Kansas Judicial Council Bulletin

DECEMBER, 1980 FIFTY FOURTH ANNUAL REPORT

FRED L. CONNER
President, Kansas Bar Association

JUDICIAL REDISTRICTING REPORT AND
RECOMMENDATIONS ON DIVORCE CODE,
PROBATE CODE AND COURT COSTS

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ALEX HOTCHKISS, (1964-1973) ..... Lyndon
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J. C. TILLOTSON, (1973-1977) ..... Norton
JOHN F. HAYES, (1973-1977) ..... Hutchinson
E. RICHARD BREWSTER, (1977-1979) ..... Topeka

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FOREWORD

The Honorable Fred L. Conner has prepared an article for this issue of the *Kansas Judicial Council Bulletin* entitled "A Memorable Day."

Mr. Conner is President of the Kansas Bar Association and is a partner in the Great Bend law firm of Conner and Opie. He has been a member of the KBA Executive Council for eight years. He also served on the Professional Ethics Committee for 22 years with seven years as Chairman, and has been a member and Chairman of numerous other KBA committees. He was the first recipient of the KBA President's Outstanding Service Award.

Born in Hutchinson, Conner attended the University of Kansas, where he earned his J.D. degree in 1934. He is a member of the American, Kansas, Southwestern Kansas, and Barton County Bar Associations and is also a Fellow and former State Chairman of the American College of Probate Counsel. He has been a member of the Probate Attorneys Association Research and Editorial Board and was a member of the 1967 Kansas Judicial Council Committee to Reapportion and Redistrict the Kansas District Courts. He and his wife, Helen, have a son, Brian.

This *Kansas Judicial Council Bulletin* contains: the article written by Kansas Bar Association President Fred L. Conner; the report of the Judicial Redistricting Advisory Committee; recommended amendments to the divorce code; proposed legislation relating to the determination of the validity of a consent to a will; a brief report of the Civil Code Advisory Committee relating to court costs; a summary of fiscal year 1980 court caseload data and a roster of judges and clerks of the district courts.

The articles concerning judicial redistricting, the divorce code, consents to wills and court costs are published to give the members of the bench and bar an opportunity to express their opinions on the subjects contained therein. Your comments are invited. You may offer your comments by writing:

KANSAS JUDICIAL COUNCIL
KANSAS JUDICIAL CENTER
301 WEST 10TH STREET
TOPEKA, KANSAS 66612

The court days for 1981 are not printed in this *Bulletin,* any person requiring a listing of court days for any judicial district can obtain that information by requesting it from the Judicial Administrator, Kansas Judicial Center, 301 West 10th Street, Topeka, Kansas 66612. Also, any person needing detailed court caseload data of the work of the Supreme Court, Court of Appeals or District Court, for the period from July 1, 1979 to June 30, 1980 may obtain it by writing the Judicial Administrator.

There have been no changes in the membership of the Judicial Council since the last report of the Council. The Kansas Judicial Council consists of the following persons: Justice David Prager, Chairman, Topeka; James D. Waugh, Secretary, Topeka; Judge J. Richard Foth, Topeka; Judge James J. Noone, Wichita; Judge Herbert W. Walton, Olathe; Senator Elwaine F. Pomeroy, Topeka; Representative Joseph J. Hoagland, Overland Park; Robert H. Cobean, Wellington; Jack E. Dalton, Dodge City; and Marvin E. Thompson, Russell.

The staff of the Judicial Council consists of Randy M. Hearrell, attorney, who is research director and administrator of the Judicial Council Office, Mrs. Nell Ann Gaunt is the fiscal officer & administrative assistant for the Council. Matthew B. Lynch, attorney, joined the Council staff in November 1979 and is research associate for the Council.

The Judicial Council continues to perform its statutory duties as prescribed by K.S.A. 20-2203. Much of the work of the Judicial Council is carried out through the use of advisory committees. The following is a summary of the work of each advisory committee for the past year.

The Benchbook Advisory Committee remains a standing committee of the Council to update and prepare supplements to the *Kansas Benchbook* as they are deemed desirable. There remain a number of copies of the *Kansas Benchbook* which the Council will distribute, free-of-charge, to attorneys who request a copy of the book. The members of the committee are Judge James J. Noone, Chairman and member of the Council, Wichita; Judge John W. Brookens, Westmoreland; Judge Harold R. Riggs, retired, Olathe; Charles S. Fisher Jr., Topeka; Charles E. Henshall, Chanute; Byron G. Larson, Dodge City; Donald Patterson, Topeka; and Gene H. Sharp, Liberal.

The Civil Code Advisory Committee is a standing committee of the Council and is designated to keep the Kansas Code of Civil Procedure current with amendments to the Federal Code of Civil Procedure and with current needs. The committee also receives assignments from the Council in related areas. The committee is currently studying: jurisdiction of small claims courts; mediation; right to jury trial; six person juries; specific proposals for change in the juvenile and care & treatment areas; the English system of lawyer compensation; discovery; a monetary threshold for appellate cases; changes in the make-up of the appellate courts; statutes which require that certain cases preempt the judicial calendar; judicial impact statements; presentence reports; court costs; prejudgment interest and retention and destruction of court records. A brief report of the committee relating to court costs is published in this *Bulletin*. The members of the committee are Marvin E. Thompson, Chairman, and member of the Council, Russell; Professor Michael A. Barbara, Topeka; Emmet A. Blaes, Wichita; Judge J. Richard Foth, member of the Council, Topeka; Charles E. Henshall, Chanute; Morris D. Hildreth, Coffeyville; Justice David Prager, Chairman of the Council, Topeka; Richard D. Shannon, Kansas City; and Leonard O. Thomas, Kansas City.

The Counsel for Indigent Persons Advisory Committee which was appointed at the request of the 1977 Legislature has completed its study of the appointment of counsel in criminal and all other proceedings constitutionally requiring appointed counsel. The committee reported to the 1980 legislature and has been disbanded. The members of the committee were Jack E. Dalton, Chairman and member of the Council, Dodge City; A. Jack Focht, Wichita; Gerald L. Goodell, Topeka; Judge Morris V. Hoobler, Salina; Ira R. Kirkendoll, Kansas City; Michael Lerner, Kansas City; Dolores V. Macke, Overland Park; Walter F. Stueckemann, Jetmore; and Representative Fred L. Weaver, Baxter Springs.

The Criminal Law Advisory Committee has been created for the purpose of studying and making recommendations on the subjects of use of deadly force by law enforcement officers, high-speed chases by law enforcement officers and strip searches. The members of the committee are Judge James J. Noone, Chairman and member of the Council, Wichita; Charles D. Anderson, Wichita; Professor Mi-

chael A. Barbara, Topeka; Representative Karen L. Griffiths, Newton; Stephen M. Joseph, Wichita; Carol Keith, Manhattan; Senator Billy Q. McCray, Wichita; Steven L. Opat, Junction City; and Loren L. Taylor, Kansas City.

The Family Law Advisory Committee is studying problems in the area of divorce and family law. The committee has prepared amendments to present Article 16 of K.S.A. Chapter 60 and is considering the Uniform Parentage Act. The recommended amendments to the divorce code are included in this *Bulletin.* The members of the committee are Judge Herbert W. Walton, Chairman and member of the Council, Olathe; Constance M. Achterberg, Salina; Phyllis H. Buzick, Sylvan Grove; John H. Johntz Jr., Olathe; Dr. Paul C. Laybourne Jr., Kansas City; Judge Jerry L. Mershon, Manhattan; Brian J. Moline, Topeka; Judge Wayne H. Phillips, Kansas City; and Judith C. Runnels, Topeka.

The PIK-Civil Advisory Committee has completed the second edition of *PIK-Civil* which can be obtained from its publisher, Bancroft-Whitney Publishing Company. The members of the committee are Judge Don Musser, Chairman, Pittsburg; Judge Herbert W. Walton, Administrative Chairman and member of the Council, Olathe; Judge Bob Abbott, Topeka; Professor Michael A. Barbara, Topeka; Judge B. Mack Bryant, Wichita; Judge Ronald D. Innes, Manhattan; Justice David Prager, Chairman of the Council, Topeka; and Judge Frederick Woleslagel, Lyons.

The PIK-Criminal Advisory Committee has completed work on a supplement to *PIK-Criminal.* The supplement was distributed in January of 1980. The members of the committee are Judge Herbert W. Walton, Chairman and member of the Council, Olathe; Judge Bob Abbott, Topeka; Professor Michael A. Barbara, Topeka; Judge B. Mack Bryant, Wichita; Judge Ronald D. Innes, Manhattan; Judge Don Musser, Pittsburg; Justice David Prager, Chairman of the Council, Topeka; and Judge Frederick Woleslagel, Lyons.

The Judicial Redistricting Advisory Committee was formed to conduct a review of the geographic configuration of the state's 29 judicial districts and report to the Legislature. The report has been forwarded to the Legislature and the report is printed in this *Bulletin.* The members of the committee are Judge J. Richard Foth, Chairman and member of the Council, Topeka; Jack R. Euler, Troy; Judge Steven P. Flood, Hays; Senator Frank D. Gaines, Augusta; Representative John Michael Hayden, Atwood; Richard C. Hite, Wichita; Representative Joseph J. Hoagland, member of the Council, Overland Park; Justice Robert H. Kaul, retired, Wamego; Ted Morgan, Lakin; and Harold A. Pfalzgraf, Wellington.

The Juvenile Code Advisory Committee is recodifying the Kansas Juvenile Code into two separate codes, one dealing with status offenders and one dealing with "criminal type" offenses. The members of the committee are Robert H. Cobean, Chairman and member of the Council, Wellington; Michael G. Glover, Lawrence; Arthur H. Griggs, Topeka; Charles V. Hamm, Topeka; Camilla K. Haviland, Dodge City; Representative James Holderman, Wichita; Judge C. Fred Lorentz, Fredonia; Judge David K. Mikesic, Kansas City; Judge Robert L. Morrison, Wichita; Mary Ann Torrence, Topeka; and David J. Waxse, Olathe.

The Special Services Advisory Committee is studying the special court services currently operating in the various judicial districts and the implementation of the requirement of L. 1978, Ch. 120, § 14 that the district courts provide certain probation services now provided by the Department of Corrections. Members of the committee are Chief Justice Alfred G. Schroeder, Chairman, Topeka; Justice

David Prager, Chairman of the Council, Topeka; Judge C. Phillip Aldrich, Larned; Judge William R. Carpenter, Topeka; Judge William D. Clement, Junction City; Judge William M. Cook, Kansas City; Judge James J. Noone, member of the Council, Wichita; Judge David H. Scott, Independence; and Michael S. McLain, Olathe. John E. Johnston, court services specialist for the office of the Judicial Administrator, is an ex officio member of the committee.

In addition to the work of the Judicial Council Advisory Committees the preparation of a redraft of the *Kansas Municipal Court Manual* has been undertaken by the staff of the Judicial Council and will be completed by the time this *Bulletin* is published.

The Judicial Council will recommend legislation amending the Probate Code and relating to the determination of the validity of a consent to a will. A copy of the proposed amendment to the Probate Code is included in this *Bulletin.* The Judicial Council will also propose other legislation in the areas in which its committees are making studies and which effect the administration of justice.

The Judicial Council proposed legislation on the following subjects to the 1980 Legislature: legislation relating to payment for performance of judicial service and duties by retired justices and judges; amendment to the class action statutes; amendment of the Protection From Abuse Act; amendment of the Probate Code in the area of disclaimers to succession; amendment of the statutes setting the legal rate of interest and the rate of interest on judgments; assessment of costs and attorneys' fees for a frivolous claim or defense; the method of selecting judges in reapportioned judicial districts; the nomination of district magistrate judges by judicial nominating commissions and the abolition of terms of court.

The work of the Council in surveying and studying the judicial system and recommending needed improvements is continuous. Any person who has comments or suggestions about any matter affecting the administration of justice is urged to contact the Judicial Council.

DAVID PRAGER, *Chairman*
Kansas Judicial Council

A MEMORABLE DAY

In olden times to which the memory of many present lawyers runneth naught, the Kansas Bar Association held its annual meeting in Kansas City. There was quite a bit of excitement because a real issue was to be determined. The general assembly was scheduled in the city auditorium because of the anticipated attendance. The largest crowd in my memory was present.

The issue to be decided was whether the K.B.A. should become integrated or remain a voluntary association. The word "integrated" has acquired more prominent connotations and the reference is to a "unified" bar as it is now known.

There was a trend then to unify bar associations. It was the fashionable thing to do. Strong advocates presented both sides of the question. Proponents argued in favor of requiring all lawyers to belong to the bar association and they were willing to give up some freedom, which had been enjoyed to that time, in order to obtain the many benefits.

The opponents of the proposal had a simple, but pungent, argument. In effect, it was "Why tamper with something that is working?" The argument was stated in several different ways, but it all boiled down to the same ultimate result. The vote was close and, in the end, the K.B.A. remained a voluntary association.

You may wonder why all of the foregoing is recited. The answer eventually will be evident. Much has happened since that day in Kansas City.

The K.B.A. has been described as a strong voluntary association. It represents the interests of all of the lawyers and, in response, it enjoys a large percentage of the practicing lawyers as its members—consistently about 87 percent. It was the first bar association to sponsor C.L.E. on public television, the first to use video tape of C.L.E. programs and telenet services, first to recommend mandatory C.L.E., and first to sponsor the National Conference on Legal Rights of the Mentally Disabled. It was one of the five states originally sponsoring prepaid legal services, computerized legal research, and statewide lawyer referral.

The K.B.A. has progressed from an executive secretary and a part time assistant in 1953 to a full time staff of 9 persons. The budget of the association has grown from $27,000 in 1953 to $621,415 for the current fiscal year. There were about 1400 members in 1953 and 4,000 are expected to hold membership at the end of this year. Originally housed in a room in the old Columbian Building, the K.B.A. now is building its new home across the street from the Kansas Judicial Center.

This is a brief of an impressive record, but it obviously is not complete. The obvious omission, of course, concerns legal ethics by whatever name now known or by which they may become known. While we all are concerned about investigation of offenders and the issuance of opinions, we tend to forget that a large part of this work involves public relations.

The K.B.A. for many years had a committee of seven members to handle all of this work. Then the committee was split into two divisions—opinions and grievances—with more members added over the years. The committee itself recommended to the K.B.A. and the Supreme Court that a full time administrator be employed and that he be vested with official authority. This recommendation led to our present system.

Opinions concerning ethics are handled by the K.B.A. The K.B.A. now assists in the investigation of grievances along with the metropolitan bars. The administrator, in effect, does what the committee chairman formerly did, but with refinements and an official capacity. Of course, the State Board and the Supreme Court are the top two rounds on this ladder.

Now, how does all this relate to the Kansas City meeting and the decision reached at it? Kansas, for all practical purposes, has a unified bar as to matters involving discipline, but remains voluntary for all other purposes. This is exactly what has been causing trouble for about the past five years in other states with unified bars. Many lawyers in these states say they need to have an association to represent all of the lawyers free from the supervision of the court.

Some states now have two bar associations—one unified and one voluntary. In other states, with unified bars, there is much talk about going back to a voluntary association and leaving only discipline behind or forming a second association on a voluntary basis. This is why, I believe, the Kansas City meeting was held on a memorable day for the K.B.A.

