KANSAS JUDICIAL COUNCIL BULLETIN

JULY, 1951 PART 2—TWENTY-FIFTH ANNUAL REPORT

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President of the Bar Association of the State of Kansas

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FOREWORD

We are glad to publish in this BULLETIN an article by Elmer E. Euwer, president of the Bar Association of the State of Kansas, whose picture appears on our cover.

Mr. Euwer is a native of Kansas, having been born in Topeka in 1890. After completing common school, he entered Washburn College from which he was graduated in 1910. Thereafter he was an employee of the Atchison, Topeka & Santa Fe Railway Company for some years and while so employed was also a student of the Law School of Washburn University, from which he was graduated in 1915. He was admitted to the Bar of the Supreme Court on June 24, 1915, and commenced practice at Goodland, where he soon became county attorney of Sherman county. He served in the United States army from February, 1918, to May, 1919, and upon his discharge resumed his practice of the law at Goodland. In addition to many local civic activities, Mr. Euwer served as a state representative in the seasons of 1923 and 1925 and was elected to the state senate in 1940, 1944 and 1948. Mr. Euwer was married to Mary M. Courter in 1917. They have three children. Mr. Euwer has always taken an interest in his profession and in its advancement and holds his membership in the American Bar Association, the Northwest Kansas Bar Association and the Bar Association of Kansas, the latter of which he now heads as president. His article merits careful thought and attention.

In this issue, we are also printing amendments to the title standards adopted by the Bar Association of the State of Kansas at its 1951 meeting, furnished by the courtesy of L. H. Ruppenthal of McPherson, chairman of the Committee on Title Standards. These are the only amendments which have been adopted since our publication of the Title Standards in our July, 1949, BULLETIN, copies of which are still available and will be furnished on request.

In our April, 1951, BULLETIN, we published a summary of new statutes enacted by the 1951 legislature which we considered to be of particular interest to lawyers and judges. We also published the text of several of these statutes which involved changes in court procedure. The greater part of this BULLETIN is devoted to a discussion of several of these new laws by attorneys who are particularly familiar with the purpose of the procedural changes.

Amendments to the statutes concerning the election of a widow or widower under a will are discussed by Samuel E. Bartlett, the original author of the probate code and member of the Judicial Council the last ten years. This change was originally suggested by Mr. Bartlett and was sponsored by the Judicial Council prior to its enactment by the legislature of 1951.

The statute relating to certification of probate proceedings to the district court is discussed by Edgar C. Bennett, formerly Judge of the Thirty-first Judicial District and former member of the Judicial Council, now residing at Newton, Kan. Judge Bennett prepared the original certification statute, but certain amendments by the 1945 legislature distorted its purpose, which is restored by the amendments of 1951.

The changes in the adoption laws are discussed by Richard L. Becker, formerly a member of the Judicial Council and now state senator from Montgomery county, who has made an extensive study of this subject and who introduced Senate bill No. 13 which was sponsored by the Judicial Council.

The new procedure for termination of joint tenancies is discussed by Robert O. Karr, attorney of Girard, Kan., and member of the House judiciary committee, who sponsored this measure. Particular attention is called to Mr. Karr's statement that this procedure is not intended to be compulsory, and to the amendments to Title Standard No. 38 to the same effect.

Senator L. H. Ruppenthal of McPherson has also submitted a short discussion of the bill to simplify the procedure for constructive service under the civil code, amending G. S. 60-2525 and 60-2526. Since this statute has now taken effect, it should be strictly followed in all cases in the district court where service by publication is necessary.

The amendments to the Kansas workmen's compensation laws are discussed by Paul S. Wise, recently appointed commissioner of workmen's compensation.

Because of the general interest in tax matters, we are also printing a notice of a new book on procedure before the Bureau of Internal Revenue, published by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association.

Appointments to the Judicial Council

Effective July 1, 1951, J. Willard Haynes of Kansas City, Kan., was appointed for a four-year term on the Judicial Council to succeed Samuel E. Bartlett; and W. D. Vance of Belleville, Judge of the Twelfth Judicial District, was appointed for a four-year term to succeed Judge C. A. Spencer. Both Mr. Bartlett and Judge Spencer have retired from the Judicial Council at their own request due to pressure of other work. Justice Walter G. Thiele and Robert H. Cobean were reappointed for four-year terms commencing July 1, 1951.

The Bar and Public Relations

By ELMER E. EUWER

By reason of the generosity of the Judicial Council, and a long followed custom, the President of the Bar Association of Kansas is granted and requested to submit an article which may be of interest to the Bar of the state.

In the development of our United States, and in the recording of our history, the lawyers have filled a prominent place, from the Constitutional Convention down to the present day. During that same period, although rendering unselfishly of time and effort, the Bar and its members have been the target of unjust and belittling criticism, and from these there has developed a general awakening of the Bar of this country and this state to its collective responsibility to the public and to its members.

What is that responsibility which the lawyers owe to the public? Perhaps three main objectives must be considered and put into practice to attain desired results: *First,* to eliminate and clean out of our midst the incompetent and unscrupulous lawyer and that type of law practice; *Second,* provide ordinary and routine legal service at a reasonable cost; and *Third,* to ethically advise the public of the service we can render and the advantages to be gained by availing one's self of such service. It shall not be my purpose in this article to enlarge on the points suggested, as a discussion of them could well be an article in itself.

