned to the secretary, may establish a lien upon certain personal property of the obligor as follows:

(1) In the case of a vehicle, the obligee or secretary may

establish a lien on the vehicle by filing a notice of lien with the division of vehicles of the department of revenue. The notice shall be in a form prescribed by the division and shall contain a description of the vehicle, the name and address of the obligee or secretary, the name and last known address of the obligor and any other information required by the division. An affidavit of the obligee or person designated by the secretary shall be filed with the notice and shall state that there is an arrearage in an amount equal to or greater than the amount of support payable for one month and that a copy of the notice of lien has been sent by first-class mail to the obligor at the obligor's last known address.

Upon the filing of the notice of lien in accordance with this subsection (a)(1) and payment to the division of a fee of $5, the division shall be authorized to demand in writing the surrender of the title certificate from the owner of the vehicle for the purpose of recording the lien on the title certificate. Once the lien is properly recorded, a transfer of title is not valid unless the lien has been released in the manner provided by K.S.A. 8-135 and amendments thereto or the transfer has been consented to in writing by the lienholder. If the obligor fails to surrender the title certificate within 15 days after the written demand by the division of vehicles, the division shall notify the person or entity seeking the lien. Such person or entity may obtain an order of the court which issued the support order requiring the obligor to surrender the title certificate to the court so that a lien may be properly recorded.

(2) In the case of a vessel or aircraft, the obligee or secretary may establish a lien on the vessel or aircraft by filing a notice of lien with the office where filing is required by K.S.A. 84-9-401 and amendments thereto to perfect a security interest in the vessel or aircraft. The notice shall contain a description of the *make, model designation and serial number of the* vessel or aircraft, including its identification *or registration* number, if any; the name and address of the obligee or secretary; and the name and last known address of the obligor. An affidavit of the obligee or person designated by the secretary shall be filed with

the notice and shall state that there is an arrearage in an amount equal to or greater than the amount of support payable for one month and that a copy of the notice of lien has been sent by first-class mail to the obligor at the obligor's last known address.

Upon the filing of the notice of lien in accordance with this subsection (a)(2) and payment of a fee of $5, the notice of lien shall be retained by the office where filed and may be enforced and foreclosed in the same manner as a security agreement under the provisions of the uniform commercial code. *If such liens are required by law to be filed in the office of the secretary of state, the filing officer shall file, index, amend, maintain, remove and destroy the lien notification statement in the same manner as a financing statement filed under part 4 of article 9 of the uniform commercial code. The secretary of state shall charge the same filing and information retrieval fees and credit the amounts in the same manner as financing statements filed under part 4 of article 9 of the uniform commercial code.*

(b) As used in this section:

(1) "Aircraft" has the meaning provided by K.S.A. 3-201 and amendments thereto.

(2) "Vehicle" has the meaning provided by K.S.A. 8-126 and amendments thereto.

(3) "Vessel" has the meaning provided by K.S.A. 82a-801 and amendments thereto.

(4) "Arrearage," "obligee," "obligor" and "order for support" have the meanings provided by K.S.A. 1985 Supp. 23-4,106 *and amendments thereto.*

Sec. 15. K.S.A. 1985 Supp. 39-755 is hereby amended to read as follows: 39-755. (a) In cases where the secretary of social and rehabilitation services is deemed to have an assignment of support rights in accordance with the provisions of K.S.A. 39-709 and amendments thereto, the secretary is authorized to bring a civil action in the name of the state of Kansas or of the obligee whose support rights are assigned to enforce such support rights, establish an order for medical support and, when appropriate or necessary, to establish the ~~paternity~~ *parentage* of a child. Civil actions ~~brought~~ by the secretary to ~~establish paternity shall not~~

~~be limited or barred until the child reaches 18 years of age~~ *determine the parentage of a child may be brought at any time if parentage is presumed under K.S.A. 1985 Supp. 38-1114 and amendments thereto or at any time until three years after the child reaches the age of majority if parentage is not presumed under K.S.A. 1985 Supp. 38-1114 and amendments thereto.* The secretary may also enforce any assigned support order or file a motion to modify any such order.

(b) The secretary of social and rehabilitation services and the attorney representing the secretary or an attorney with whom the secretary has entered into a contract or agreement for such services under this act shall be deemed to represent the interests of all persons, officials and agencies having an interest in the assignment. The court shall determine, in accordance with applicable provisions of law, the parties necessary to the proceeding and whether independent counsel should be appointed to represent any party to the assignment or any other person having an interest in the support right.

(c) Any support order made by the court in such a proceeding shall direct that payments be made to the secretary of social and rehabilitation services so long as there is in effect an assignment of support rights to the secretary and, upon notification by the secretary to the court that the assignment is terminated, that payments be made to the person or family.

(d) The provisions of this section shall also apply to cases brought by the secretary on behalf of persons who have applied for services pursuant to K.S.A. 39-756 and amendments thereto.

Sec. 16. K.S.A. 1985 Supp. 20-302b, 23-473, 23-4,105, 23-4,107, 23-4,108, 23-4,109, 23-4,111, 23-4,118, 23-4,125, 23-4,130, 23-4,131, 23-4,132, 23-4,137, 23-4,146 and 39-755 are hereby repealed.

Sec. 17. This act shall take effect and be in force from and after its publication in the statute book.