FRED L. CONNER, *President*
Kansas Bar Association

REPORT OF THE KANSAS JUDICIAL COUNCIL JUDICIAL REDISTRICTING ADVISORY COMMITTEE

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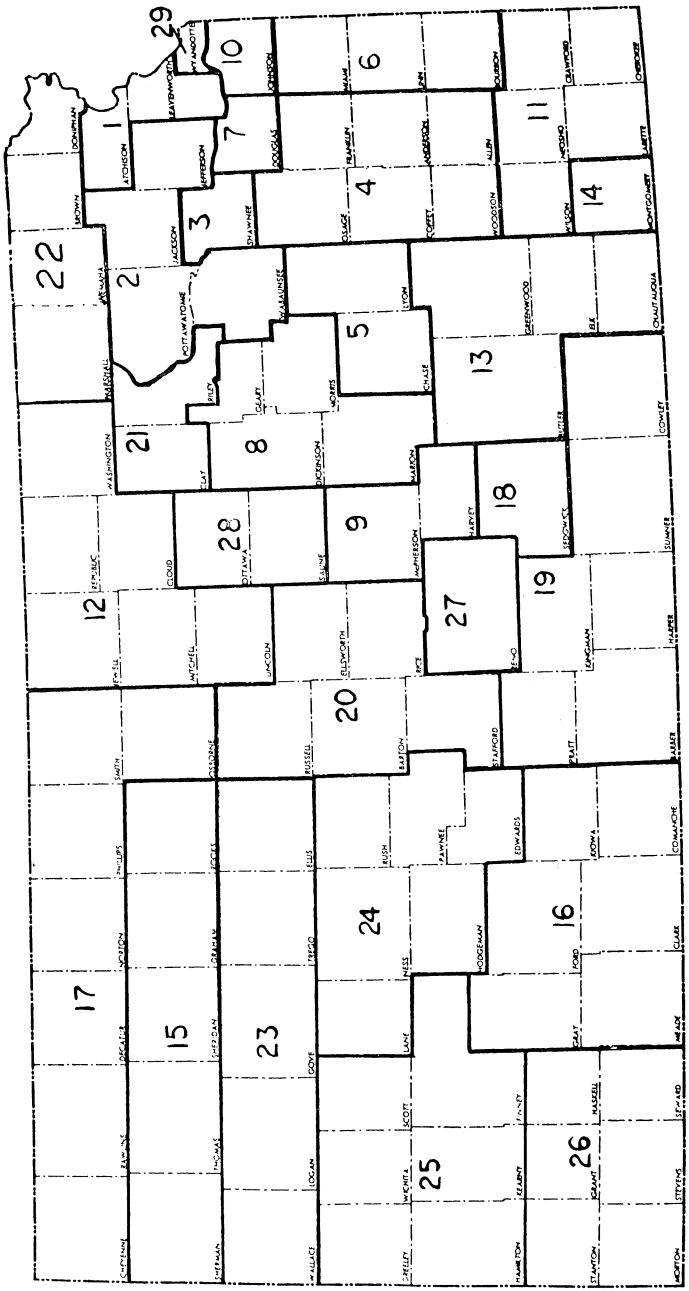
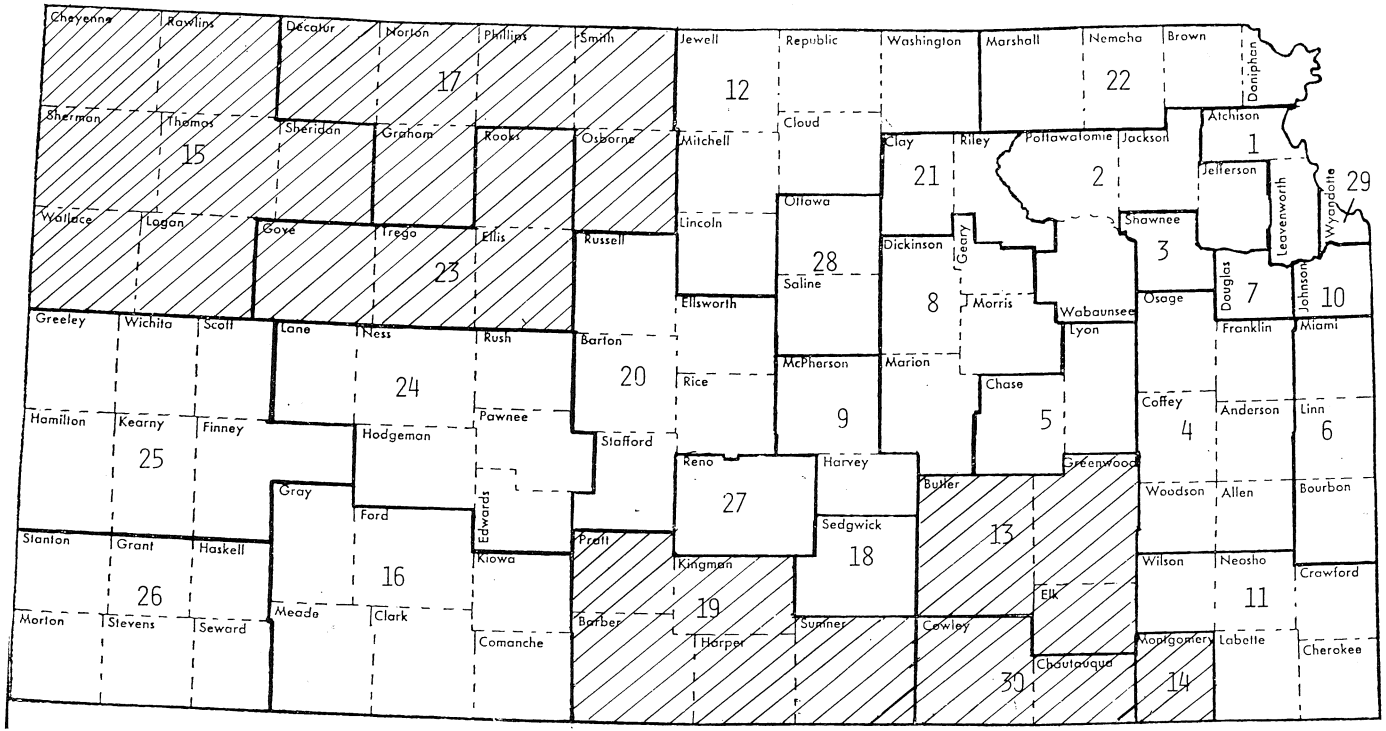
PRESENT KANSAS JUDICIAL DISTRICTS



PROPOSED KANSAS JUDICIAL DISTRICTS

(SHADED AREA INDICATES AFFECTED DISTRICTS)



I. BACKGROUND OF STUDY

This study of judicial redistricting was initiated by a letter addressed to the Kansas Judicial Council from Senator Ross O. Doyen, then chairman of the Legislative Coordinating Council. The letter read as follows:

"The Special Legislative Committee on Ways and Means has asked the Legislative Coordinating Council to request the Judicial Council to study the following matter. Thereupon, at its meeting on August 10, 1979, the LCC took action requesting the Judicial Council to conduct a review of the current geographic configuration of the 29 Judicial Districts and to submit to the Legislature a report thereon. The legislative concern relates to the present alignment of counties, including numerous problems and inefficiencies associated with the present situation. The LCC feels that the Judicial Council has better initial access to relevant information which may be appropriate to consider in determining whether any judicial reapportionment is desirable and to suggest the direction which any such reapportionment might take."

The last judicial redistricting study was done by a committee of the Judicial Council which submitted its report January 12, 1968. Prior to that redistricting there had been no general redistricting of the Kansas District Courts since 1895.

At its meeting on August 31, 1979 the Judicial Council considered the request of the Legislative Coordinating Council and voted unanimously to undertake the task as requested. Thereupon, the Judicial Council, following its usual procedure, appointed an advisory committee consisting of persons who have knowledge of the area under consideration and have diverse backgrounds. The following persons were requested, and agreed, to serve on the Judicial Council Judicial Redistricting Advisory Committee:

J. RICHARD FOTH, Chairman, Topeka; member of the Judicial Council, and Chief Judge of the Court of Appeals.

JACK R. EULER, Troy, lawyer, former state representative, and former chairman of the House Judiciary Committee.

STEVEN P. FLOOD, Hays, District Judge and administrative judge of the 23rd Judicial District.

FRANKLIN D. GAINES, Augusta, lawyer and state senator from the 16th district.

DAN HAMRICK, Coffeyville, newspaper editor, (Mr. Hamrick resigned prior to the first committee meeting when he moved from the state to accept another position).

JOHN MICHAEL HAYDEN, Atwood, insurance agent, state representative from the 120th district, and chairman of the House Ways and Means Committee.

RICHARD C. HITE, Wichita, lawyer and partner in the law firm of Kahrs, Nelson, Fanning, Hite, and Kellogg.

JOSEPH J. HOAGLAND, Overland Park, member of the Judicial Council, lawyer, state representative from the 22nd district, and chairman of the House Judiciary Committee.

ROBERT H. KAUL, Wamego, retired justice of the Kansas Supreme Court and former district judge.

TED R. MORGAN, Lakin, lawyer.

HAROLD A. PFALZGRAF, Wellington, Lawyer.

The committee held its initial meeting on November 5, 1979 and has met six times since.

II. METHOD OF STUDY

The committee began with the gathering of information, which was a continuous process throughout the study. Secondly, the committee set "guiding principles" upon which it based its decisions. Finally, the committee examined each judicial district in the state to determine whether any changes were warranted.

A. *Gathering Information*

The gathering of information by the committee included information gathered by individual committee members, and the holding of hearings in areas where redistricting seemed probable. Letters were written to interested persons throughout the state, research into the background of the assignment was conducted, and statistics relating to caseload and travel time were prepared. The following is a more complete explanation of the procedures:

1. *Personal Contact*

Each member of the committee made personal contact with numerous persons. Some members contacted each lawyer in their area and two members held hearing in in their area. The reports of individual members to the committee were invaluable, not only to locate areas needing redistricting, but to make the statistics compiled by the committee more meaningful by giving the committee a "feel" for areas under consideration.

2. *Letters and Publications*

In an effort to get local input from throughout the state letters were mailed to certain groups and notices were printed in certain publications.

An initial mailing containing information about the redistricting study and requesting suggestions was made to: each administrative judge in the state, each member of a judicial nominating commission, each county bar association president, the League of Kansas Municipalities, the Kansas Sheriffs Association, and the Kansas Association of Counties.

In addition to the initial mailing, interested persons in the judicial districts where specific changes were tentatively discussed were mailed a letter setting forth the proposed change, with accompanying statistics and other material and requesting their opinion of the proposed change. In those districts a letter was sent to each lawyer, judge, legislator, county commissioner, local bar president, and member of the district nominating commission. In some judicial districts where different configurations were proposed several letters were sent. Also, some of the committee members, on their own initiative, wrote a number of persons in their local area seeking their throughts on judicial redistricting.

In response the committee received over 220 letters, which were duplicated and circulated to each committee member. The number is impressive when it is noted that many were sent on behalf of a local bar association, law firm or other group. Each was carefully considered by the committee.

3. *Research*

The committee first considered the relevant statutes and reviewed the report of the 1968 Judicial Reapportionment Committee.

The committee staff then compiled statistics from the Judicial Administrator's *Annual Report on the Courts of Kansas.* These were broken down for each judicial district, county, and judge. State wide averages per judicial district were prepared and broken down for comparison purposes into major urban, small urban, and rural districts.

It was recognized that raw caseload data does not fully reflect actual judge time required, but like the 1968 committee this committee concluded that, applied uniformly on a state wide basis it provided the most accurate gauge of work load available.

The committee used "mock-ups" of present and proposed judicial districts to set forth the impact of proposed changes. These "mock-ups" compared the present and proposed judicial districts in such areas as number of counties, population, number of judges, average major cases disposed of per judge, average number of major trials per judge, total traffic cases, and mileage traveled by the judge. (For definition of "major cases" see part III below.)

B. *Guiding Principles*

The committee considered and set guiding principles to be followed in the redistricting of the judicial districts:

Work load of the judges should be equalized, so far as possible.

Travel time of the judges should be minimized so far as possible with a view toward making more efficient use of judges' time and conserving energy.

Proposed changes should be made only to achieve a substantial step toward one or both of the above goals.

Every effort should be made to avoid unnecessarily changing districts which are functioning well.

The committee took notice of numerous other factors in considering the possible redistricting including: local trade areas; the origin of outside counsel practicing in the area; possible changes in location of judges' home towns; routes of travel of judges; population trends; caseload trends; and traditional district lines.

The committee also considered the "basic factors" the 1968 redistricting committee set out. Those factors were:

"(a) Equalization of work load of district judges throughout the state with consideration given to such factors as necessary travel time in addition to actual caseload.

"(b) Desirability of having all districts be multiple-judge districts if provision can be made for non-partisan selection and without eliminating incumbent judges.

"(c) Utilization of all incumbent judges in the judicial service.

"(d) Requiring express approval of the Chief Justice before new divisions of courts are established.

"(e) Geographical accessibility of judges.

"(f) Administrative feasibility.

"(g) Some regard to traditional district lines.

"(h) Retention of administrative flexibility to allow for unusual situations affecting individual work loads."

It will be noted that although they may be somewhat restated, or no longer as significant as they were due to the unification of the court system, the basic factors set forth by the 1968 committee are not greatly different than those considered by

the present committee with the exception of factor (b). The present committee has taken the position that it has found no reason to create large multi-judge districts, but such districts should not be rejected as a possibility.

C. *Hearings*

Once the committee determined that an area was a likely candidate for redistricting, a hearing was held in that area at which the committee's ideas were put forward and those affected could express their views. The entire committee conducted public hearings with regard to proposed plans of judicial redistricting of the 19th judicial district (Pratt, Kingman, Barber, Harper, Sumner, and Cowley Counties), the 13th judicial district (Butler, Elk, Greenwood, and Chautauqua Counties) and the 14th judicial district (Montgomery County). In addition, Representative Hayden and Judge Flood organized and held hearings regarding the proposed redistricting of the 15th, 17th, and 23rd judicial districts.

III. PROPOSALS CONSIDERED

Throughout the following discussion of redistricting proposals, caseload averages are given. These averages are per judge averages for district and associate district judges and are based on figures contained in a computer print-out furnished by the Office of Judicial Administration entitled "Major Caseload by Judge-ID". "Major Cases" include all civil cases filed pursuant to Chapters 60 and 61, except small claims, and all misdemeanor and felony cases, including appeals from municipal courts. Probate, juvenile, and traffic cases are not included.

Early in the committee's study it was agreed that no predetermination of the number of judicial districts, size of judicial districts or the consolidation of judicial districts would be made but the committee would consider each district on an individual basis. This ad hoc method of study was followed and the committee narrowed its consideration to the 4th; 6th; 8th; 12th; 13th; 14th; 15th; 17th; 19th; 21st and 23rd judicial districts. After further study the areas of primary concern were the northwest (15th, 17th, and 23rd) and south central (13th, 14th, and 19th) areas of the state.

A. *Proposals Considered and Changes Recommended*

1. *15th, 17th, and 23rd Judicial Districts*

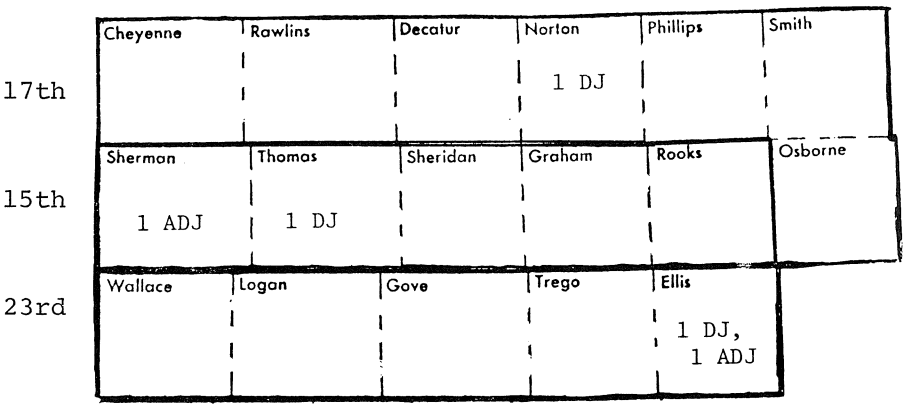
IT IS RECOMMENDED THAT THE 15TH JUDICIAL DISTRICT CONSIST OF CHEYENNE, LOGAN, RAWLINS, SHERIDAN, SHERMAN, THOMAS, AND WALLACE COUNTIES; THAT THE 17TH JUDICIAL DISTRICT CONSIST OF DECATUR, GRAHAM, NORTON, OSBORNE, PHILLIPS, AND SMITH COUNTIES; AND THAT THE 23RD JUDICIAL DISTRICT CONSIST OF ELLIS, GOVE, ROOKS, AND TREGO COUNTIES.

Presently the northwestern judicial districts contain the following counties:

15th—Graham, Rooks, Sheridan, Sherman, and Thomas
17th—Cheyenne, Decatur, Norton, Osborne, Phillips, Rawlins, and Smith
23rd—Ellis, Gove, Logan, Trego, and Wallace

As can be seen from the following diagram, the districts are essentially several counties long and one county wide. This configuration follows the rail lines judges formerly traveled from courthouse to courthouse, and compels judges to travel long distances in order to serve their districts.