In the 1930's, the Bar became conscious of the fact that laymen with no professional training or ethical responsibility were making inroads upon a field which by law was reserved to the lawyer, and that condition exists today, as many of us learn from our daily contact with the public. Only recently I was informed by a client of the information advanced by an abstracter, not a lawyer, that it was a mistake to have made a will because of tax problems that arise because of a will. Such absurd information is not only being given, but in many cases no doubt followed, and the Bar has and will suffer a substantial loss of business through these encroachments, but the loss of business to the Bar is secondary to the loss sustained by the public.

I sometimes wonder if the lawyers themselves realize the service they render to the public in the every day application of the laws in the office, before the court, the work of committees on amendments of laws and uniform legislation, Americanization and citizenship, and preparation and revision of different codes, all in the interest of the public. In my opinion, there is no way to measure that service, and although the service is continually being given, no headlines herald the event.

The American Bar Association, the State Bar Associations, the American Judicature Society and numerous legal publications have for some time been advancing the idea that something should be done to create a better understanding between the public and the Bar. Too much free publicity is given to the lawyer who fails in his duty to uphold the law and the ethics of his profession, and too little publicity is given to the lawyer who in many instances donates his service and continually upholds and defends the law and the ethics of his profession.

The Bar Association of Kansas has had a public relations committee for many years, and in my review of the Association's proceedings, the first published

report was in the year 1937. However, the field of public relations was covered by other committees prior to that time, but not in as comprehensive a manner as in later years.

After the annual meeting in 1949, a public relations committee, consisting of twelve members with staggered terms ranging from one year to three years, was appointed for our Association. That committee, composed of capable lawyers, went to work to outline a plan and program to present to the Association, and at the annual meeting in 1950, at the last session of the meeting, which was well attended, that session adopted a comprehensive program for the officers and executive council to put into effect. The report was published and to a limited extent, an attempt was made to carry out some of the recommendations. There is serious doubt in the mind of this writer, that the Bar of this state, even at this time, realizes the extent to which the adoption of the public relations committee report has committed the Association.

Having adopted the report, it became necessary for the executive council to find ways and means to carry it out. The public relations committee was granted the authority to solicit funds, and the lawyers responded with sufficient funds to start the program. Difficulties were encountered and results were not as the public relations committee desired. Changes were made and some results obtained.

It became very evident that if such a comprehensive program was to be successful, more funds were needed. The executive council had no other alternative than to propose an amendment to the constitution and submit it to the membership to increase the dues of the Association. Notice, as provided in the constitution, was given, the printed program notified the membership of the time the proposed amendment would be considered, the question was debated, not only as to the increase of dues, but also as to the ethical effect of the public relations committee's action on some portions of their program, and after a thorough discussion a vote was taken and the result was the adoption of the amendment by a majority of three votes; 253 having voted from a registration of approximately 800 at the convention, and a membership of over 1,400 in the State Bar Association.

I do not assume to speak for the Bar Association, or anyone except myself, and what I write in this article reflects a personal view, but I frankly state that I do not feel that the action taken at the 1951 annual meeting on the questions under discussion, by the close vote recorded, was sufficient to indicate the will of the members of the state Association.

Before this article is printed, the executive council may take some action or at least indicate a plan to be adopted and followed to clarify the situation in which we find ourselves at the moment.

Membership in any organization is vital to its existence, and a small majority should not jeopardize the continuation of a fine organization of lawyers which the public must have, must use, and cannot get along without in daily human relations.

I trust that those who read this article will not feel that I have gone beyond the bounds of my subject, but I felt that it was an opportunity to advise the lawyers of this state the recorded events herein set forth in order that those not privileged to attend the annual meeting might have the history of what transpired on the questions under discussion at the annual meeting, and which

are so vital not only to the public relations committee, but also to the public and the Association as a whole.

Let us not be discouraged, and let us not be antagonistic or vindictive, but let us clean our own house, set it in order, and look to the good of the Bar Association of Kansas and our relations with the public, and in a co-operative spirit, work for the results which we all desire.

Amendments to Title Standards

At its annual meeting in May, 1951, the Bar Association of the State of Kansas amended Title Standards No. 44 and No. 38 as published in the July, 1949, Judicial Council BULLETIN, as follows:

I

That the recommendation under Title Standard No. 44 be amended to read as follows:

RECOMMENDATION: If the deed has been recorded for a sufficient length of time that the statute might have run against the mortgage or mortgages and if it can be shown that no claim has been made under such mortgage or mortgages and no payments of interest or principal made by the titleholders since the recording of the deed; *or if the mortgage is referred to or described in any instrument of record prior to the date provided in G. S. (1949) 67-332 and any amendments thereto;* then the title can be taken on such showing; otherwise, quiet title. (1944 Standards, XII.)

II

That Standard No. 38 be amended by the addition of a new recommendation, No. 38 (b):

QUESTION (new): House bill No. 492 (Chapter 346, Session Laws of 1951, effective July 1, 1951), specifies procedure in probate court to decree termination of life estates and joint tenancies. Shall Standard No. 38 be amended to specify procedure to be followed?

RECOMMENDATION: (*b*) Yes. Accept procedure under H. B. No. 492 as an alternative procedure to that provided in original Standard No. 38 (July, 1949).

Election of Spouse under New Statute

By SAMUEL E. BARTLETT

(NOTE: House bill No. 120 was printed in full on page 55 of the April, 1951, issue of the Judicial Council BULLETIN, and was published as Chapter 335 of the Session Laws of 1951.)

G. S. 1949, 59-603 provided:

"59-603. *Election of spouse.* The surviving spouse, who shall not have consented in the lifetime of the testator to the testator's will as provided by law, may make an election whether he will take under the will or take what he is entitled to by the laws of intestate succession; but he shall not be entitled to both. If the survivor fails to consent or to make an election, he shall take by the laws of intestate succession."