Present

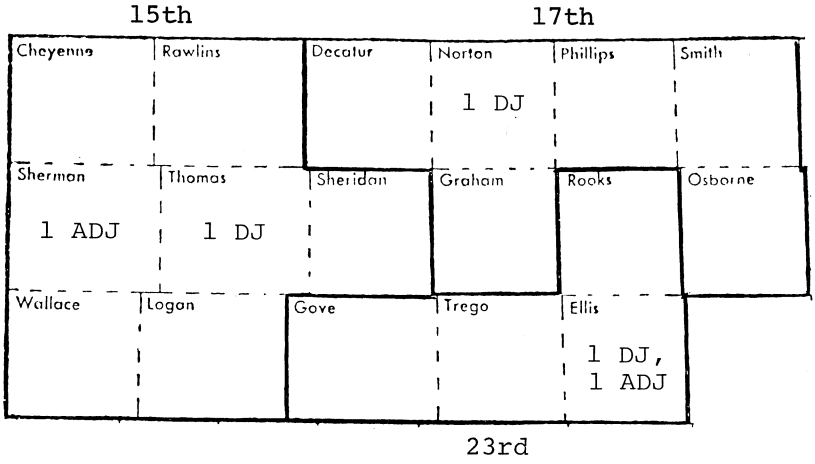


	Round Trip From DJ to Each County Seat	Total Dispositions Per Judge		Total Trials Per Judge	
		FY 1979	FY 1980	FY 1979	FY 1980
15th	470 miles	311.0	360.5	33.0	39.0
17th	760 miles	464.0	464.0	42.0	66.0
23rd	688 miles	469.0	613.5	78.5	102.5
	1,918 miles				

It appeared to the committee that the opportunity existed to significantly reduce the travel time of judges and the resulting energy use and expense by means of redistricting. Any such decrease in travel time would allow judges to devote more attention to their judicial duties.

The committee considered various proposals for the redistricting of the northwestern judicial districts. The plan recommended by the committee is shown in the following diagram designated as proposal C.

Proposal C



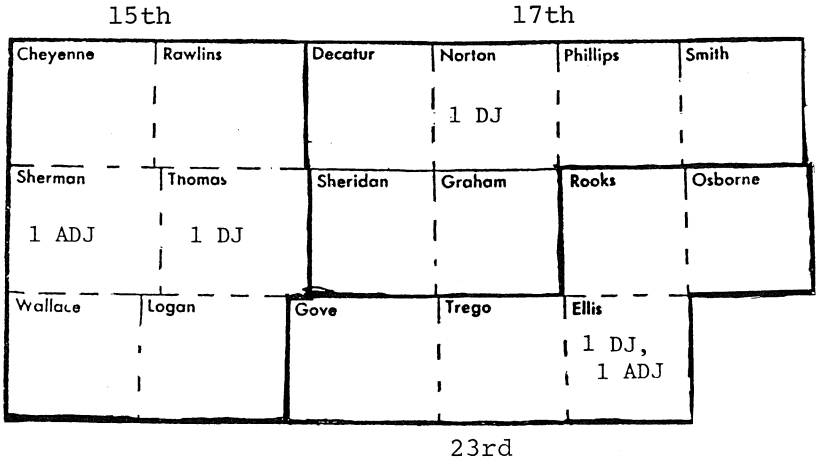
	Round Trip From DJ to Each County Seat	Total Dispositions Per Judge		Total Trials Per Judge	
		FY 1979	FY 1980	FY 1979	FY 1980
15th	520 miles	322.5	370.5	32.5	42.0
17th	494 miles	423.0	464.0	39.0	64.0
23rd	306 miles	478.0	603.5	80.5	100.5
	1,320 miles				

Under this recommended proposal, the travel time of all judges is substantially reduced. The district (23rd) with the highest caseload has the lowest travel requirements, while the district (15th) with the lowest caseload has the highest travel requirements. However, the presence of an associate district judge in Sherman County makes 34 miles the greatest distance between a lawyer judge and any county seat in the proposed 15th judicial district.

An important consideration in the adoption of proposal C by the committee is the possibility of placing Rooks County in the 17th district at some point in the future. Such a move would be premised upon continued growth in the caseload of the 23rd district and sufficient growth in the caseload of the 17th district to justify the creation of an associate district judge position. Additionally, proposal C results in six counties changing judicial districts, the fewest of any of the redistricting plans considered by the committee.

In arriving at proposal C as the committee's recommendation on redistricting the northwestern judicial districts, two other proposals were first considered. After meetings by committee members Representative Michael Hayden and Judge Steven Flood with the judges and several lawyers of the northwestern districts, the committee devised a redistricting plan, designated below as proposal A.

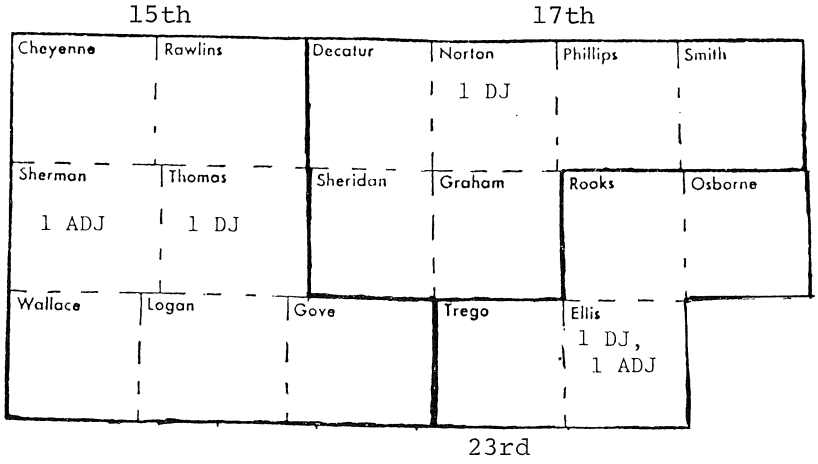
Proposal A



	Round Trip From DJ to Each County Seat	Total Dispositions Per Judge		Total Trials Per Judge	
		FY 1979	FY 1980	FY 1979	FY 1980
15th	454 miles	314.0	351.5	31.0	40.5
17th	436 miles	356.0	424.0	32.0	50.0
23rd	452 miles	520.0	642.5	85.5	109.0
	1,342 miles				

Proposal A achieved the goal of significantly reducing travel, but it increased the caseload of the 23rd district. The 23rd district presently has the highest caseload averages of the three northwestern judicial districts. In an attempt to maintain the travel savings of proposal A, yet reduce the caseload of the 23rd district, the committee considered proposal B. This proposal involved the shifting of Gove County from the proposed 23rd district to the proposed 15th district.

Proposal B



	Round Trip From DJ to Each County Seat	Total Dispositions Per Judge		Total Trials Per Judge	
		FY 1979	FY 1980	FY 1979	FY 1980
15th	562 miles	338.0	368.0	33.5	43.0
17th	436 miles	356.0	424.0	32.0	50.0
23rd	296 miles	496.0	626.0	83.0	106.5
	1,294 miles				

While proposal B lowered the caseload level in the 23rd district when compared with proposal A, the caseload and trial levels under proposal B were still somewhat higher than those in the presently existing 23rd district. Additionally, the travel of the district judge of the 15th district was increased substantially when compared with his present travel requirements. The suggestion was made that Sheridan County be substituted for Gove County in the proposed 15th district. This suggestion, in part, led to the consideration of proposal C which has been adopted by the committee as its recommendation for the redistricting of the northwest judicial districts.

2. *19th Judicial District*

IT IS RECOMMENDED THAT THE 19TH JUDICIAL DISTRICT BE COMPRISED OF BARBER, HARPER, KINGMAN, PRATT AND SUMNER COUNTIES.

In addition to the counties listed in the above recommendation, the present 19th judicial district also includes Cowley County.

Prior to 1968 the 19th district existed as three separate judicial districts with Cowley County as one district, Sumner County as another, and the four western counties as a third separate district. In practice, the 19th continued to operate as three separate districts. In 1979 Cowley judges disposed of one case in Pratt, while the district judge from Kingman disposed of one case in Cowley. Sumner judges disposed of all the Sumner cases and one case in Harper County. In 1980 Cowley judges disposed of one case in Barber and four cases in Sumner County. Judges from Pratt disposed of three cases in Cowley County.

Members of the 19th district bar have indicated to the committee that there is very little inter-county law practice among Sumner, Cowley, and the four western counties. The opinion was also expressed that the difference between more urban, industrial Cowley County and the relatively rural western counties, combined with the geographic size of the district, has led to difficulties in administration.

The committee considered separating Sumner County from the four western counties of the 19th district. The committee concluded that Sumner County has demographic similarities to the western counties of the 19th district and that it does not present the administrative problems associated with Cowley County. Furthermore, the availability of two lawyer judges in Sumner County allows for flexibility in the operation of the district.

The caseload averages for the 19th judicial district are as follows:

	Total Dispositions Per Judge		Total Trials Per Judge	
	FY 1979	FY 1980	FY 1979	FY 1980
Present 19th	337.8	355.9	27.1	31.4
Four Western Co's. (Barber, Harper, Kingman & Pratt)	311.0	306.5	45.0	48.5
Sumner County	390.0	331.0	34.5	54.0
Cowley County	325.0	393.0	14.5	11.3
State Less Major Urban Districts	485.8	544.3	40.1	40.3

The committee reached the following conclusions:

a. Cowley county operates as an essentially separate judicial district.
b. the geographic size of the 19th district combined with differences in law practice between Cowley and the western counties results in administrative difficulties.
c. There is a lack of inter-county law practice between Cowley County and the rest of the 19th district.
d. The caseload averages in the 19th district are relatively low, especially in Cowley County.
e. Cowley County is overjudged and these judges can't be utilized elsewhere in the 19th district.
f. The opportunity exists to utilize Cowley County judges in reducing the workload of the 13th judicial district.

Based on the above conclusions, the committee recommends the severance of Cowley County from the 19th judicial district.

3. *13th and 30th Judicial Districts*

IT IS RECOMMENDED THAT THE 13TH JUDICIAL DISTRICT CONSIST OF BUTLER, ELK, AND GREENWOOD COUNTIES AND THAT A 30TH JUDICIAL DISTRICT BE CREATED CONSISTING OF COWLEY AND CHAUTAUQUA COUNTIES; AND, THAT UPON THE FIRST VACANCY IN AN ASSOCIATE DISTRICT JUDGE POSITION OCCURRING IN COWLEY COUNTY, THE SUPREME COURT EXAMINE THE NEED FOR SUCH POSITION AND, UNLESS THE WORKLOAD OF THE DISTRICT HAS SIGNIFICANTLY INCREASED, ELIMINATE THE POSITION PURSUANT TO K.S.A. 1979 SUPP. 20-354.

The 13th judicial district is presently composed of Butler, Chautauqua, Elk, and Greenwood Counties. One district judge is located in Greenwood County and a district and an associate district judge are located in Butler County.

The following table shows the caseload averages for judges of the 13th judicial district and the statewide averages for judges of all districts, excluding the major urban districts (3rd, 10th, 18th, and 29th).

	Total Dispositions Per Judge		Total Trials Per Judge	
	FY 1979	FY 1980	FY 1979	FY 1980
13th District	588.3	613.7	61.7	53.0
State Less Major Urban Districts	485.8	544.3	40.1	40.3

In contrast to the relatively high caseload of the 13th district, the committee noted the presence of neighboring judicial districts, the 14th and 19th, with considerably lower caseload averages as reflected in the following table.

	Total Dispositions Per Judge		Total Trials Per Judge	
	FY 1979	FY 1980	FY 1979	FY 1980
14th District (Montgomery County)	439.3	479.5	14.3	14.5
19th District	337.8	355.9	27.1	31.4
Cowley County	325.0	393.0	14.5	11.3

Furthermore, judges from Butler and Greenwood Counties are required to travel to Elk and Chautauqua Counties to dispose of cases. Judges from Montgomery, the 14th district, and Cowley Counties, part of the 19th district, have no comparable travel requirements.

It appeared to the committee that a redistricting plan could be devised which would utilize judges from neighboring districts to alleviate the heavy work load in the 13th judicial district.

The committee concluded that both Cowley and Montgomery Counties are overjudged. If each county were to have a judge position eliminated, the caseload averages would be as follows:

	Total Dispositions Per Judge		Total Trials Per Judge	
	FY 1979	FY 1980	FY 1979	FY 1980
Montgomery County	585.7	639.3	19.0	19.3
Cowley County	433.3	524.0	19.3	15.0

As can be seen, Cowley County has the lower caseload averages. With the addition of Chautauqua County the caseload averages for the judges in Cowley County would be as follows:

	Total Dispositions Per Judge		Total Trials Per Judge	
	FY 1979	FY 1980	FY 1979	FY 1980
Four Judges	353.8	415.3	17.3	16.8
Three Judges	471.6	553.7	23.0	22.3

The following chart shows the miles judges from Cowley County would travel to dispose of cases in Chautauqua County compared with the miles judges of the 13th district are presently required to travel:

	To Sedan (Chautauqua)	Round Trip
Arkansas City (Cowley)	51	102
Winfield (Cowley)	56	112
Eureka (Greenwood)	56	112
El Dorado (Butler)	84	168

The committee reached the following conclusions:

a. the caseload and travel requirements for judges of the 13th district are high,
b. the caseload and travel requirements for judges in Cowley County are low,
c. due to its low work load, Cowley County is best suited to handle the additional work load of Chautauqua County,
d. Cowley County is overjudged, even with the addition of Chautauqua County,
e. Cowley County operates separately from the rest of the 19th judicial district, and
f. less travel will be required of Cowley County judges than is presently required of judges of the 13th judicial district.

Based upon the above conclusions the committee recommends that Chautauqua County be removed from the 13th judicial district and combined with Cowley County to form a 30th judicial district; and that upon a vacancy occurring in an associate district judge position in Cowley County the Supreme Court eliminate the position, unless there is a significant increase in the caseload of the 30th judicial district.

4. *14th Judicial District*

IT IS RECOMMENDED THAT THE 14TH JUDICIAL DISTRICT HAVE THREE JUDGES OF THE DISTRICT COURT AND THAT THE SUPREME COURT ELIMINATE AN ASSOCIATE DISTRICT JUDGE POSITION IN THE 14TH JUDICIAL DISTRICT, PURSUANT TO K.S.A. 1979 SUPP. 20-354, UPON THE FIRST SUCH VACANCY OCCURRING THEREIN.

The 14th judicial district is presently a single-county district with courthouses in both Independence and Coffeyville in Montgomery County. In the following table, caseload averages for the 14th district as it presently exists (four judges) and as proposed (three judges) are compared with averages for the other single-county judicial districts. The table also includes combined averages for the entire state,

excluding the major urban districts (3rd, 10th, 18th, and 29th), and combined averages for other small urban districts (7th, 27th, and 28th).

	Total Dispositions Per Judge		Total Trials Per Judge	
	FY 1979	FY 1980	FY 1979	FY 1980
Montgomery (14th—4 judges)	439.3	479.5	14.3	14.5
Proposed Montgomery (14th—3 judges)	585.7	639.3	19.0	19.3
Shawnee (3rd)	832.3	896.8	62.7	56.0
Douglas (7th)	707.0	864.0	53.0	65.3
Johnson (10th)	581.1	705.3	68.6	61.1
Sedgwick (18th)	887.3	960.8	82.0	60.0
Reno (27th)	698.3	747.0	45.3	42.8
Wyandotte (29th)	777.6	858.4	102.0	101.2
All Single-County Districts	755.1	838.8	73.3	64.4
State Less Major Urban Districts	485.8	544.3	40.1	40.3
Small Urban Districts	703.5	814.3	41.5	51.1

As can be seen, the caseload averages for the 14th district, especially the trials-per-judge average, are noticeably low for a single-county, relatively urban judicial district. In fact, the trials average was so low the committee attempted to verify the trial figures. The Office of Judicial Administration, which was the source of the statistical information used by the committee, was contacted and responded that they were unaware of any reporting difficulties existing in Montgomery County. The chief clerk of the 14th judicial district was called and to the best of the clerk's recollection the trial figures were accurate.

In an attempt to utilize the excess judicial manpower in the 14th district, the committee considered combining the 11th and 14th judicial districts. However, the caseload averages in the 11th district are also relatively low (FY 1979: 410.6 dispositions including 32.1 trials; FY 1980: 461.6 dispositions including 34.8 trials) and the district appears to have no need for additional judges.

The committee concluded:

a. the caseload averages for the 14th judicial district are extremely low, especially for a single-county, relatively urban district (while the committee has some reservations about the statistics used, even after allowing considerable margin for error the averages are low),
b. the 14th judicial district is presently overjudged and three judges are sufficient to handle the district's work load,
c. the opportunity does not exist to utilize the judges of the 14th district in the 11th judicial district,
d. excess judicial manpower exists in Cowley County which can be used to alleviate the high caseload and travel requirements of the 13th judicial district, and
e. due to the impending vacancy in an associate district judge position in the 14th judicial district, it is preferable to eliminate such position and to use Cowley County judges in reducing the work load of the 13th judicial district.

In light of the above conclusions the committee recommends the elimination of an associate district judge position in the 14th judicial district.

B. *Proposals Considered; No Change Recommended*

1. *4th and 6th*

The 4th and 6th judicial districts presently contain the following counties:

4th—Allen, Anderson, Coffey, Franklin, Osage, and Woodson

6th—Bourbon, Linn, and Miami

The three northernmost counties of the two judicial districts, Osage, Franklin, and Miami, all border urban areas and are taking on a more urban orientation in the practice of law. This led the committee to consider the grouping of these three counties resulting in the following judicial districts:

Proposed 4th—Franklin, Osage, and Miami

Proposed 6th—Allen, Anderson, Bourbon, Coffey, Linn, and Woodson

This proposal results in districts of approximately equal population and total caseload. However, the 4th and 6th judicial districts presently have relatively equal caseload-per-judge averages. Due to the distribution of judges in these districts, the proposal would have an adverse impact on the equality of the caseload averages, as is shown in the following table:

	Total Dispositions		Total Trials	
	FY 1979	FY 1980	FY 1979	FY 1980
Present 4th	485.3	425.5	49.7	50.0
Present 6th	490.0	501.5	56.5	70.0
Proposed 4th	586.0	622.5	70.5	94.5
Proposed 6th	316.3	365.0	30.5	37.8

Members of the bench and bar of the 4th and 6th judicial districts who responded to the inquiries of the committee, were nearly unanimous in their preference for the present judicial districts. In light of this response and the proposal's effect on caseload averages, the committee recommends no change in the 4th and 6th judicial districts at the present time. Population and caseload trends may make this a likely candidate for change when redistricting is next considered.

2. *8th*

The 8th judicial district consists of Dickinson, Geary, Marion, and Morris Counties. Geary County is presently responsible for slightly over half of the total caseload of the 8th district. If Geary County were a single-county judicial district it would be better able to utilize the district attorney system. With this in mind, the committee considered a proposal which would split the 8th into two separate judicial districts with Geary County constituting one of those districts.

As the following table shows, the caseload-per-judge averages for the 8th district are comparable to the statewide averages, less the major urban districts (3rd, 10th, 18th, and 29th). The table also indicates that the dispositions per judge would be substantially higher and the trials per judge considerably lower in Geary County than in the other district created out of the 8th. There is a noticeable decline in the caseload-per-judge averages of the proposed new District I for 1980. Much of the decline would seem attributable to a vacancy of over three months in the associate district judge position in Marion County and another vacancy of over one month in the district judge position of division one.

	Total Dispositions		Total Trials	
	FY 1979	FY 1980	FY 1979	FY 1980
New District I (Dick., Marion, Morris) .	340.5	306.0	47.0	34.0
New District II (Geary)	640.0	718.0	32.5	20.5
Present 8th	464.3	480.5	38.3	26.5
State Less Major Urban Districts	485.8	544.3	40.1	40.3

In 1979, Geary judges disposed of 136 cases including 31 trials in other counties of the 8th district. During that same period other judges of the 8th district disposed of 293 cases including 19 trials in Geary County. Corresponding figures for 1980 are 279 cases including 36 trials disposed of by Geary judges in other counties of the 8th district, and 309 cases including 10 trials disposed of by other judges of the 8th district in Geary County. From this the committee concludes that the 8th is not presently operating as two separate districts and that the flexibility the district presently enjoys would be destroyed by the proposed redistricting. Consequently, the committee recommends no change in the 8th judicial district.

3. *12th and 21st*

The 12th and 21st judicial districts consist of the following counties:
12th—Cloud, Jewell, Lincoln, Mitchell, Republic, and Washington
21st—Clay and Riley

The district judge of the 12th judicial district is presently located in Lincoln County. Due to the relatively long distance, 110 miles, from Lincoln to Washington, the committee considered shifting Washington County from the 12th to the 21st judicial district. Washington is 67 miles from Manhattan.

The district judge of the 12th judicial district disposed of 54 cases including 6 trials in Washington County in 1979, and 65 cases including 8 trials in 1980. The impact of the proposal on caseload-per-judge averages is shown in the following table:

	Total Dispositions		Total Trials	
	FY 1979	FY 1980	FY 1979	FY 1980
Proposed 12th	416.0	350.0	51.0	33.0
Proposed 21st	503.3	642.0	10.7	6.3
Present 12th	470.0	415.0	57.0	41.0
Present 21st	485.3	620.3	8.7	5.7

While the 12th district gains some relief from its higher trials-per-judge average, several factors weigh against the proposed redistricting. The distance between Washington and Lincoln is the longest distance between county seats in the 12th district. The location of the district judge in the 12th district is, of course, likely to change from time to time, and in such event Washington County will not always require as long a journey by the district judge. The bar of Washington County has expressed a desire to remain in the 12th district, emphasizing the similarity of practice with the rest of the 12th as opposed to the more urban practice of the 21st district. The district judge has experienced no difficulties in serving Washington County and is quite willing to see it retained in the 12th district. According to figures from the "Major Caseload by Judge-ID" report furnished by the Office of Judicial Administration (see table below), the 12th has a lower ratio of pending cases to filings than does the 21st district and, overall, a lower percentage of older pending cases.

	Filed	Pending	Percent of Pending Cases Over 24 Months Civil	Percent of Pending Cases Over 12 Months Criminal
FY 1979:				
12th	1,217	292	2.4	17.2
21st	1,756	696	12.8	9.2
FY 1980:				
12th	1,234	305	1.2	0.0
21st	1,925	569	2.4	4.5

In light of the above factors the committee recommends no change in the 12th and 21st judicial districts.

IV. OTHER COMMITTEE ACTION

A. *Payment of Expenses and Per Diem to Retired Justices and Judges Performing Judicial Service*

The committee considered and recommended a statute relating to payment of expenses and per diem to retired justices and judges who continue to perform judicial services which was passed by the legislature. The statute may be found at §§ 1 and 2 of Chapter 94 of the *1980 Session Laws of Kansas.*

B. *Other Recommendations*

1. *Method of selection of judges of redistricted judicial districts*

Presently, the statutes do not speak to the method of selection of judges in judicial districts that are redistricted. Special problems occur if a new judicial district is a combination of counties of which one or more previously elected its judges and one or more previously selected its judges on a nonpartisan basis.

The legislative members of the committee attempted to address this problem by the introduction of 1980 House Bill No. 3245 which required an election on the subject of how judges should be selected in any newly formed judicial district composed of counties which previously chose their judge by different methods. The bill passed the House, but not the Senate.

It is the recommendation of the committee that the legislature pass a bill which sets forth the procedure to be followed in the aforementioned situation. The committee has gone on record as finding 1980 House Bill No. 3245 to be a reasonable solution to the problem. The Judicial Council also supported the bill. The committee recognizes that the decision of how to solve the problem is a legislative policy decision and recommends that the legislature take whatever action it deems appropriate to fill this void in the statutes.

2. *Distinctions between district judges and associate district judges*

The committee favors removal of all distinctions between the positions of district judge and associate district judge. The committee notes § 4 (b) of chapter 94 of the *1980 Session Laws of Kansas,* which takes a major step in that direction.

C. *Other Matters*

1. *Terms of court*

It was the opinion of the committee that statutory "terms of court" no longer serve any function and can cause travel by judges that would not be required otherwise. If "terms of court" are eliminated a judge's presence in each county at least one day a month is still required by Supreme Court Rule No. 102. The requirement of this rule could not be eliminated without raising serious, constitutional issues, especially in the field of criminal law. The legislative members of the committee agreed they would follow up on the problem and 1980 Senate Bill No. 839 was introduced. The bill passed the Senate, and was considered by but did not pass the House.

2. *County nominating commissions for district magistrate judges*

Nominations to the position of district magistrate judge are made by the same district nominating commission that nominates district and associate district judges. In multi-county judicial districts many of the members of the judicial nominating commission do not know the candidates for district magistrate judge from counties other than their own. The committee felt that nominating commissions for district magistrates composed of residents of the county or a combination of county and district residents would be an improvement. As a result the legislative members of the committee introduced 1980 House Bill No. 3244. The bill was considered but did not pass.

RECOMMENDED AMENDMENTS TO THE KANSAS DIVORCE CODE PREPARED BY THE JUDICIAL COUNCIL FAMILY LAW ADVISORY COMMITTEE

INTRODUCTION

On October 21, 1977, the Kansas Judicial Council voted to create the Family Law Advisory Committee and on November 11, 1977, the members of the committee were appointed. The committee was granted latitude in the consideration and solution of problems in the area of family law.

The committee commenced work on January 13, 1978, and has met regularly since that time, with study and preparation being done by the committee or individual members on their own time.

The major efforts of the committee have been devoted to a substantial revision of Article 16 of K.S.A. Chapter 60. Among other things, this necessitated acquaintance of the non-lawyer committee members with the present Kansas law on divorce and a detailed study of the Uniform Marriage and Divorce Act. Additionally, the committee, as requested by the Honorable Joseph J. Hoagland, Chairman, House Judiciary Committee, made a study of and recommendations concerning possible revisions to the Protection from Abuse Act (K.S.A. 1979 Supp. 60-3101, *et seq.*). These recommendations of the committee were approved by the Judicial Council and enacted by the Kansas Legislature and are presently reflected in Ch. 177, *1980 Session Laws of Kansas* which became effective July 1, 1980.

Other major areas of ongoing committee concern include study of the Uniform Parentage Act and consideration of the conciliation approach in domestic relations cases.

Members of the committee were appointed on the basis of their knowledge and expertise in the fields to be studied. The following persons are members of the committee:

HONORABLE HERBERT W. WALTON, Chairman of the committee, from Olathe, a member of the Judicial Council, and District Judge of Division I of the 10th Judicial District. Judge Walton is past president of the Kansas District Judges Association, and was formerly probate judge and assistant county attorney of Johnson County. He is chairman of the Judicial Council's PIK-Criminal Advisory Committee and administrative chairman of the PIK-Civil Advisory Committee.

CONSTANCE M. ACHTERBERG, a practicing lawyer and assistant county attorney for civil matters in Salina, former chairman of the Kansas Bar Association Family Law Section, and current secretary-treasurer of the Kansas Bar Association.

PHYLLIS H. BUZICK, a registered occupational therapist in Sylvan Grove, and former member of the President's Task Force on the Mentally Handicapped.

JOHN H. JOHNTZ, JR., a practicing lawyer in Olathe. Mr. Johntz is a member of the Board of Editors of the Kansas Bar Journal, the Family Law Section of the American Bar Association, the American Academy of Matrimonial Lawyers, and the Family Law Bench-Bar Committee of the Johnson County Bar Association.

PAUL C. LAYBOURNE, JR., M.D., professor of psychiatry and family practice, associate professor of pediatrics, and director of child psychiatry at the University of Kansas Medical Center. Dr. Laybourne is a former member of the Governor's Advisory Commission on Institutional Management and Community Mental Health programs.

HONORABLE JERRY L. MERSHON, from Manhattan, District Judge, Division II of the 21st Judicial District. Judge Mershon is a past member of the Kansas Task Force on Children and Youth and is a current member of the National Council of Juvenile and Family Court Judges. He has served as a faculty member and lecturer at the National College of Juvenile Justice, University of Nevada, the National College of District Attorneys, University of Houston, and Kansas State University.

BRIAN J. MOLINE, general counsel to the Kansas Corporation Commission in Topeka. Mr. Moline is a former member of the Kansas House of Representatives and former executive director of the Legal Aid Society of Wichita, Inc.

HONORABLE WAYNE H. PHILLIPS, District Judge of the 29th Judicial District. Judge Phillips resides in Bonner Springs and was engaged in the general practice of law in Wyandotte County prior to his appointment to the bench in 1975.

JUDITH C. RUNNELS, a registered nurse from Topeka, is legislative liaison for Governor John Carlin. Formerly, she worked as lobbyist for the Kansas State Nurses Association and was president of the League of Women Voters of Topeka.

The committee wishes to note the contribution of Carolyn S. Skaer, an attorney from Wichita and an original member of the committee, who was forced to resign due to other demands on her time. The committee also notes the valuable support effort of the Judicial Council staff members, Randy M. Hearrell, Matthew B. Lynch, Paul Purcell, and Nell Ann Gaunt.

Finally, the committee is deeply indebted to Kathryn Pooley who contributed countless hours to the typing of the multiple drafts and final form of the proposed legislation.

PROPOSED TITLE OF ARTICLE:

Article 16. DISSOLUTION OF MARRIAGE, SEPARATE MAINTENANCE, AND ANNULMENT; CUSTODY OF MINORS; AND FINANCIAL DISPOSITIONS.

GENERAL COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The Family Law Advisory Committee has reviewed at length various statutory schemes for the alteration of marital status and the placement of custody and financial disposition associated with the alteration of marital status. The Committee gave consideration from time to time to a more radical change in the present Kansas statutory provisions but determined in the end to leave the general form of the statutes as much intact as possible for the dual purposes of preserving the relevancy of as much of the present body of case law as possible and enacting into law a statutory scheme that in substance and form did not radically depart from the present Kansas law.

PROPOSED STATUTE

60-1601. Grounds for dissolution of marriage or separate maintenance.

The District Court shall grant a decree of dissolution of marriage or separate maintenance for any of the following grounds: (1) incompatibility; (2) failure to perform a material marital duty or obligation, (3) incompatibility by reason of the mental illness or incapacity of one or both spouses. The third ground shall require a finding of either [a] confinement of the subject spouse in an institution for reason of mental illness for a period of two years, which confinement need not be continuous, or [b] an adjudication of mental illness or mental incapacity of the subject spouse by a court of competent jurisdiction while the subject spouse is confined in an institution for reason of mental illness; that in either case, there must be a finding by at least two of three physicians, appointed by the court before whom the action is pending, that the mentally ill or incapacitated spouse has a poor prognosis for recovery from such mental illness or incapacity, based upon general knowledge available at such time. A decree granted on the third ground shall not relieve a party from contributing to the support and maintenance of the mentally ill or incapacitated spouse.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The Family Law Advisory Committee has changed the term "divorce" to "dissolution of marriage" throughout Article 16 for the reason that the term "divorce" is commonly perceived as a harsh legal action representing failure on the part of the parties to the marriage and, therefore, the Committee substituted a modern term to reduce some of the stigma and guilt often associated with divorce proceedings.

Presently fifteen states use "dissolution of marriage." These states are Arizona (A.R.S. §§ 25-311 to 25-381), California (West's Ann. Civ. Code §§ 4350, *et seq.*), Colorado (C.R.S. 14-10-105, *et seq.*), Connecticut (General Statutes §§ 46b-40, *et seq.*), Florida (West's F.S.A. §§ 61.001, *et seq.*), Illinois (S.H.A. ch. 40 §§ 401 *et seq.*), Indiana (IC 31-1-11.5-1 to 31-1-11.5-24), Iowa (I.C.A. §§ 598.1, *et seq.*), Kentucky (K.R.S. c. 403.140), Minnesota (M.S.A. §§ 518.002, *et seq.*), Missouri (V.A.M.S. §§ 452.300, *et seq.*), Montana (M.C.A. 40-4-101 to 40-4-220), Nebraska (R.R.S. 42-347, *et seq.*), New Mexico (§§ 40-4-1, *et seq.,* N.M.S.A. 1978), and Washington (R.C.W. 26.09.010, *et seq.*).

Additionally, Alaska (A.S. 9.55.231) and Ohio (R.C. 3105.62-.65) provide for dissolution under particular circumstances; typically where both parties sign a petition and present the court with a separation agreement.

It was the feeling of the Committee that the Kansas statutory grounds for divorce and separate maintenance had been added to in a piecemeal fashion in the past and generally liberalized through amendments to the statute through the years and that the reduction of the grounds to three would serve the following salutary purposes: (1) by listing the ground of incompatibility first, there would be a tacit recognition that in most cases the ground of incompatibility most realistically summarizes the "cause" of the failure of the marriage, and (2) that by summarizing all of the fault grounds into a single summary statement of marital fault, the public record both in the allegations of the petition and the findings of the court would be considerably softened by not making public specific reference to such traditional fault grounds as adultery and habitual drunkenness. Nonethe-

less, the court would continue to have the traditional power to find a party at fault in the failure of the marriage if the evidence warranted such a finding.