The 1951 legislature amended the foregoing section by changing the last sentence to read:

"If the survivor consents to the will or fails to make an election, as provided by law, he shall take under the testator's will." (House bill No. 120.)

G. S. 1949, 59-2233 was also amended to read:

"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 (this section of the probate code). 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 he shall have filed in the probate court, within six 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 appraisement of the estate is filed, the said election shall be set aside upon application of the spouse made within thirty (30) days after the filing of the appraisement. For good cause shown, the court may permit an election within such further time as the court may determine, if an application therefor is made within said period of six months." (House bill No. 120, sec. 2.)

The substantive right of election remains unchanged, that is, the surviving spouse has the choice of alternative rights—one under the law of intestate succession and one under the will. The election of one is relinquishment of the other. The law as it existed prior to the 1951 amendments was that the surviving spouse took under the law unless she elected to take under the will. The change effected by the amendments is that the surviving spouse takes under the will unless she elects to take under the law.

The change is a beneficial one. Too often it has occurred that a testator devised and bequeathed his property or the greater part thereof to his wife, who thought she was the recipient thereof, but through oversight or inadvertence failed to elect to take it as provided by statute. It has also not infrequently occurred that the surviving spouse died before the election was made. She now takes under the will unless she elects to take otherwise.

These changes in the law make the law of this state similar to the laws of most of the other states, and thereby eliminate the bothersome question which sometimes arises in cases of testate nonresident decedents who own land in this state. (See *Brooks v. Carson,* 166 Kan. 194, 200 P. 2d 280.)

The statute, as it presently exists, gives to the surviving spouse an opportunity to assert a right, rather than an opportunity to waive such right. (*Estate of Andrews,* 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296.) The right is personal to the surviving spouse. It is uniformly held, in states which have similar statutes, that either spouse may dispose of his or her property by will, as he or she sees fit, subject to the right of the surviving spouse to reject such testamentary disposition and to take under the law. This right of the surviving spouse to reject the provisions of the will of the deceased spouse is secured by the statute above quoted. The failure of the surviving spouse to elect otherwise within the time and in the manner prescribed by law is equivalent to an assent to the disposition of the property as fixed by the will. (*Nordquist v. Sahlbom,* 114 Minn. 329, 131 N. W. 323; *In re Fleming's Estate,* 217 Pa. 610, 66 A. 874, 11 L. R. A., n. s., 379, 10 Ann. Cas. 826; *Estate of Andrews,* 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296; *Gallup v. Rule,* 81 Colo. 335, 255 P. 463; *Liden's Estate v. Foster,* 103 Colo., 58, 82 P. 2d 775; *Friedman v. Andrews,* 293 Mass. 566, 200 N. E. 575; *In re Gunyon's Estate* (*Church v. McLaren*), 85 Wis. 122, 55 N. W. 152.)

Since the right to elect against the will is personal to the surviving spouse, the right may be exercised only by him or her. It is a personal privilege given by statute to the surviving spouse, and does not pass at his or her death to his or her executors, administrators, or heirs. A surviving spouse who dies without making an election is conclusively presumed to have consented to the will. (See cases last above cited.)

An election is made effective by filing it in the proper probate court. (G. S. 1949, 59-2233, as amended by House bill No. 120.) The filing of it is made by statute the operative act of election or renunciation and a right cannot grow out of an election or come into existence until the election is complete. The election in such case cannot be made by anyone in the name of the surviving spouse after his or her death. If the election is duly signed and delivered to another with instructions to file it in the proper court, an agency may thereby be created which would ordinarily terminate at the death of the spouse. If the spouse dies before the election is filed, the election is not complete, and the subsequent filing of it by another, although within the prescribed time, does not make such election valid. (*In re Gunyon's Estate* (*Church v. McLaren*) 85 Wis. 122, 55 N. W. 152.) Any steps in exercising the right of election as may properly be delegated to another person to perform as agent of the spouse cannot be performed by such person after the death of the spouse has put an end to the agency. (*Freeman v. Andrews,* 293 Mass. 566, 200 N. E. 575.) There are, however, decisions to the contrary under statutes only slightly different from the statutes of this state. (*McGrath v. McGrath,* 38 Ala. 246; *Georgetown National Bank v. Ford,* 215 Ky. 472, 285 S. W. 218, 82 A. L. R. 1495.)

If the surviving spouse is insane or otherwise mentally incapable personally of making an election, it may under circumstances and procedure prescribed by the probate code be made by the proper probate court (G. S. 1949, 59-2234); nevertheless, the right remains personal to the surviving spouse and, if no such election is made in his or her lifetime, the right does not pass at his or her death to his or her executors, administrators, or heirs. (*Nordquist v. Sahlbom,* 114 Minn. 329, 131 N. W. 323; *Vanderlinde v. Bankers' Trust Co.,* 270 Mich. 599, 259 N. W. 337; *Harding's Administrator v. Harding's Executor,* 140 Ky. 277, 130 S. W. 1098, Ann. Cas. 1912 B, 526; *Sippel v. Wolff,* 333 Ill. 284, 164 N. E. 678; *Arnold's Estate,* 249 Pa. 348, 94 A. 1076.)

It is held in some jurisdictions (the decisions are not uniform) that the authority of the court to make an election for and on behalf of an insane or incompetent spouse must be exercised in the lifetime of the spouse and cannot be exercised by the court after the spouse's death. If no election is made by the court during the lifetime of the spouse, no election can be made by it after the spouse's death. (*In re Arnold's Estate,* 249 Pa. 348, 94 A. 1076; *Grammer v. Bourke,* —— Ind. App.——, 70 N. E. 2d 198.) In one case it is said: "The fact that the right to elect is a personal one does not interfere with the right of the court to elect when the individual who might make the election is alive but incapable of doing so. Nor does it conflict with the principle . . . that, when the person who might make the election dies, the right of election dies with him." (*Harding's Administrator v. Harding's Executor,* 140 Ky. 277, 130 S. W. 1098.)