Mental illness or incapacity was retained as a ground for the reasons that (1) it might strain the concept of incompatibility to include in it a type of incompatibility based upon mental illness or incapacity; and (2) the Supreme Court of Kansas has found that behavior which is a result of mental illness or incapacity is not the "fault" of the mentally ill or incapacitated person and, therefore, the ground of mental illness or incapacity should not be included under a marital fault concept. *Crosby v. Crosby,* 186 Kan. 420, 350 P.2d 796 (1960); *Lindbloom v. Lindbloom,* 177 Kan. 286, 279 P.2d 243 (1955).

The alternative requirement of confinement for mental illness or incapacity has been reduced from three to two years. The reference in the present statute to plaintiff and defendant has been changed to spouse for the reason that the mentally ill and non-mentally ill spouses might not necessarily be defendant and plaintiff respectively.

The operative verb "may" has been changed to "shall" since the Committee has recommended that the power of the district court to refuse to grant a divorce or separate maintenance when the parties are found to be in equal fault (present statute 60-1606) be eliminated.

PROPOSED STATUTE

60-1602. Grounds for annulment.

The district court shall grant a decree of annulment of any marriage for any of the following causes: (1) the marriage is void for any reason; or (2) the contract of marriage is voidable because of being induced by fraud, mistake of fact, lack of knowledge of a material fact, or any other reason justifying rescission of a contract of marriage.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The proposed statute reflects accurately the present status of the case law on the law of annulment. All marriages subject to annulment are either void for some reason or, at the option of one of the spouses, voidable by a showing of inducement by fraud, mistake, or lack of knowledge. *Dodd v. Dodd,* 210 Kan. 50, 499 P.2d 518 (1972); *Johnson County National Bank and Trust Company v. Bach,* 189 Kan. 291, 369 P.2d 231 (1962).

The operative verb "may" has been changed to "shall" because the Committee believes that the court should not have the power to refuse to grant an annulment when one of the causes enumerated in the statute is found to exist.

PROPOSED STATUTE

60-1603. Residence.

(a) *State.* The plaintiff or defendant in an action for dissolution of marriage must have been an actual resident of the state for sixty (60) days next preceding the filing of the petition.

(b) *Military residence.* Any person who has been a resident of or stationed at a United States post or military reservation within the state for sixty (60) days next preceding the filing of the petition may file an action for dissolution of marriage in any county adjacent thereto.

(c) *Residence of spouse.* For the purposes of this article, a spouse may have a residence in this state separate and apart from the residence of the other spouse.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The only change in the present statute was to allow a sixty (60) day residency by either the plaintiff or defendant to constitute a basis for subject matter jurisdiction. The present statute would not allow an action to be maintained in Kansas by an out-of-state plaintiff even though the defendant spouse had lived within the State of Kansas for more than sixty (60) days. In *King v. King,* 185 Kan. 742, 745, 347 P.2d 381, 384 (1959), the court stated that plaintiff, a California resident, could not maintain an action for divorce, but only one for separate maintenance. Defendant had apparently been a Kansas resident for a considerable period of time. When considering what prerequisite there should be for the State of Kansas to take jurisdiction over the alteration of a marriage, the distinction between the residency of a plaintiff in the State of Kansas as opposed to the residency of a defendant in the State of Kansas does not seem to be meaningful. This is consistent with § 302(a)(1) of the Uniform Marriage and Divorce Act.

Subsection (c) of the present statute permitted the wife, for purposes of this article, to establish a residency apart from her husband. The perceived necessity of the statute doubtless arose from the common law Doctrine of Coverture wherein during the period of a marriage the wife essentially lost her separate legal status and was thought of as existing legally in a state of oneness with her husband and was, therefore, unable to establish a separate residency. *Johnson v. Johnson,* 57 Kan. 343, 46 P. 700 (1896), recognized the right of the wife to acquire a separate residency under the then existing Kansas statute. In this modern age, there is probably no need for subsection (c). However, the committee has retained the subsection and, at the same time, modernized it to allow either spouse to establish a separate residency from the other spouse.

PROPOSED STATUTE

60-1604. Petition and summons.

(a) *Verification of petition.* The truth of the allegations of any petition under this article must be verified by the plaintiff in person.

(b) *Contents of petition.* The grounds for dissolution, annulment, or separate maintenance shall be alleged as nearly as possible in the general language of the statute, without detailed statement of facts. If there are minor children of the marriage, the petition shall state their names and ages and shall contain, or shall be accompanied by an affidavit which contains, the information required in K.S.A. 1980 Supp. 38-1309.

(c) *Bill of particulars.* The opposing party may demand a statement of the facts, which shall be furnished in the form of a bill of particulars and the facts stated therein shall be the specific facts upon which the action shall be tried but if interrogatories have been served on or a deposition taken of the party from whom the bill of particulars is demanded, the court may in its discretion refuse to grant the demand for a bill of particulars. A copy shall be delivered to the judge. The bill of particulars shall not be filed with the clerk of the court or become a part of the record except on appeal, and then only when the issue to be reviewed relates to such facts. The bill of particulars shall be destroyed by the district judge or associate district judge unless an appeal is taken in which case the bill of

particulars shall be destroyed upon receipt of the final mandate from the appellate court.

(d) *Service of process.* Service of process shall be made in the manner provided in article 3 of this chapter.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The only change that has been made in this statute, other than the elimination of repetitious language in subsection (b), is a provision relating to destruction of the bill of particulars.

PROPOSED STATUTE

60-1605. Answer and counterpetition.

The defendant may answer and may also file a counterpetition for dissolution of marriage, annulment, or separate maintenance. If new matter is set up in the answer, it shall be verified by the defendant in person. If a counterpetition is filed, it shall be subject to the provisions of subsections (a), (b) and (c) of K.S.A. 1980 Supp. 60-1604. When there are minor children of the marriage, the answer shall contain, or be accompanied by an affidavit which contains, the information required by K.S.A. 1980 Supp. 38-1309.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The statute is changed to correct the improper designation "cross petition" to the proper designation for an action of a defendant against a plaintiff, "counterpetition". K.S.A. 60-213(a), (g). ***Haysville State Bank v. Hauserman,*** 225 Kan. 671, 594 P.2d 172 (1979). The language referencing subject matter jurisdiction (see also 60-1603 comment) has been eliminated because of its immateriality.

PROPOSED STATUTE

60-1606. Orders authorized.

The court shall grant a requested dissolution of marriage, separate maintenance decree, or annulment unless the court finds that there are no grounds for the requested alteration of marital status. If a dissolution of marriage, separate maintenance decree, or annulment is denied for want of grounds, the court shall nevertheless, if application is made by one of the parties, make the orders authorized by this article in 60-1610 A and B.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The Committee has eliminated the power of the court to deny relief on the basis of equal fault. See ***King v. King,*** 183 Kan. 406, 327 P.2d 865 (1958), where the parties were found to be in equal fault and the refusal of the district court to grant a divorce was upheld. Further, the proposed statute requires the court, in cases where dissolution of marriage, separate maintenance, or annulment is denied for want of grounds, to nonetheless upon application provide for the minor children of the parties and to effectuate a complete economic disposition of the case. It was felt that it would be an untenable situation for both the minor children of the parties and the parties themselves if an attempted alteration of marital status by a party was denied and, at the same time, the court would not provide for the minor children and structure the economic relationship between the parties even though requested to do so. Were such a situation to happen, the married parties would potentially find themselves in postures of extreme conflict of interest but with

matters of custody, support, and property completely unresolved. See *Rosander v. Rosander,* 177 Kan. 45, 276 P.2d 338 (1954), where the divorce was denied for want of grounds and the court refused to make a division of the parties' property.

PROPOSED STATUTE

60-1607. Interlocutory orders.

(a) After a petition for dissolution of marriage, annulment, or separate maintenance has been filed, the judge assigned to hear such action may, without requiring bond, make and enforce by attachment, orders covering the following matters:

(1) Jointly restrain the parties with regard to disposition of the property of the parties and provide for the use, occupancy, management and control thereof;

(2) restrain the parties from molesting or interfering with the privacy or rights of each other;

(3) provide for the custody of the minor children, and the support, if necessary, of either party and of any minor children during the pendency of the action. No ex parte order shall have the effect of changing the custody of a minor child from a parent who has had the sole de facto custody of the child to the other parent unless there is sworn testimony to support the showing of extraordinary circumstances;

(4) make provisions, if necessary, for the expenses of the suit, including reasonable attorneys fees, as will insure to either party efficient preparation for the trial of the case;

(5) appoint an attorney to represent the interests of a minor child with respect to the child's support, custody and visitation.

(b) Orders under (1), (2), and (3) in (a) above may be entered upon ex parte hearing upon compliance with Supreme Court Rules. In the event any such order is issued ex parte, the court shall hear a motion to vacate or modify such ex parte interlocutory order within ten days of the date that a party requests such a hearing. In the absence, disability, or disqualification of the judge assigned to hear such action, any other judge of the district court may make any order authorized in this section, including vacation or modification of any order issued by the judge assigned to hear such action.

(c) An order of support obtained pursuant to this section may be enforced by an order of garnishment as provided herein. No such order of garnishment shall be issued unless ten days or more have elapsed since the order of support was served upon the party required to pay the same, and the order of support contained a notice that the order of support may be enforced by garnishment and that the party has a right to request an opportunity for a hearing to contest the issuance of an order of garnishment, if such hearing is requested by motion filed within five days after service of the order of support upon such party. If a hearing is requested, the court shall hold such hearing within five days after the motion requesting the same is filed with the court or at such later date as may be agreed to by the parties. No bond shall be required for the issuance of an order of garnishment pursuant to this section. Except as provided herein, garnishments authorized by this section shall be subject to the procedures and limitations applicable to other orders of garnishment authorized by law. A party desiring to have the order of garnishment issued shall file an affidavit with the clerk of the district court stating that:

(1) The order of support contained the notice required by this subsection;

(2) ten or more days have elapsed since the order of support was served upon the party required to pay the same; and

(3) either no hearing was requested on the issuance of an order of garnishment within the five days after service of the order of support upon the party required to pay the same, or such a hearing was requested and held and the court did not prohibit the issuance of an order of garnishment.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The Committee was sensitive to the fact that ex parte interlocutory orders of the sort referenced in this statute are often the first introduction of a citizen to our system of justice. By their ex parte nature, there is potential for abuse of such orders and a defendant is often shocked and angered by suddenly finding himself or herself subject to orders that seem unfair. At the same time, the Committee felt that the necessity for obtaining certain orders to maintain the status quo from the outset of an alteration of marriage action justifies the continued use of ex parte hearings. In an attempt to reconcile the two competing interests as much as possible, the Committee has made the following changes from the present statute: (1) ex parte orders restraining one party with regard to the use of his or her property or contact with his or her spouse, which often appeared to the restrained party to be unfair, will no longer be allowed unless the court restrains both parties equally; (2) when de facto custody of children has been solely with one parent, no ex parte order shall change that custody to the other parent except in extraordinary circumstances; (3) attorneys' fees and the appointment of a guardian ad litem will not be allowed upon ex parte application; and (4) the party against whom the orders issue shall in any event have a right to a due process hearing on the merits of the orders within ten days of the time he or she requests such a hearing. The Uniform Marriage and Divorce Act has a similar, but more restricted provision, which allows ex parte orders only upon a showing that irreparable injury would result to the moving party if no order were issued and, in any event, not allowing ex parte orders with regard to temporary maintenance. The Uniform Marriage and Divorce Act provision is similar to the California Family Law Act of 1969.

The Committee changed the five day minimum period for an order of garnishment to issue to a ten day period because the present statute does not allow sufficient time for a potential garnishor to request a hearing on the merits of the order prior to a garnishment being issued.

The Committee eliminated the restriction upon permitting a judge of the district court other than the judge who originally made the ex parte interlocutory order to vacate or modify the order. The rules of the various judicial districts are sufficient to insure that a defendant will not be able to forum shop with his or her motion to vacate or modify.

Ex parte orders for attorneys' fees were eliminated. The Committee was convinced that such orders are often not followed by litigants, thus breeding disrespect for the judicial process. Temporary attorneys' fees can still be obtained upon application with notice.

The ex parte initiation of investigations in the present statute has been eliminated and non-ex parte investigations are provided for in proposed statute K.S.A. 60-1615.

The court is given the power to appoint an attorney as guardian ad litem to represent the interests of the minor child during the pendency of the litigation and during any post-dissolution litigation that might affect the child's interests. The provision is separate from other types of guardianships and conservatorships that appear elsewhere in Kansas statutes and the language is drawn substantially from § 310 of the Uniform Marriage and Divorce Act. It is not unknown for judges to have appointed guardians ad litem without specific statutory authority in the past. The statute now makes clear the power of the court to make the appointment.

PROPOSED STATUTE

60-1608. Time for hearing; continuance; pretrial conference; counseling, when.

(a) An action for dissolution of marriage shall not be heard until sixty (60) days after the filing of the petition unless the judge shall enter an order declaring the existence of an emergency, stating the precise nature of the emergency, the substance of the evidence material thereto, and the names of the witnesses who gave the evidence.

(b) Upon the request of either party, the court shall set a pretrial conference to explore the possibilities of settlement of the case to expedite the trial. Such pretrial conference shall be set on other than the date of trial and the parties shall be present or available within the courthouse.

(c) After the filing of the answer or other responsive pleading by the defendant, the court may, on its own motion or upon motion of either of the parties, require both parties to the action to seek marriage counseling if such services are reasonably available.

(d) The cost of any counseling authorized by this section may be assessed as costs in the case.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The purpose of requiring a pretrial conference and specifically stating that the pretrial conference in addition to its traditional use will have a further purpose of exploring the possibilities of settlement was to require parties to seriously consider settlement in cases where for some reason one or both of the parties has been reluctant to fully consider settlement. The Committee felt strongly that settlement not only greatly reduces the use of the time of the court, but more importantly leaves the parties with less ill feeling toward one another and a better feeling about the financial disposition of their case.

Even though counseling for the parties after the filing of an action is rarely successful in the strict sense of achieving a reconciliation, the Committee believes that such counseling can nonetheless be helpful. It can serve to educate the parties with regard to the significance of their problems while living together and the understanding that alteration of their marital status does not represent personal failure. The Committee concludes that much can be gained by parties who leave a marital relationship doing so with as little guilt and as good a feeling about himself or herself and his or her former spouse as possible. Reference should be made to the proposed statute K.S.A. 60-1617 concerning counseling when custody and visitation problems are presented.

PROPOSED STATUTE

60-1609. Common law marriage.

Common law marriages entered into after _____ shall not be recognized in Kansas.

JUDICIAL COUNCIL COMMENT:

The Judicial Council was not persuaded that common law marriages should be abolished in Kansas. Nevertheless, the Council believed that the recommendation of the Family Law Advisory Committee should be submitted to the bench, bar, and other interested persons for comment and critique. In doing so, the Council recognized that this is a sensitive matter involving the institution of the family and that a broad spectrum of views would be helpful in making final recommendations to the Kansas Legislature.

COMMENT OF THE FAMILY LAW ADVISORY COMMITTEE:

The Committee eliminated common law marriage in the State of Kansas. This state is one of the very few states that continue to recognize common law marriage. *Fleming v. Fleming,* 221 Kan. 290, 559 P.2d 329 (1977). (In addition to Kansas, the District of Columbia and twelve other states recognize common-law marriages. The other states are Alabama, Colorado, Georgia, Idaho, Iowa, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. [Chick, C. "Common Law Marriages: A Compilation of Statutory Materials and Appellate Decisions" Los Angeles County Law Library, January, 1979].) The Committee decided to eliminate non-formal marriage in Kansas basically for three reasons: (1) the difficulties of proof of issues of fact with regard to the condition of becoming married by the common law which have always existed in domestic relations litigation are being accelerated by the fact that it is now becoming commonplace for persons having the capacity to marry to instead live together as nonmarital partners; (2) in this modern age parties can easily obtain a formal marriage if they actually determine to do so; and (3) if certain property matters have to be resolved when nonmarital partners cease to live together, there are various causes of action other than dissolution of marriage to effectuate that end.

The balance of the statute has been eliminated. Subsections (a) and (c) of the statute unnecessarily restate rules of evidence which already exist and which apply to all actions including marital actions. K.S.A. 60-402. Subsection (a) doubtless was enacted at a time when connivance, fraud, and coercion were matters of particular concern to divorce litigation because a showing of fault was necessary before a divorce could be granted. Subsection (d) states that corroboration is not required and such would be the law if there is no reference to corroboration.

PROPOSED STATUTE

60-1610. Decree.

A decree in an action under this article may include orders on the following matters:

A. Minor Children.

(1) *Child Support and Education.* The court shall make provisions for the support and education of the minor children. The court may change or modify any prior order when a material change in circumstances is shown irrespective of the present domicile of the child or the parents. The court may order the child support

and education expenses to be paid by either or both parents for any child to age eighteen (18) years, at which age the support shall terminate, unless by written agreement approved by the court such parent or parents agree to pay support beyond the time each child attains the age of eighteen (18) years. In determining the amount to be paid for child support, the court shall consider all relevant factors, without regard to marital misconduct, including: the financial resources and needs of both parents; the financial resources and needs of the child; and the physical and emotional condition of the child. Until a child attains age eighteen (18) years, the court may set apart such portion of property of either the husband or wife, or both of them, as may seem necessary and proper for the support of that child.

(2) *Child Custody.*

(a) Subject to the provisions of the Uniform Child Custody Jurisdiction Act as contained in K.S.A., Chapter 38, Article 13, the court may change or modify any prior order of custody when a material change of circumstances is shown.

(b) The court may place the custody of a child with a stepparent. In determining custody, as between a natural parent and stepparent, a natural parent has a prima facie right to custody unless it is found by clear and convincing evidence that the best interests of the child will be served by awarding custody to the stepparent.

(c) The court may order physical or mental examinations of the parties if requested pursuant to K.S.A. 60-235. All physician-patient communication privileges, except those communications arising under counseling pursuant to K.S.A. 60-1608(d) and (e), shall be waived when both parties request custody of a child.

(3) *Child Custody Criteria.* The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including but not limited to:

(a) the length of time that any such child has been under the actual care and control of any person other than a parent and the circumstances relating thereto;

(b) the desires of the child's parents as to custody;

(c) the desires of the child as to the child's custodian;

(d) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests; and

(e) the child's adjustment to such child's home, school, and community.

Neither parent shall be considered to have a vested interest in the custody of any child as against the other parent, regardless of the age of the child, and there shall be no presumption that it is in the best interests of any infant or young child to give custody to the mother.

(4) *Types of Custodial Arrangements.*

Subject to the provisions of this article, the court may make any order relating to custodial arrangement which is in the best interests of the child, including but not limited to the following:

(a) *Sole Custody.* The court may place the custody of a child with a parent, and the other parent shall then be the non-custodial parent. The custodial parent shall have the right to make decisions in the best interests of the child subject to the visitation rights of the non-custodial parent.

(b) *Joint Custody.* The court may place the custody of a child with both parties on a shared or joint custody basis. In such event, the parties shall have equal rights to make decisions in the best interests of the child under their custody. When a

child is placed in the joint custody of the child's parents, the court may further determine that the residency of the child shall be divided (i) in an equal manner with regard to time of residency or (ii) on the basis of a primary residency arrangement for the child.

(c) *Divided Custody.* In an exceptional case, the court may divide the custody of two or more children between the parties.

(d) *Non-parental Custody.* Except as provided in subsection (2) (b), if the court finds that neither parent is fit to have custody, the court may award custody of the child to such other person or agency as the court finds to be in the best interests of the child, and make such orders for care, support, education, and visitation as it deems appropriate. Such custody placement shall not be a severance of parental rights nor give the court the authority to consent to the adoption of the child. A non-parent or agency custodian shall be deemed to have the same powers concerning the child as a parent. The court may refer a transcript of the proceedings to the County or District Attorney for consideration with regard to the best interests of the child, with the costs to be paid from the county general fund. Any finding of unfitness under this subesection shall not be binding on any proceedings under K.S.A., Chapter 38, Article 8, and any order thereunder shall supersede any order under this subsection. If the parents do not object, the court may place custody as provided in K.S.A. 60-1618.

B. Financial.

(1) *Division of Property.* The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reasonable manner without regard to marital fault, either by a division of the property in kind, or by setting the same or a part thereof over to one of the spouses and requiring either to pay such sum as may be just and proper, or by ordering a sale of the same under such conditions as the court may prescribe and dividing the proceeds of such sale.

(2) *Maintenance.* The decree may award to either party an allowance for future support denominated as maintenance, in such amount as the court shall find to be fair, just and equitable under all of the circumstances. The decree may make the future payment modifiable or terminable upon circumstances prescribed therein. In any event, the court may not award maintenance for a duration of time in excess of one hundred twenty-one (121) months. The court shall, upon the expiration of the stated duration of time for maintenance payments to be made, have the jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments and the court may upon such motion and hearing reinstate the payments in whole or in part for a duration of time conditioned upon certain modifying or terminating contingencies as set by the court, but in any event limited to a duration of time of one hundred twenty-one (121) months. The recipient may file subsequent motions for reinstatement of maintenance at the expiration of subsequent durations of time for maintenance payments to be made, but no single duration of time ordered by the court may exceed one hundred twenty-one (121) months. The allowance may be in a lump sum or in periodic payments or on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that have not already become due, but no modification shall be

made without the consent of the party liable for the maintenance if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree. Nothing herein shall limit the right of the recipient of the maintenance to move the court for reinstatement of maintenance payments at the expiration of the duration of time set for the maintenance payments by the court.

(3) *Separation Agreement.* If the parties have entered into a separation agreement which the court finds to be valid, just and equitable, it shall be incorporated in the decree; and the provisions thereof on all matters settled thereby shall be confirmed in the decree except that any provisions for the custody, support or education of the minor children shall be subject to the control of the court in accordance with all other provisions of this article. Matters settled by such an agreement other than matters pertaining to the custody, support or education of the minor children shall not be subject to subsequent modification by the court except as the agreement itself may prescribe, the parties may subsequently consent, or where the recipient of maintenance cohabits with another person on a resident, continuing conjugal basis, in which case the court shall have the right to hear a motion brought by the party obligated to pay the maintenance for modification or reduction of the maintenance.

(4) *Costs and Fees.* Costs and attorneys' fees may be awarded to either party as justice and equity may require. The court may order that the amount be paid direct to the attorney, who may enforce the order in the attorney's name in the same case.

C. Miscellaneous.

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

(2) *Effective Date.* Every decree of dissolution of marriage shall contain a provision to the effect that the parties are prohibited from contracting marriage with any other persons within or without the state until the expiration of the time for appeal from the judgment of dissolution of marriage, or if an appeal is taken, until the judgment of dissolution of marriage becomes final. Any marriage contracted before the judgment becomes final shall be null and void, but any agreement approved in the decree to waive the right of appeal shall be effective to shorten such period of time.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

60-1610 summarizes all of the decisions which the court is required to make or review if the parties have made the decisions themselves in a separation agreement. The major breakdown of the statute is in three sections: A. minor children, B. financial, and C. miscellaneous.

Minor children breaks down into four separate subsections.

The first subsection follows the present law, specifically codifying the case law on the threshold requirement to hear a motion for change of child support, *Hill v. Hill,* 5 Kan. App. 2d 1, 611 P.2d 158 (1980), *Hardenburger v. Hardenburger,* 216 Kan. 322, 532 P.2d 1106 (1975), and the case law on the meaning of the term "age of majority," *Rice v. Rice,* 213 Kan. 800, 518 P.2d 477 (1974), *Jungjohann v. Jungjohann,* 213 Kan. 329, 516 P.2d 904 (1973), and the case law on the fact that property cannot be set aside for the education or support of children beyond the age of majority, *Emery v. Emery,* 104 Kan. 679, 180 P. 451 (1919). The statute makes clear the fact that once a decree under this article has been granted, a

motion may be brought to vacate or modify any prior order with regard to child support or education even if neither of the parents of the subject child are domiciled in Kansas at the time that the motion is brought. The first subsection also makes clear certain relevant factors to be considered in setting the amount of child support and also specifically excludes as a consideration marital misconduct of the payor-parent.

Subsection (2) enumerates three rules with regard to placement of child custody. First, changes and modifications may be made only upon a showing of a material change of circumstances, *Hill v. Hill,* 5 Kan. App. 2d 1, 611 P.2d 158 (1980), *Hardenburger v. Hardenburger,* 216 Kan. 322, 532 P.2d 1106 (1975), and always subject to the provisions of the Uniform Child Custody Jurisdiction Act, see *Larsen v. Larsen,* 5 Kan. App. 2d 284, 615 P.2d 806 (1980). Second, while the parental preference rule requiring a showing of unfitness is not changed as to non-stepparent third parties seeking custody, a different standing is given to stepparents than to other third parties. The committee recognized that a child in a given instance could have a deeper attachment to a psychological parent than to a biological parent and custody may be placed with a stepparent as opposed to a parent in a case where clear and convincing evidence is found that the best interests of the child will be served by such custody placement. Third, although it should be clear from Kansas discovery law that physical or mental examinations of parties contesting custody should be ordered pursuant to K.S.A. 60-235, that fact has been specifically stated in the subparagraph. Likewise, under Kansas Rules of Evidence Law, there would be no physician-patient communication privilege in a custody contest relating to communications between a party and his or her psychiatrist or psychologist (K.S.A. 60-427[d]). That fact is also specifically stated in the subparagraph since the courts have not always recognized it. (An exception to the fact that the privilege does not exist is specifically made with regard to court ordered counseling pursuant to K.S.A. 60-1608(d) and (e) on the rationale that otherwise the counseling would be less productive.)

Subsection (3) under minor children lists some relevant factors which the court will want to consider in determining the placement of custody. Much of the language comes from § 402 of the Uniform Marriage and Divorce Act. The subsection very specifically eliminates the maternal preference or tender years doctrine. See *St. Clair v. St. Clair,* 211 Kan. 468, 507 P.2d 206 (1973) where issue of mental health of mother resolved in her favor by application of the presumption of the tender years doctrine.

Subsection (4) of the minor children section relates to types of custodial arrangements. The subsection permits the court to place custody of a child in the traditional custodial/non-custodial parent arrangement, in a joint custody arrangement, or any type of custodial arrangement in the best interests of the child. The joint custody arrangement grants both parties the equal right to decision-making and the equal obligation of responsibility in the upbringing of the child. The statute further specifically grants the court authority to determine the residency arrangement of a child in the joint custody of his or her parents. While divided custody is permitted by the subsection, it is noted that such arrangement would be made in only the exceptional case. Finally, subsection (4) provides for non-parental custody where the court finds that neither parent is fit to have custody, but such custody placement does not permanently deprive the parents of their parental rights nor give the court authority to consent to the adoption of the child.

The second division of 60-1610 is the financial disposition of a case involving the alteration of marital status.

Subparagraph one thereunder is exactly the same as the present statute with the addition of the qualification "without regard to marital fault" which has the effect of eliminating consideration of marital fault as a criterion for the division of property. This represents a departure from the present law of Kansas in that the Kansas Supreme Court has determined that fault is a factor to be considered in the division of property. *Parish v. Parish,* 220 Kan. 131, 134, 551 P.2d 792, 795 (1976); *LaRue v. LaRue,* 216 Kan. 242, 250, 531 P.2d 84, 91 (1975).

Subparagraph two under financial covers maintenance. The present statute has been unchanged with the single exception of a limitation on the court to a maximum duration of maintenance payments of one hundred twenty-one (121) months, but with the recipient of the maintenance having the right to move the court to reinstate maintenance at the time of the termination of the stated duration.

Subsection three of financial relates to separation agreements. It makes no change in the present statute with the exception of allowing the court to consider modification or vacation of maintenance agreed to in the separation agreement where the recipient of the maintenance is cohabiting with another person on a resident, continuing basis. The language itself comes from § 510(b) of the Illinois Marriage and Dissolution of Marriage Act which makes by law the cohabitation of the party receiving maintenance a condition which allows the court in its discretion to terminate maintenance. The current trend toward non-married partners living together motivated the Committee to make that change. Without the change, the court is powerless to modify or terminate maintenance being paid to a former spouse who begins living in a marriage-like relationship with another person. *Fleming v. Fleming,* 221 Kan. 290, 559 P.2d 329 (1977). See K.S.A. 60-1609, as changed by the Committee.

Subsection four relating to costs and fees was not changed, but a sentence was added allowing more practical enforcement of attorneys' fees. This is consistent with § 313 of the Uniform Marriage and Divorce Act.

The third division of 60-1610 is miscellaneous, referring neither to children nor financial matters. The language from subsection (f) is unchanged. The provisions from subsection (h) concerning the effective date of the decree and the prohibition against remarriage were amended. The language of the amendment makes reference to dissolution of marriage, and to "persons within and without the state" in relation to remarriage. It further clarifies language on the finality of judgment from the former statute concerning the prohibition of remarriage. Lastly, the amendment permits the parties to shorten the period for remarriage by an agreement approved in the decree to waive the right of appeal. This will permit the parties to remarry upon the granting of the dissolution of marriage.

PROPOSED STATUTE

60-1611. Effect of a decree in another state.

A judgment or decree of divorce or dissolution of marriage rendered in any other state or territory of the United States, in conformity with the laws thereof, shall be given full faith and credit in this state; except, that in the event the defendant in such action, at the time of such judgment or decree, was a resident of this state and did not personally appear or defend the action in the court of such state or territory, and such court did not have jurisdiction over his or her person,

all matters relating to maintenance, property rights of the parties and support of the minor children of the parties, shall be subject to inquiry and determination in any proper action or proceeding brought in the courts of this state within two (2) years after the date of the foreign judgment or decree, to the same extent as though the foreign judgment or decree had not been rendered. Nothing herein shall authorize a court of this state to enter a custody decree, as defined in K.S.A. 1978 Supp. 38-1302, contrary to the provisions of the Uniform Child Custody Jurisdiction Act.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The statute was unchanged other than the addition of the terms "dissolution of marriage" and "maintenance".

PROPOSED STATUTE

60-1612. Self help.

If a party fails to comply with a provision of a decree or temporary order or injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended; but such other party may move the court to grant an appropriate order.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

This statute is new. It memorializes the fact that the obligation to pay child support and the obligation to allow visitation are not interdependent and is intended to abolish self-help remedies, now all too common in family litigation, whereby one party withholds support or maintenance payments to force the other party to comply with visitation orders and vice versa. The statute comes from § 315 of the Uniform Marriage and Divorce Act.

PROPOSED STATUTE

60-1613. Assignments.

The court may order the person obligated to pay support or maintenance to make an assignment of a part of his or her periodic earnings or trust income to the person entitled to receive the payments. The assignment is binding on the employer, trustee, or other payor of the funds two (2) weeks after service upon him or her of notice that it has been made. The payor shall withhold from the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the district court trustee or the person specified in the order. The payor may deduct from each payment a sum not exceeding Two Dollars ($2.00) as reimbursement for costs. An employer shall not discharge or otherwise discipline an employee as a result of a wage or salary assignment authorized by this section.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

This statute is new. It was the feeling of the Committee that one of the most serious problems for divorced persons receiving support and for society in general is the difficulty of post-dissolution of marriage enforcement of support orders. This assignment provision would assist in such enforcement and it comes verbatim from § 312 of the Uniform Marriage and Divorce Act.

PROPOSED STATUTE

60-1614. Interviews.

The court may interview the child in chambers to ascertain the child's wishes as to the child's custodian and as to visitation. The court may permit counsel to be present at the interview. Upon request of any party, the court shall cause a record of the interview to be made and the record of the interview shall be available to counsel and may be made a part of the record in the case.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

This section is designed to permit the court to make custody and visitation decisions as informally and noncontentiously as possible, and at the same time preserve a fair hearing for all interested parties. The statute comes in part from the Uniform Marriage and Divorce Act, § 404.

PROPOSED STATUTE

60-1615. Investigations and Reports.

(a) In contested custody proceedings, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by court services officers, the Department of Social and Rehabilitation Services, or any consenting person or agency employed by the court for that purpose.

(b) In preparing the report concerning a child, the investigator may consult any person who may have information about the child and the potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian. If the requirements of subsection (c) are fulfilled, the investigator's report may be received in evidence at the hearing.

(c) The court shall make the investigator's report available prior to the hearing to counsel or to any party not represented by counsel. Any party to the proceeding may call the investigator and any person whom the investigator has consulted for cross-examination. In consideration of the mental health or best interests of the child or children, the court may approve a stipulation that the interview records not be divulged to the parties.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

This section substantially follows the language of the Uniform Marriage and Divorce Act, § 405. The Committee felt that such investigations and reports can be quite helpful to the court.

PROPOSED STATUTE

60-1616. Visitation.

(a) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.