However, as above stated, there are decisions to the contrary. In a case to the contrary the court commented: "In the case we have here, had the

widow continued to live, and had she continued mentally incompetent, she would not have been concluded by the provisions [whereby it is deemed that she elected to take under the will]. No opportunity having been afforded to exercise the privilege of election—to make a choice between two alternatives, the provisions of the law and the provisions of the will—the same reasoning supports the view that the court may determine which is the most advantageous to her interest, *in this instance to her estate,* and enter an order of distribution in accordance with such finding." (*Ambrose v. Rugg,* 133 Ohio St. 433, 175 N. E. 691, 74 A. L. R. 449 [Italics supplied].) This holding seems to run counter to the weight of authority that the right of election does not pass at the death of the surviving spouse to his or her executors, administrators, or heirs, for the reason that in such case the election is in effect made on their behalf. (See Annotations in 74 A. L. R. 462 and 147 A. L. R. 346 for collection of cases on the question.)

The right of election cannot be controlled by creditors of the surviving spouse nor by the court at the instance of such creditors. The surviving spouse may not be deprived of his personal privilege to make or not to make an election, and may not be compelled to take under or against the deceased spouse's will as his creditors may choose or determine. No procedure, legal or equitable, can grasp the right or privilege and utilize it for the benefit of creditors of the surviving spouse. (*In re Fleming's Estate,* 217 Pa. 610, 66 A. 874, 11 L. R. A. n. s., 379, 10 Ann. Cas. 826; *Bottom v. Fultz,* 124 Ky. 302, 98 S. W. 1037; *Bains v. Globe Bank & Trust Co.,* 136 Ky. 332, 124 S. W. 343.)

Under the statute, as it existed prior to the adoption of the probate code in 1939, it was well settled that an election could be made by acts *in pais*—by accepting the benefits of the will. (See *Cox v. McBroom,* 155 Kan. 2, 122 P. 2d 185; *In re Estate of Anderson,* 159 Kan. 512, 156 P. 2d 860.) Whether an election *in pais* could have been made by the surviving spouse under the probate code, as it existed prior to the amendments made by the legislature in 1951, does not appear to have been passed upon by the supreme court. (See *Hughes v. Hughes,* 152 Kan. 720, 107 P. 2d 672; *Nusz v. Nusz,* 155 Kan. 699, 127 P. 2d 441.) But regardless of whether an election *in pais* had a place under the probate code as originally enacted, such an election does not seem to have any place under the law as it presently exists. An election *in pais* under the former law, if sustained, was always an election to take under the will. An election *in pais* to take under the will is therefore obsolete for the reason that the statute makes the election under the will, unless the prescribed procedure for renouncing the will is followed. Conduct inconsistent with the will (short of an election as provided) cannot have the effect of abrogating the provisions of the will. (See *Gallup v. Rule,* 81 Colo. 335, 255 P. 463; *Estate of Sheely,* 102 Colo. 194, 78 P. 2d 378; *Colvin v. Hutchinson,* 338 Mo. 576, 92 S. W. 2d 667; *Billiter v. Parriott,* 128 Neb. 238, 258 N. W. 395; *Gordon v. Gordon,* 140 Neb. 400, 299 N. W. 515; *Daub's Estate,* 305 Pa. 446, 157 A. 908; *Minnich's Estate,* 288 Pa. 354, 136 A. 236.)

It is clear from the code provisions that the matter of election need not be called to the attention of the surviving spouse until after the will of the deceased spouse has been admitted to probate. (*In re Estate of Hoover,* 156 Kan. 31, 131 P. 2d 917.) An election by a surviving spouse to take by intestate succession is not a defense to the probate of the deceased spouse's will. (*In re Estate of Gereke,* 165 Kan. 249, 195 P. 2d 323.) And an election by

a surviving spouse to take under the law and against the will does not preclude such person from acting as executor under the will. The estate must be administered, and such executor should be permitted to execute the duties of the trust. (*Tomb v. Bardo*, 153 Kan. 766, 114 P. 2d 320.) A surviving spouse is not estopped from electing to take her statutory share of the estate on the ground that she offered the will for probate, nor because it was admitted to probate, nor because she did not appeal from the order admitting it to probate, nor because she qualified and served as executor. (*In re Estate of Garden*, 158 Kan. 554, 148 P. 2d 745.)

House bill No. 120 provides in section 3 as follows:

"SEC. 3. The provisions of this act shall govern in proceedings on wills admitted to probate after the effective date of this act, and the provisions of sections 59-603 and 59-2233 of the General Statutes of 1949 as existing prior to amendment by this act, shall govern in proceedings on wills admitted to probate before the effective date of this act."

The effective date of the act is June 30, 1951 (Chapter 335, Session Laws of 1951).

Certification of Probate Proceedings to District Court

By EDGAR C. BENNETT

(NOTE.—Senate Bill No. 83 was printed in full on page 62 of the April, 1951, issue of the Judicial Council BULLETIN, and was published as Chapter 345 of the Session Laws of 1951.)