(b) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

(c) Grandparents and stepparents may be granted visitation rights.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

Sections (a) and (b) of the proposed law come verbatim from the Uniform Marriage and Divorce Act, § 407, with duplicitous language in subsection (b) being deleted. The import of the law is to protect the visitation rights of a non-custodial parent except in extraordinary cases where such visitation would seriously endanger the child's physical, mental, moral, or emotional health. Unless the court found such endangerment, the non-custodial parent's visitation rights could not be restricted or terminated in spite of the desires of the child or custodial parent.

Section (c) gives the court jurisdiction to allow, at the court's discretion, visitation rights to grandparents and stepparents. Previously, such jurisdiction was conferred upon the court only in the case of visitation requested by grandparents whose child (the grandchild's parent) has died during the minority of the grandchild. See K.S.A. 38-129, *et seq.; Browning v. Tarwater,* 215 Kan. 501, 524 P.2d 1135 (1974), where a grandparent's visitation rights granted under K.S.A. 38-129, *et seq.,* were terminated upon the adoption of the grandchild.

PROPOSED STATUTE

60-1617. Counseling.

(a) Upon motion by any party or by the court's own motion, the court may order at any time prior to or subsequent to the alteration of the parties' marital status that the parties and any of their children be interviewed by a licensed psychiatrist, psychologist, or other trained professional in the area of family counseling approved by the court for the purpose of determining whether it is in the best interests of any of the parties' children that the parties and any of their children have counseling with regard to matters of custody and visitation. The court shall receive the opinion of the professional in writing and it shall be made available by the court to counsel upon request. Counsel may examine as a witness any professional so consulted by the court. If the opinion of the professional is that counseling is in the best interests of any of the children, then the court may order the parties and any of the children to have counseling.

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

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

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

PROPOSED STATUTE

60-1618. Placement of Custody With Non-Parent After Decree.

At any time after custody of any minor child has been awarded pursuant to a decree of dissolution of marriage, annulment, or separate maintenance decree, any person who has had actual physical custody of any such child after such decree

was rendered with the consent of the parent having legal custody, where applicable, may request by motion to the court rendering such decree that legal custody of such child or children be awarded to such person. Notwithstanding the parental preference doctrine, the court may award custody of any such child to such person if the best interests of such child will be served thereby and if the court determines that a parental relationship has been established between such child or children and the moving party. No motion may be made pursuant to this subsection unless the movant has had actual physical custody of the child or children within six (6) months from the date of the motion. In determining the best interest of the child, the court shall consider all relevant factors, including but not limited to the following: (a) the length of time that any such child has been under the actual care and control of any person other than a parent and the circumstances relating thereto; (b) the desires of the child's parents as to custody; (c) the desires of the child as to the child's custodian; (d) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests; (e) the child's adjustment to such child's home, school, and community; and (f) the mental and physical health and age of all individuals involved.

COMMENT OF FAMILY LAW ADVISORY COMMITTEE:

The Committee concluded that while the present statute was meritorious in that it recognized that children can develop strong relationships to a psychological parent as opposed to a biological parent, the statute was nonetheless improperly placed within the present statute on "Decree" when in fact it was a post-decree matter.

PROPOSED LEGISLATION RELATING TO THE DETERMINATION OF THE VALIDITY OF A CONSENT TO A WILL

The November, 1977 *Kansas Judicial Council Bulletin* contains forms for guidance in the administration of estates in the Probate Divisions of the District Courts of Kansas. Form 103 ("Petition for Probate of Will and Issuance of Letters Testamentary"), paragraph 10, contains an allegation that the spouse ". . . consented in writing to the Last Will and Testament." The corresponding portion of the prayer asks that the "Consent of Spouse" be determined a valid consent.

Not only did the Judicial Council Probate Advisory Committee include in Form 103 the foregoing allegations, but the Committee also included in Form 105 ("Notice of Hearing and Notice to Creditors") notice that the petitioner asked ". . . that the 'Consent of Spouse' filed herein be determined a valid consent."

The Probate Advisory Committee believed that in many, if not most, instances the "Consent of Spouse" would have been executed simultaneously with the execution of the "Last Will and Testament" and that the same witnesses would have acted as witnesses to both instruments, in which instances, with proper notice and with no violation of "due process", both issues could be determined in one consolidated hearing. It is the opinion of the Judicial Council that the authority to consolidate hearings on these dual issues when no controversy exists will result in savings of costs and will be more convenient for all parties concerned.

It has recently been brought to the attention of the Judicial Council that the Supreme Court decisions, *In re Estate of Osborn,* 167 Kan. 656, 208 P.2d 207 (1949), Syllabus 2, and the corresponding portion of the opinion, and *In re Estate of Petty,* 227 Kan. 697, 608 P.2d 987 (1980), Syllabus 2, and the corresponding portion of the opinion, might lead the courts to conclude that in a probate proceeding on a petition for probate of a will, the court had no jurisdiction to also determine a "Consent of Spouse" to be a valid and binding consent.

Presumably argument for such lack of jurisdiction would be based on the case law (see *In re Estate of Suesz,* 228 Kan. 275, 613 P.2d 947 [1980]) which holds that probate proceedings are statutory proceedings and K.S.A. 59-2220 does not specifically require or authorize the "Petition for Probate of Will" to allege the existence of a "Consent of Spouse". In order to give permissive statutory authority to the court to hear and determine the dual questions of (1) whether the instrument alleged to be the Last Will is entitled to probate, and (2) whether the instrument alleged to be the "Consent of Spouse" is a valid and binding consent, in a consolidated hearing of the two separate issues or in separate hearings, the Judicial Council recommends consideration of amendments to K.S.A. 59-2220; K.S.A. 59-2222; K.S.A. 59-2223; K.S.A. 1979 Supp. 59-2224; and K.S.A. 59-2233, as follows. Your comments are invited.

K.S.A. 59-2220. PETITION FOR PROBATE OF WILL. A petition for the probate of a will, in addition to the requirements of a petition for administration, shall state: (1) The names, ages, residences and addresses of the devisees and legatees so far as known or can with reasonable diligence be ascertained; (2) the name, residence and address of the person, if any, named as executor; and, (3) the name and address of the scrivener of the will, if known or ascertainable with due diligence. The will shall accompany the petition if it can be produced. *The petition may also state whether a surviving spouse has executed a consent to the will, in which event said consent shall accompany the petition if it can be produced.* A petition for the probate of a lost or destroyed will shall contain a statement of the provisions of the will.

K.S.A. 59-2222. NOTICE FOR PROBATE, ADMINISTRATION OR REFUSAL TO GRANT LETTERS OF ADMINISTRATION. When a petition is filed for the probate of a will, *or for the determination that a consent of spouse to said will is a valid and binding consent,* or for administration, or for refusal to grant letters of administration, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to K.S.A. 59-2209, unless the court shall make an order to the contrary. If notice is by order of the court not required to be given pursuant to K.S.A. 59-2209, the court shall order notice thereof to be given, unless waived, in such manner as the court shall direct. When the petition seeks simplified administration, the notice shall advise all persons that under such provision the court need not supervise administration of the estate, and no notice of any action of the executor or administrator or other proceedings in the administration will be given, except for notice of final settlement of decedent's estate. The notice shall further advise all persons that if written objections to simplified administration are filed with the court, the court may order that supervised administration ensue. When a petition has been filed for the refusal of letters of administration, pursuant to K.S.A. 59-2287, the notice given shall advise all persons that at such hearing exempt property and a reasonable allowance will be set aside to the surviving spouse and minor children,

or both, and that no further notice of the proceeding will be given. When the state is a proper party the notice shall be served upon the attorney general and the county or district attorney of the county.

K.S.A. 59-2223. HEARING ON PROBATE OR ADMINISTRATION; ENTRY OF APPEARANCE, WAIVER OF NOTICE AND CONSENT TO IMMEDIATE HEARING. When a petition is filed for the probate of a will, *or for the determination that a consent of spouse to said will is a valid and binding consent,* or for administration, if all parties interested as heirs, devisees, and legatees enter their appearance in writing, waive the notice otherwise required, and consent to an immediate hearing, a hearing may be had, in the discretion of the court, as if notice had been given. Such entry of appearance, waiver of notice and consent to an immediate hearing may be given by: A trustee on behalf of the trustee and all beneficiaries of the trust; a conservator on behalf of the conservator and all his or her conservatees; a guardian on behalf of the guardian and all his or her wards; a guardian ad litem on behalf of the guardian ad litem and all of those whom he or she represents; or by an attorney under the soldiers' and sailors' civil relief act on behalf of an attorney appointed pursuant to the soldiers' and sailors' civil relief act and all of those whom such attorney represents.

K.S.A. 1979 Supp. 59-2224. HEARING FOR PROBATE OF WILL. *The hearing of a petition for the probate of a will and hearing of a petition to determine that the consent of the spouse to said will is a valid and binding consent, shall be separate issues which, within the discretion of the court, may be determined in a consolidated hearing or in separate hearings.* On the hearing of a petition for the probate of a will *or the determination that the consent of a spouse to said will is a valid and binding consent,* unless *they are* uncontested, self-proved will *or consent,* the testimony of at least two (2) of the subscribing witnesses shall be taken in person, by affidavit or by deposition. Otherwise, the court may admit the testimony of other witnesses to prove the capacity of the testator *or the spouse* and the due execution of the will *or the consent* and as evidence of such execution may admit proof of the handwriting of the testator *or the spouse* and of the subscribing witnesses. Any heir, devisee, or legatee may prosecute or oppose the probate of any will *or consent.* If the instrument *alleged to be the will* is not allowed as the last will and if the estate should be administered, the court shall grant administration to the person or persons entitled thereto.

K.S.A. 59-2233. ELECTION TO TAKE UNDER WILL OR BY INTESTATE SUCCESSION. *Except where the court has previously determined the validity and binding consent to a will,* when a will is admitted to probate the court shall forthwith transmit to the surviving spouse a certified copy thereof, together with a copy of K.S.A. 59-603 and this section and certify to such transmittal. If such spouse has consented to the will, as provided by law, such consent shall control; otherwise such spouse shall be deemed to have elected to take under the testator's will unless such spouse shall have filed in the district court, within six (6) months after the probate of the will, an instrument in writing to take by the laws of intestate succession. If said spouse files an election before the inventory and valuation of the estate is filed, said election shall be set aside upon petition of the spouse made within thirty (30) days after the filing of the inventory and valuation. For good cause shown, the court may permit an election within such further time as the court may determine, if a petition therefor is made within said period of six (6) months.

K.S.A. 59-602(2) refers to the limitation on testamentary power with reference to the one-half of property secured to the surviving spouse without a written consent. While the section refers to "consent" it does not need amending. K.S.A. 59-603 provides for an election in the absence of a written consent. The section needs no amendment.

ROBERT H. COBEAN, *Member*
Kansas Judicial Council

A BRIEF REPORT OF THE JUDICIAL COUNCIL CIVIL CODE ADVISORY COMMITTEE RELATING TO COURT COSTS

In 1979 the Judicial Council was requested by the Office of the Judicial Administrator to study and make recommendations relating to court costs. The request was accepted by the Judicial Council and assigned to the Civil Code Advisory Committee, which made recommendations that were approved by the Judicial Council.

The recommendations were held for introduction in the 1981 legislative session to coordinate their effective date with the date of full implementation of state payment for costs of nonjudicial personnel. The recommendations of the Committee are as follows:

(1) Remove from the statutes the following statutory charges against the docket fee: bar docket fees (19-1307); judges retirement fee (20-2603); court reporters fees (28-170b); prosecuting attorneys training fund fee (28-170a and 28-170[c]); law enforcement training fund fee (74-5612 *et seq.*) and additional fees in civil and criminal cases (28-173a).

In the past charges deducted from the docket fee have been seen as a "painless" method of raising revenue, especially from the state level, because the charges produced funds for special projects without an additional tax or a reduction in state revenues, although at an expense to the counties. This situation will change on July 1, 1981, the date on which the state will completely assume payment of the salaries of nonjudicial court personnel. On that same date the county treasurer will be required to remit to the state treasurer all funds received from court costs and fees. Because of state assumption the deductions from docket fees would result in a loss of revenue to the state because each dollar deducted from the docket fee after July 1, 1981 is a dollar that is diverted from the state general revenue fund. Continuing to fund these programs through deductions from docket fees and costs is tantamount to state funding without going through the budget process or the legislative appropriation procedure.

Another reason for making the preceding recommendation is the recognition by the Committee that the cost of the bookkeeping, accounting and auditing of small sums out of a docket fee is greatly disproportionate to the income derived, and may in fact exceed the amounts involved. Prior to 1963 separate charges were made for each service of the clerk of the court and the sheriff. In 1963, in recognition of the accounting and auditing expense involved, it was determined by the legislature that instead of individual charges a fixed docket fee should cover all such services. The Committee believes that the legislative determination at that time was right and its philosophy should be followed.

It should be specifically noted that because the fees for judges retirement and reporters are separated from the docket fee, with all required bookkeeping, accounting and auditing procedures, and then are deposited in the same fund (state general revenue) as the remainder of the docket fee that the deduction of these fees from the docket fee requires several costly but useless acts.

The Committee made no recommendations regarding the law library fees. These fees are presently deducted from the docket fee and the Committee believes this practice should continue. It is recognized that this recommendation may seem inconsistent with the other recommendations of the Committee, but the Committee is of the opinion that law library fee funds are unique. They do not exist in all counties, statutes on the subject were drafted in a piecemeal manner, and the operation of law libraries differs from county to county as does the amount set aside for this use. It is also recognized that county law libraries have value in that they allow better administration of justice by providing research tools in the hands of judges and the lawyers who practice before them.

(2) Raise the amount of docket fees from $35 to $55 in actions filed under Chapter 60, except small claims actions which will remain at $5. Raise the amount of the docket fee from $15 to $30 in actions filed under Chapter 61. All of the docket fee in small claims cases and $10 of the docket fee in other Chapter 60 cases and $10 of the docket fee in Chapter 61 cases be paid to the county general revenue fund.

As to raising the amount of the docket fee it is the opinion of the Committee that the purpose of docket fees is to require a fair contribution by litigants toward the use of the court facilities. The Committee does not believe that the litigants should pay all of the expenses of the litigation because the resolution of litigation benefits all of the persons of the state.

The docket fees in Chapter 60 actions (other than small claims) were raised from $25 to $35 in 1974. The docket fees in Chapter 61 cases were raised to $15 in 1976. Inflation has taken its well known toll since those times. The recommended docket fees would be comparable to those of the surrounding states.

It is the opinion of the Committee that $10 of the docket fee collected in Chapter 60 and 61 cases and the entire $5 of the docket fee collected in small claims cases should be deposited in the county general fund. Traditionally, court costs were partial reimbursement to the county for services of the clerk and services of the sheriff in serving process. When individual charges for each were eliminated a flat docket fee was charged to cover both services. The state has assumed responsibility for payment for personnel of the clerk's office after July 1, 1981, but not for the sheriff. The sheriff remains as a county employee who devotes time to service of process, service of warrants and handling of prisoners, all duties which assist in the legal process but services for which 100% of the cost falls on the county. Unless other provision is made, after July 1, 1981 the sheriff's office will have this burden without any revenue being paid to the county. Oklahoma, Nebraska and Colorado charge special process fees ranging from $7 to $27. For these reasons the Committee recommends the $5 and $10 payments to the counties from the docket fee.

The Committee also considered and will recommend other minor changes in the area of court costs. The Committee was also recently requested to consider and report on a number of other related statutes. That work has begun, but is not yet completed.

SUMMARY OF FY 1980 COURT CASELOAD DATA

Fiscal year 1980 brought an increase in court activity at the appellate level, as both filings and dispositions were higher than their fiscal year 1979 levels. For both appellate courts the total number of cases commenced was 1089; this represented an increase of 12.3% over the 1979 total. A year ago the year to year increase was 3%. The number of case dispositions again showed a year to year increase, although this years increase did not match the dramatic increase of a year ago. Case dispositions increased to 989 in FY '80, a 5.2% increase over FY '79. Two years ago case dispositions for the appellate courts totaled 772.

The increase in case filings though outstripped the increase in case terminations with the result that pending cases for the appellate courts increased 11.6% in FY '80 compared to FY '79.

TABLE 1

COMBINED APPELLATE COURT CASELOAD
(APPEALS AND ORIGINAL CASES)
FY '80

	Number of cases	
Pending 7-1-79	852	
Commenced	1,089	
Total Caseload		1,941
Terminated		989
Pending 6-30-80		952

TABLE 2

SUPREME COURT CASELOAD SUMMARY
FY 1980

	Number of Cases	
Pending 7-1-79		207
Commenced		202
Transferred from Court of Appeals		47
Total Caseload		456
Terminated	307	
Pending 6-30-80	149	

TABLE 3

COURT OF APPEALS CASELOAD SUMMARY
FY 1980

	Number of Cases	
Pending 7-1-79	645	
Commenced	916	
Total Caseload		1,561
Transferred to Supreme Court		47
Terminated		682
Pending 6-30-80		832

DISTRICT COURTS:

There were also increases in trial court activity in fiscal year 1980, as a comparison of the following data with that from previous years shows. Filings in the five major case categories (Chapter 60 regular and domestic relations, Chapter 61, felony and misdemeanor) increased 9.75% over the FY '79 levels. The largest single increase was the 18.8% increase in Limited Actions filings.

Case terminations increased in every major category in FY '80 compared to FY '79. Major case terminations were 12% above those of a year ago, with civil case terminations up 13.5% and criminal case terminations up 8.2%.

The following table summarizes district court caseload data for FY '80.

TABLE 4

SUMMARY OF DISTRICT COURT CASELOAD FOR THE STATE
YEAR ENDING JUNE 30, 1980

	Pending 7-1-79	Cases Filed	Cases Terminated	Pending 6-30-80
Civil Cases:				
Regular Actions	13,201	17,816	16,830	14,187
Domestic Relations	9,433	25,856	25,604	9,685
Limited Actions	11,318	40,345	37,018	14,645
Total, Civil	33,952	84,017	79,452	38,517
Criminal Cases:				
Felonies	4,197	10,944	11,310	3,831
Misdemeanors	4,368	16,040	17,821	2,587
Total, Criminal	8,565	26,984	29,131	6,418
SUBTOTAL	42,517	111,001	108,583	44,935
Traffic cases		273,704	267,562	
Formal Juvenile Cases		14,469	12,362	
Decedent estates		6,182	5,076	
Guardianship/ conservatorship estates		2,400	1,050	
Trusts		365	155	
TOTAL		408,121	394,788	

Other Actions:			
Small claims	15,045	Informal juvenile cases	14,741
Adoptions	2,156	Determinations of descent	1,963
Treatment proceedings	2,983	Miscellaneous probate actions	1,926

ROSTER OF JUDGES & CLERKS OF THE DISTRICT COURTS AS OF JANUARY 12, 1981

Judicial District	DISTRICT JUDGE	ASSOCIATE DISTRICT JUDGE	DISTRICT MAGISTRATE JUDGE	CLERK OF DISTRICT COURT
1	Div. 1: Kenneth Harmon, Leavenworth °	Frederick N. Stewart, Leavenworth	Richard A. Dempster, Atchison	Janice L. Stone, Atchison
	Div. 2: (Vacant)	John L. White, Leavenworth	Dolan McKelvy, Atchison	Ronald E. Miles, Leavenworth
2	Div. 1: John W. Brookens, Westmoreland °	Tracy D. Klinginsmith, Jackson	Dennis L. Reiling, Jefferson	Mary Robison, Jackson
			Oliver F. Maskil, Pottawatomie	Evelyn A. Bowers, Jefferson
			Verle L. Swenson, Wabaunsee	Patricia Campbell, Pottawatomie
				Norma J. Doty, Wabaunsee
3	Div. 1: William R. Carpenter, Topeka	Franklin R. Theis, Shawnee		Lorene Wells, Shawnee
	Div. 2: Fred S. Jackson, Topeka	James H. Hope, Shawnee		
	Div. 3: E. Newton Vickers, Topeka °	Mary Schowengerdt, Shawnee		
	Div. 4: Adrian J. Allen, Topeka	Bill G. Honeyman, Shawnee		
	Div. 5: James M. Macnish, Topeka	Matthew J. Dowd, Shawnee		
	Div. 6: Terry L. Bullock, Topeka			
4	Div. 1: Floyd H. Coffman, Ottawa °	Donald L. White, Franklin	George G. Levans, Allen	Jeanne Smith, Allen
	Div. 2: John W. White, Iola	James J. Smith, Anderson	Orville E. Steele, Coffey	Roberta Bowman, Anderson
			Larry L. Coursen, Osage	Audrey L. Hegg, Coffey
			Robert L. Ward, Woodson	Ruby Sanford, Franklin
				Margaret Knight, Osage
				Doris Peterson, Woodson
5	Div. 1: (Vacant)	William J. Dick, Lyon	Francis D. Towle, Chase	Virgene E. Gaines, Chase
				(vacant), Lyon
6	Div. 1: Charles M. Warren, Fort Scott °	Leighton A. Fossey, Linn	Samuel I. Mason, Bourbon	Betty O'Dell, Bourbon
		(Vacant), Miami		Ann Stuart, Linn
				Vivian L. McCready, Miami
7	Div. 1: Ralph M. King, Lawrence	John M. Elwell, Douglas		Sherlyn Sampson, Douglas
	Div. 2: James W. Paddock, Lawrence °			
8	Div. 1: John F. Christner, Abilene	George F. Scott, Geary	Tom Nold, Dickinson	Roberta Sleichter, Dickinson
	Div. 2: William D. Clement, Junction City °	Melvin M. Gradert, Marion	Clarence L. Sawyer, Morris	Lillian Newman, Geary
				Geraldine Seibel, Marion
				Marie Borkert, Morris
9	Div. 1: Sam H. Sturm, Newton °	John T. Reid, Harvey		Joe Fox, Harvey
		Carl B Anderson, Jr., McPherson		Carol Goodson, McPherson

° Administrative Judge of the Judicial District

ROSTER OF JUDGES AND CLERKS OF THE DISTRICT COURT—*Continued*

Judicial District	DISTRICT JUDGE	ASSOCIATE DISTRICT JUDGE	DISTRICT MAGISTRATE JUDGE	CLERK OF DISTRICT COURT
10	Div. 1: Herbert W. Walton, Olathe	Marion W. Chipman, Johnson		Lova Duncan
	Div. 2: James H. Bradley, Olathe	Earle D. Jones, Johnson		
	Div. 3: Buford L. Shankel, Olathe	J. Stewart McWilliams, Johnson		
	Div. 4: William G. Gray, Olathe	Sam K. Bruner, Johnson		
	Div. 5: Phillip L. Woodworth, Olathe	Bill E. Haynes, Johnson		
	Div. 6: Lewis C. Smith, Olathe °	Robert G. Jones, Johnson		
		Jannett Howard, Johnson		
		Gerald L. Hougland, Johnson		
11	Div. 1: Don Musser, Pittsburg °	Richard D. Loffswold, Crawford	B. J. LaTurner, Cherokee	Theda Correll, Cherokee
	Div. 2: William P. Meek, Baxter Springs	John C. Gariglietti, Crawford	Dwaine Spoon, Wilson	Janice Caruthers, Crawford
	Div. 3: Charles J. Sell, Parsons	Daniel L. Brewster, Labette		Sue Stover, Labette
	Div. 4: C. Frederick Lorentz II, Fredonia	Richard L. Ashley, Neosho		Virginia Embry, Neosho
				Erma Spohn, Wilson
12	Div. 1: Richard W. Wahl, Lincoln °		Marvin L. Stortz, Cloud	Nancy Jones, Cloud
			Jack D. Bradrick, Jewell	Joan Rehmert, Jewell
			Ardith Von Fange, Lincoln	Jennie Panzer, Lincoln
			Henry Russell, Mitchell	Marilyn Huffman, Mitchell
			William E. Thompson, Republic	Earl J. Baldridge, Republic
			Steve Kaminski, Washington	Lois Acree, Washington
13	Div. 1: J. Patrick Brazil, Eureka	John M. Jaworsky, Butler	Waine L. Jones, Chautauqua	Virginia Elmore, Butler
	Div. 2: Page W. Benson, El Dorado °		Darlene P. Royse, Elk	Joyce Borchers, Chautauqua
			Harriet Shumard, Greenwood	Nadine Fickle, Elk
				Eleanor Jacoby, Greenwood
14	Div. 1: David H. Scott, Independence °	Raymond Belt, Montgomery		Bessie Scofield, Montgomery
		Kenneth D. David, Montgomery		
		Floyd V. Palmer, Montgomery		
15	Div. 1: Keith R. Willoughby, Colby °	Jack L. Burr, Sherman	Pauline Coker, Graham	Genevieve Brunk, Graham
			(Vacant), Rooks	Virginia Doughty, Rooks
			Ward Gilliland, Sheridan	Vergie Wente, Sheridan
			Nellie L. Blakely, Thomas	Dixie Chatfield, Sherman
				Genevieve A. Keller, Thomas

° Administrative Judge of the Judicial District

ROSTER OF JUDGES AND CLERKS OF THE DISTRICT COURT—*Continued*

Judicial District	DISTRICT JUDGE	ASSOCIATE DISTRICT JUDGE	DISTRICT MAGISTRATE JUDGE	CLERK OF DISTRICT COURT
16	Div. 1: Don C. Smith, Dodge City °	Jay Don Reynolds, Ford	Michael A. Freelove, Clark	Betty Wyatt, Clark
			L. E. Mike Murphey, Comanche	Ellen Erwin, Comanche
			Maurice L. Johnson, Gray	Beatrice Slattery, Ford
			Pauline Schwarm, Kiowa	Marie Babcock, Gray
			John Murphy, Meade	Billie Huckriede, Kiowa
				Evelyn Dye, Meade
17	Div. 1: Charles E. Worden, Newton °		Frederick J. Hammers, Cheyenne	Ena Zimbelman, Cheyenne
			Elmer J. Tacha, Decatur	Alice J. Vernon, Decatur
			Wilda June Brown, Norton	Darla Engel, Norton
			Shirley Henderson, Osborne	Kathern Krier, Osborne
			Martha Kellogg, Phillips	Doris Van Allen, Phillips
			Dorothy R. Reinert, Rawlins	Bessie B. Peterson, Rawlins
			Betty McDonald, Smith	Karen Blank, Smith
18	**Div. 1: Willis W. Wall, Wichita**	**Div. A: Elliott Fry, Sedgwick**		Dorothy I. VanArsdale
	Div. 2: Ray Hodge, Wichita	**Div. B: Robert Hornung, Sedgwick**		
	Div. 3: Keith Sanborn, Wichita	**Div. C: Hal Malone, Sedgwick**		
	Div. 4: James V. Riddel, Wichita	**Div. D: David W. Kennedy, Sedgwick**		
	Div. 5: James J. Noone, Wichita	Div. E: James G. Beasley, Sedgwick		
	Div. 6: D. Keith Anderson, Wichita	Div. F: Paul L. Thomas, Sedgwick		
	Div. 7: Tom Raum, Wichita	Div. G: Robert C. Helsel, Sedgwick		
	Div. 8: Nicholas W. Klein, Wichita	Div. H: Ron Rogg, Sedgwick		
	Div. 9: David P. Calvert, Wichita	Div. I: John E. Foulston, Sedgwick		
	Div. 10: Tyler C. Lockett, Wichita			
	Div. 11: Robert L. Morrison, Wichita			
	Div. 12: Michael Corrigan, Wichita			
	Div. 13: Owen Ballinger, Wichita			
19	Div. 1: Doyle E. White, Winfield	David S. Lord, Cowley	Thomas L. McGuire, Barber	Ruth Hamm, Barber
	Div. 2: Charles H. Stewart, Kingman °	Robert L. Bishop, Cowley	John Moore, Harper	Evelyn Gates, Cowley
		Tom Pringle, Cowley	Gene Shay, Kingman	Olive L. Ghormley, Harper
		Clarence E. Renner, Pratt	Walter McClauskey, Pratt	Janis McIlrath, Kingman
		Lloyd K. McDaniel, Sumner		Betty Onstott, Pratt
		Thomas H. Graber, Sumner		Judy Slack, Sumner

° Administrative Judge of the Judicial District

ROSTER OF JUDGES AND CLERKS OF THE DISTRICT COURT—*Continued*

Judicial District	DISTRICT JUDGE	ASSOCIATE DISTRICT JUDGE	DISTRICT MAGISTRATE JUDGE	CLERK OF DISTRICT COURT
20	**Div. 1: Barry A. Bennington, St. John**	William J. Laughlin, Barton.....	Clarence Kahler, Ellsworth.....	Diane Brittain, Barton
	Div. 2: Herb Rohleder, Great Bend °	.....	Don L. Alvord, Rice.....	Pamela G. Russ, Ellsworth
			A. L. Hall, Russell	Judy MacLaren, Rice
			Lee Nusser, Stafford	Patricia M. Ayres, Russell
				Darlene Bartlett, Stafford
21	Div. 1: Ronald D. Innes, Manhattan °	Harlan W. Graham, Riley.....	Chester W. Kent, Clay	Lucille Murrison, Clay
	Div. 2: Jerry L. Mershon, Manhattan.....	.....	.....	Ruth Houghton, Riley
22	Div. 1: William L. Stevenson, Hiawatha ° ..	Robert L. Gernon, Brown.....	Virgil W. Begesse, Doniphan	Mildred Davis, Brown
			Maxine Cumro, Marshall	Alice F. Crane, Doniphan
			Francis G. Holthaus, Nemaha	Wilma Jean Blaser, Marshall
				Jane Heinen, Nemaha
23	Div. 1: Steven P. Flood, Hays °.....	Tom Scott, Ellis.....	Vaudie Schaible, Gove.....	Velma Giebler, Ellis
			Annabell M. Peck, Logan	Mabel Fagan, Gove
			David L. Rhodes, Trego	Virginia B. Beamer, Logan
			Logan Dobbs, Wallace	Cora V. Hladek, Trego
				Penny Mincks, Wallace
24	Div. 1: C. Phillip Aldrich, Larned °.....	.....	Richard Miller, Edwards	Joan Parnell, Edwards
			Virginia M. Schroeder, Hodgeman .	Agnes Gleason, Hodgeman
			Roger A. Yost, Lane	Ella Lawrence, Lane
			Opal Burdett, Ness	Deborah L. Fagan, Ness
			David Buster, Pawnee	Shelley R. Son, Pawnee
			Leonard A. Mastroni, Rush	Clara Humburg, Rush
25	Div. 1: J. Stephen Nyswonger, Garden City	Harrison Smith, Finney °.....	C. Ann Kennis, Greeley	Rose Murray, Finney
			Donna L. J. Blake, Hamilton	Mary Melton, Greeley
			(Vacant), Kearny	Helen Helm, Hamilton
			Gordon Goering, Scott	Elizabeth Williams, Kearny
			Claude S. Heath, III, Wichita	B. Arlista Grube, Scott
				Betty Blackburn, Wichita

° Administrative Judge of the Judicial District

ROSTER OF JUDGES AND CLERKS OF THE DISTRICT COURT—*Concluded*

Judicial District	DISTRICT JUDGE	ASSOCIATE DISTRICT JUDGE	DISTRICT MAGISTRATE JUDGE	CLERK OF DISTRICT COURT
26	Div. 1: Keaton G. Duckworth, Elkhart °	Kim D. Ramey, Seward	K. T. Gregg, Grant David G. Rinehart, Haskell Shirley A. Davis, Morton Vance L. Whittington, Stanton Verna Kay McQueen, Stevens	Edna M. Walker, Grant Arline Staton, Haskell Verda Mae Allen, Morton Faye Shoemaker, Seward Bonnie Eckas, Stanton Betty Lamberson, Stevens
27	Div. 1: Porter K. Brown, Hutchinson Div. 2: J. Stanley Hill, Hutchinson °	Richard J. Rome, Reno (Vacant), Reno		Sara Hill, Reno
28	Div. 1: Morris V. Hoobler, Salina ° Div. 2: Raymond E. Haggart, Salina	Gene B. Penland, Saline John Weckel, Saline	Adrian Lapka, Ottawa	Esther Plunkett, Ottawa Betty J. Just, Saline
29	Div. 1: James J. Lysaught, Kansas City Div. 2: William M. Cook, Kansas City Div. 3: Dean J. Smith, Kansas City Div. 4: John W. Mahoney, Kansas City Div. 5: Leo J. Maroney, Kansas City ° Div. 6: Cordell D. Meeks Jr., Kansas City Div. 7: Wayne H. Phillips, Kansas City	Ralph D. Lamar, Wyandotte David P. Mikesic, Wyandotte Matthew G. Podrebarac, Wyandotte Bill D. Robinson, Jr., Wyandotte (Vacant), Wyandotte Lawrence G. Zukel, Wyandotte Robert J. Foster, Wyandotte		Helen Zagar, Wyandotte

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