Attention of the legal profession is directed to the enactment of Senate bill No. 83, which is an amendment of sec. 59-2402A, 1947 Supp. This bill enacts into law this addition to our probate procedure in the form it was originally offered by the Judicial Council in 1945. The principal change is that a positive rather than a negative approach is taken. Prior to the present amendment, the statute provided that "when a petition, except . . ." is filed, a transfer of the hearing might be requested in the district court. The task of ascertaining whether the matter at hand was an exception or not proved somewhat difficult and resulted in much uncertainty as to whether the district court really had jurisdiction. It is believed that the positive approach, that is, concise and definite statements in the new statute as to what matters are transferrable will clear up much of the confusion which resulted in attempting to interpret the former statute.

The Judicial Council feels that a more extensive use of this statute will do much to eliminate at least one of the grounds for the complaint that probate proceedings are much too time consuming and, therefore, expensive. In complex and difficult situations, when an appeal to the district court is almost a certainty, particularly in counties having lay probate judges, transfers under this statute will eliminate one extra and useless hearing. Of course, it also eliminates the result sometimes sought, of affording a preliminary hearing of the other side's case, before one is required to disclose his own position. However desirable this procedure might seem in a particular situation, the Judicial Council believes it not to be in the best interest of either the public or the legal profession to prolong the time or multiply the cost of closing an estate.

Therefore it is hoped that a full use of this statute will prove the aid that is hoped for.

A suggestion has been received which will probably not be adopted by the Revisor of Statutes in the interest of conservation of space. It is that the statute be printed in the following form for ease of reading and checking. Perhaps you would like to clip and paste it for future use.

"SECTION 1. Section 59-2402a of the General Statutes of 1949 is hereby amended to read as follows: Sec. 59-2402a. When a petition shall be filed in the probate court,

(1) to admit a will to probate;
(2) to determine venue or a transfer of venue;
(3) to allow any claim exceeding $500 in value;
(4) for the sale, lease or mortgage of real estate;
(5) for conveyance of real estate under contract;
(6) for payment of a legacy or distributive share;
(7) for partial or final distribution;
(8) for an order compelling a legatee or distributee to refund;
(9) for an order to determine heirs, devisees or legatees; or
(10) for an order which involves construction of a will or other instrument;

any interested party may request the transfer of such matter to the district court. When a request for such transfer is filed less than three days prior to the commencement of the hearing, the court shall assess the costs occasioned by the subpoena and attendance of witnesses against the party seeking the transfer. Such request may be included in any petition, answer or other pleading, or may be filed as a separate petition, and shall include an allegation that a bona fide controversy exists and that the transfer is not sought for the purpose of vexation of delay. Notice of such request shall be given as ordered by the probate court."

Changes in Adoption Laws

By RICHARD L. BECKER

(NOTE.—Senate bill No. 13 was printed in full on page 58 of the April 1951 issue of the Judicial Council BULLETIN, and was published as Chapter 344 of the Session Laws of 1951. House bill No. 174 was printed in full on page 55 of the April 1951 issue of the Judicial Council BULLETIN, and was published as Chapter 341 of the Session Laws of 1951.)

CHANGES IN ADOPTION PROCEDURE

Two important changes were made in the adoption laws by the 1951 session of the legislature. The first concerns the consent necessary for adoption. The second makes a fundamental change in the procedure.

G. S. 1949, 59-2102, now reads:

"Before any minor child is adopted, consent must be given to such adoption: (1) By the living parents of such child except as otherwise provided herein. (2) *By the mother of an illegitimate child.* (3) By one of the parents if the other has failed or refused to assume the duties of a parent for two consecutive years or is incapable of giving such consent. (4) By the legal guardian of the person of the child if both parents are dead or if they have failed or refused to assume the duties of parents for two consecutive years. (5) By the proper

authority of any charitable institution or child welfare agency authorized by the laws of this state to place children for adoption when such institution or agency has acquired custody and legal control for the period of minority. In all cases where the child sought to be adopted is over fourteen years of age and of sound intellect, the consent of such child must be given. Consent in all cases shall be in writing, acknowledged before an officer authorized by law to take acknowledgment. Minority of a parent shall not invalidate his consent." (Italics supplied.)

The change is in "(2)." This portion of the section formerly provided: "(2) By the mother of an illegitimate child: *Provided*, If the father of such illegitimate child has acknowledged paternity and has assumed the duties of a parent, his consent shall also be required." The entire proviso relative to the father of the illegitimate child has been eliminated by the 1951 enactment.

The amendment returns this provision to that existing prior to the enactment of the probate code. G. S. 1935, Sec. 38-107 provided: "If the child be illegitimate, the consent of the mother only shall be necessary."

In discussing legislative enactment, it is dangerous for anyone, even a member of that body, to state what "the legislature thought," or to attempt to give "the reason the legislature acted." However, I shall venture to discuss briefly the reasoning of some of the members of the 1951 legislature in furthering changes in our adopting procedure.

Does one who fathers a child out of wedlock have any rights to that child that the law should protect? Is not the welfare of such a child best served by easing the problem of the mother in her decision to place the child in a normal home?

Under the former statute it was necessary to obtain the consent of the natural father if he had acknowledged paternity and assumed the duties of a parent. Thus the father, who cannot give the child a normal home, because he is not married to the mother, can prevent the child's being placed in such a home by arbitrarily refusing to give consent. Where the contention was that the father had not acknowledged parernity, or having acknowledged paternity had failed to assume the duties of a parent, it became necessary to litigate that fact. Even in those cases where no such contention was made by the father, it was necessary to serve notice, and in some instances give notice by publication, to establish the right to dispense with the father's consent. In those cases where consent could be obtained from such a father, by executing the consent, the father learns the identity of the adoptive parents. Thus a scoundrel who had assumed no responsibility could make difficult the placing of the child by the mother, and could force the giving of notice and the resultant publicity which can be of lasting injury to the child. Cases exist where the natural father of an illegitimate child by his conduct after the birth of the child can build up certain "equities" in his child but certainly the strongest of these cannot outweigh the greater benefits to be obtained by permitting the unfortunate mother, along and with the least strife, difficulty and publicity, to place her child for adoption.

In any event it is now possible for the mother of the "fatherless" child to place her baby for adoption without notice to or consent from the natural father.

Senate bill No. 13 eliminates entirely the interlocutory decree of adoption. By the amendment made by Senate bill No. 13 G. S. 1949, Sec. 59-2278 now reads:

"The written consents required shall be filed with the petition. Upon the filing of the petition the court shall fix the time and place for the hearing thereon, which shall not be less than thirty days nor more than sixty days from the filing of the petition, which time may be extended by the court for cause. Notice shall be given to all interested parties, including the state department of social welfare. Pending the hearing the court may make an appropriate order for the care and custody of the child. Promptly upon the filing of the petition the court shall send to the state department of social welfare, a copy thereof and of the consents. The state department of social welfare, without cost to the natural parents or to the petitioner, shall make an investigation of the advisability of the adoption and report its findings to and recommendations to the court as much as ten days before the hearing on the petition. In making its investigation the state department of social welfare is authorized to make an appropriate examination of the child as to its mental development and physical condition so as to determine whether there are obvious or latent conditions which should be known to the adopting parents, and shall also make such investigation of the adopting parents and their home and their ability to care for the child as would tend to show its suitability as a home for the child, and if requested to do so by the court, may inquire whether the consents to the adoption were freely and voluntarily made. Upon the hearing of the petition the court shall consider the report of the state department of social welfare, together with all other evidence offered by any interested party, and if the court shall make a final order of adoption, and shall deliver the child to the petitioner, if that has not already been done. In any event the costs of the adoption proceedings, other than those caused by the state department of social welfare, shall be paid by the petitioner."

The language specifying the notice of the hearing, to-wit: "Notice shall be given to all interested parties, including the state department of social welfare." is the exact language of the old statute in directing notice of the hearing for the final order. Consequently the research and judgment of counsel as to proper notice for the final order under the old law can still determine the notice to be given upon the final order of adoption which is now the only order made.

The language setting forth the action to be taken by the court upon the hearing is the same as that to be taken on the hearing for an interlocutory order under the old law with two exceptions. It now states that the order to be made shall be a *final* order and that the child *shall* be delivered to the adoption parents if that has not already been done.

The bill as introduced by the writer, and which was a recommendation of the Judicial Council, provided that the final order of adoption could be set aside within six months. The legislature saw fit to remove this provision.

The questionable relationship between the child and the adopting parents during the period between the interlocutory order and the final order and the belief that provision for an interlocutory or "trial" period was not of material value brought about this change.

Attention had been called to the fact that the ruling of the Veterans Administration that the adopting parents had no parental relationship during this period had created hardship. Pension benefits, insurance benefits and support provisions had been denied to children in the process of adoption by Kansas soldiers and veterans where the adopted children of those of other states, not having the delay of the interlocutory procedure, received those benefits. The right to use such children as dependents for income tax purposes also incurred financial loss deemed unnecessary.

It was felt that no material inconvenience or "miscarriage of justice" would

result from the removal of the six months "trial period." Most adopting parents have contemplated their action for months or years. An investigation must be made by the state board of social welfare before any order can be entered. If anything appears that would cause the department to question the advisability of the adoption a request for an extension of time for hearing can be made and it is difficult to conceive of a court refusing such continuance. It was the judgment of the legislature that the elimination of the interlocutory decree in the great majority of cases would benefit the child being adopted.

The result of the two amendments made by the recent session of the legislature from the procedural point of view is as follows: (1) Irrespective of the circumstances the consent of the mother is the only consent necessary for the adoption of an illegitimate child. (2) There is no interlocutory order, notice must be given of the first and only hearing and upon such hearing a final order of adoption is made.

A very able and exhaustive article on adoption in Kansas appears in the May, 1951, issue of the Journal of the Bar Association of the State of Kansas. It is "Adoption Procedure in Kansas" by Marvin E. Larson of the Washburn Municipal University School of Law.

New Procedure for Termination of Joint Tenancies

By ROBERT O. KARR

(NOTE.—House bill No. 492 was printed in full on page 57-58 of the April, 1951, issue of the Judicial Council BULLETIN, and was published as Chapter 346 of the Session Laws of 1951.)

House bill No. 492 was presented to the legislature by the Committee on Judiciary after a number of the members of this committee, all of whom are attorneys, had discussed the problems of title which they had encountered involving joint tenancy deeds. The three principal problems involved were:

First, the acceptance of a joint tenancy title after the death of one of the joint tenants within the period of one year. The basis of this difficulty, of course, was the Berry Case. See 168 Kan. 253.

Second, the status of the title where an individual makes a deed from himself to himself and his wife as joint tenants. See 15 JBK 241.

Third, the question of titles involved in multiple joint tenancies, especially with intervening conveyances before death.

The state of Oklahoma has had a statute since 1941 providing for a very short proceedings for determination of death to terminate life estates and estates in joint tenancy. Title 58, paragraph 911. This statute was the basis for House bill No. 492. The original bill was amended in the Senate by the insertion of the word, "Hereafter" in the first line of the first section.

The committee felt that this bill was a step towards the solution of title examiners' problems in the above three situations with which they are faced, and that it might also answer other joint tenancy problems which were not presented to the committee.

Line 8 of this bill contains the word "may," which makes its application permissive instead of mandatory, in the opinion of this writer. The addition of the word "hereafter" by the Senate would apparently make it clear that it would apply to situations arising after the effective date of the statute, and that

it would not be retroactive. It would not appear that this amendment was intended to make the statute mandatory; if that had been the purpose, the word "may" would have been changed. It was not the purpose of the legislature to work an undue hardship on the thousands of persons owning their titles jointly. It was the purpose of the legislature to provide a simplified, easy, and inexpensive method of handling the many problems of title that have arisen by the use of joint tenancy deeds. The customary manner of showing the death of a joint tenant is by filing a certified copy of the death certificate and obtaining a clearance of inheritance tax from the State Commission of Revenue and Taxation. See 18 JBK 211. It would appear that the same procedure could be followed in most cases in the future.

In such cases where this new statute is used, it will cause little, if any, delay over the present method of obtaining a death certificate, as such certificate requires at least ten days as well as the fact that the inheritance tax clearance requires at least ten days. There will be a considerable savings in time over the present statute for determination of descent or a quiet title action. Attorneys' fees and costs will be somewhat higher than they would be in the first case, and somewhat lower than they would be in the latter two cases.

No discussion of procedure should be necessary, as the statute clearly states the procedure and closely follows that now used in our determination of descent.

It might be interesting to note that an alternative solution was House bill No. 251 which was passed by the House at the same time House bill No. 492 was passed, but was killed in the Senate Judiciary Committee. This bill specifically recognized the deed from an individual to himself and wife as joint tenants; that an adjudication of incompetency shall not operate to terminate a joint estate; that the granting of a joint tenancy in the granting clause of a deed should control over the habendum clause containing inconsistent language; that proof of death of a joint tenant should be made by filing a certified copy of death certificate or affidavit of death; and that execution, levy, and sale of the interest of a judgment debtor should constitute a severance of the joint tenancy. It appears that the senate committee felt that House bill No. 492 was the better solution.

The use of joint tenancy gives rise to many other questions and problems, such as federal gift tax, federal estate tax, state inheritance tax, unfairness to children in case of remarriage and creation of new joint tenancy with new spouse, as well as unfairness to creditors of deceased joint tenant. No attempt was made by this committee to clarify or rectify any of these problems. It is the opinion of this writer that probably the joint tenant statute should be repealed, but I am well aware of the fact that repercussion would be terrific.

Amendments to Statutes for Constructive Service

By L. H. RUPPENTHAL

(NOTE.—Senate bill No. 59 was printed in full on pages 59-61 of the April, 1951, issue of the Judicial Council BULLETIN, and was published as Chapter 349 of the Session Laws of 1951.)

Senate bill No. 59, session of 1951, is an act to simplify and clarify the constructive service statutes, forming part of the code of civil procedure.

When the 1909 code was in preparation, various subjects of existing law were parceled out to attorneys for research and recommendations to the com-

mittee. The attorney who did the research on the constructive service statutes collected the alternative provisions of the several Session Laws pertaining thereto, and submitted them to the committee with the expectation that the language of the existing sections would be used as the basis of a revised and simplified code provision.

Whether through oversight or lack of time the original sections crept into the code bill without change and they were enacted as part of the 1909 code.

The redundant and apparently conflicting provisions resulted in a variety of procedure as required by examiners of title throughout the state.

In 1941, the writer first proposed to the Legislative Council a revision of the constructive service statutes. (10 JBK, 117.) The Second World War intervened and it was not until the 1951 session of the legislature that the matter was brought to the attention of the appropriate legislative committees by the introduction of Senate bill No. 59.

The committees gave serious attention to the details of the bill's provisions, with the result that many helpful and pertinent changes were made before it was enacted into law.

The bill amends (G. S. 1949) Sections 60-2525, 60-2526 and 60-2527, abbreviating and rewording the existing sections without amplification of meaning other than to express definitely in certain instances what has been taken to be the implied meaning. Without making illegal any of the various approved forms used for constructive service in the past, its brevity, simplicity and the uniform guide forms provided in the act for the affidavit and notice should result in a uniform procedure throughout the state.

Amendments to Workmen's Compensation Laws

By PAUL S. WISE

(NOTE.—Published as Chapter 305, Session Laws of 1951.)

The amendments made by the 1951 legislature to the workmen's compensation law were principally substantive in character, increasing the benefits due the workman as the result of personal injury or death by accident.

There were two minor procedural changes. Section 44-525 was amended by the insertion of the following phrase: ". . . or except at the discretion of the commissioner on settlement agreements . . ." Thus the commissioner is authorized to allow lump-sum payments on settlement agreements, at his discretion. Section 44-555 was amended to increase the filing fee on a final receipt and release from $1 to $2, and to require a new fee of $1 for the filing of employers' reports of accidental injuries.

Section 44-510, the benefit section of the law, was amended as follows:

Medical and hospital benefits increased from the former maximum of $750 to $1,500.

The weekly compensation benefit increased from a maximum of $20 to $25 per week for total disability. The minimum weekly benefit of $7 for total disability was not changed.

The maximum death benefit for dependents of a deceased workman was increased from $5,000 to $6,000. The minimum death benefit of $2,500 was not changed.

The maximum funeral benefit of $150 was increased to $300.

There was no change in the scheduled number of weeks for the loss or loss of use of certain members of the body.

The following table sets out the comparative benefits provided under the old and new laws. The new benefits are applicable to all accidental injuries occurring on and after April 6, 1951.

TABLE OF MAXIMUM BENEFITS

Kansas Workmen's Compensation Law

	Old law	New law
Medical and hospital allowance	$750.00	$1,500.00
Death payment to dependents	5,000.00	6,000.00
Burial allowance	150.00	300.00

Accidental injury disability	Number weeks payable	Total compensation at $20 weekly	Total compensation at $25 weekly
General bodily	415	$8,300.00	$10,375.00
Insanity or imbecility	415	8,300.00	10,375.00
Total paralysis	415	8,300.00	10,375.00
Loss both eyes	415	8,300.00	10,375.00
Loss both hands	415	8,300.00	10,375.00
Loss both feet	415	8,300.00	10,375.00
Loss both arms	415	8,300.00	10,375.00
Loss both legs	415	8,300.00	10,375.00
Arm	210	4,200.00	5,250.00
Leg	200	4,000.00	5,000.00
Hand	150	3,000.00	3,750.00
Foot	125	2,500.00	3,125.00
Eye	110	2,200.00	2,750.00
Hearing, both ears	100	2,000.00	2,500.00
Hearing, one ear	25	500.00	625.00
Thumb	60	1,200.00	1,500.00
Thumb, end joint only	30	600.00	750.00
1st (index) finger	37	740.00	925.00
1st, end joint only	18½	370.00	462.50
1st to middle joint	24⅔	493.20	616.66
2d (middle) finger	30	600.00	750.00
2d, end joint only	15	300.00	375.00
2d to middle joint	20	400.00	500.00
3d (ring) finger	20	400.00	500.00
3d, end joint only	10	200.00	250.00
3d to middle joint	13⅓	266.60	333.33
4th (little) finger	15	300.00	375.00
4th, end joint only	7½	150.00	187.50
4th to middle joint	10	200.00	250.00
Great toe	30	600.00	750.00
Great toe, end joint only	15	300.00	375.00
Each other toe	10	200.00	250.00
Each other toe, end joint only	5	100.00	125.00
Each hernia	12	246.00	300.00

Partial loss of use of a member is compensable on a pro rata basis. Below the elbow is the "hand"; below the knee the "foot." Amputation cases—allow ten percent extra—not over fifteen weeks, for healing period. Healing period allowed for operated hernias.

A comparison of the daily compensation rates under the old law and the new law is as follows:

Old rate		*New rate*	
Daily compensation rate	$2.86	Daily compensation rate	$3.57
2 days at $2.86	5.72	2 days at $3.57	7.14
3 days at $2.86	8.58	3 days at $3.57	10.71
4 days at $2.86	11.44	4 days at $3.57	14.28
5 days at $2.86	14.30	5 days at $3.57	17.85
6 days at $2.86	21.42	6 days at $3.57	21.42

Under the new law an average weekly wage of over $41.57, or a monthly wage of $180.57 is necessary to call for the new weekly benefit of $25 as compared to the average weekly wage of $33.33 or monthly wage of $144.44 for the old weekly benefit of $20.

Book Notice

PROCEDURE BEFORE THE BUREAU OF INTERNAL REVENUE, *by Edgar J. Goodrich of the District of Columbia, Iowa, Minnesota and West Virginia Bars and Lipman Redman of the District of Columbia and Pennsylvania Bars. Published by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association, 133 South 36th Street, Philadelphia 4, Pennsylvania. 1951, $2.00. Page 157.*

This book deals with procedure in a tax case. It is a step-by-step guide as to how to handle a tax case before the Bureau of Internal Revenue. It begins with the situation when a tax return is first questioned and carries through until the case is either settled or earmarked for litigation.

Significance is given to the book because tax men have stated that this material has never before been collated in one place, particularly as concisely as is here done. It therefore meets a need in two respects. The general practitioner, for whom it is primarily written, will find here an easy-to-understand manual. But because the material, so important in the practice of both lawyers and accountants, is succinctly presented in so short a space, it will be helpful even to these experts.

Incidentally, the material is the second of a trilogy in the increasing list of publications of the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association. First is the previously published LEGAL PROBLEMS IN TAX RETURNS, and in preparation is the LITIGATION OF TAX CASES. The three combined will cover a tax case from beginning to end.

The reader is first oriented with a concise picture of the over-all organizational structure of the Bureau and with specific instructions for his admission to practice before it. He is then initiated into the matter of some basic Bureau procedures, such as the issuance of rulings and other administrative announcements, which are often more important than court decisions in the disposition of matters before the Bureau and which are equally often confusing to the uninitiated.

With this broad framework as background, the book then picks up the ordinary income tax return about to be filed and traces it, in detailed fashion, through its various and devious steps, stops, turns, and about-faces, through

the collectors' and agents' offices and the technical staff. It treats every procedural twist to be met on the way, discussing the origins of different types of problems, their possible disposition, arguments for and against settlement at the various stages, and the several alternatives in the event of no agreement. The trail stops as the issue is about to be litigated.

The same treatment is then accorded to the processing of fraud cases involving potential criminal prosecution. That area of Bureau practice involves basically different considerations and procedures. Suggestions for dealing with special agents, the Penal Division and the Department of Justice are therefore separately handled.

Included also is extensive discussion of a number of miscellaneous but highly important procedures. This covers such topics as special rulings, closing agreements, offers in compromise, refund claims, assessment and collection, and computation of interest. It comes as a surprise to the general practitioner, for example, that in many instances, the Bureau will give what amounts to an advisory opinion of the tax consequences of a proposed business transaction, so that the transaction can be altered or abandoned if the tax impact proves burdensome.

All of these practical, procedural problems are thoroughly covered in a practical, down-to-earth fashion. The book tells the general practitioner what he must and can—and sometimes should—do at the various key points, not only to protect the taxpayer's rights, but also to present his position most effectively in dealing with different Bureau representatives. It should be in the library of every lawyer.

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