2008 REVIEW OF THE LAW
FAMILY LAW

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I. INTRODUCTION

This portion of the Annual Survey reviews cases and legislation decided or signed into law in the period roughly April 1, 2007 through April 1, 2008. The Appellate Courts, particularly the Court of Appeals, continue to provide guidance and direction for the practitioner in family law matters, in regard to the procedural requirements for separation agreements and the subsequent enforcement of such agreements, as well as matters effecting children, child custody and child support. The Courts continue to give their primary focus and attention to issues related to children, but the appellate courts are also deciding cases that give the family practitioner guidance related to drafting and settling property matters between married couples. The Supreme Court decision *In re K.M.H.*, 285 Kan. 53, 169 P.3d 1025 (2007) is relevant to family law lawyers because it establishes new Kansas law for parenting in artificial insemination cases, but the significant issues are covered in the Constitutional Law chapter of the Annual Survey.

II. SEPARATION AGREEMENTS

A. Oral Settlement Agreements

An official court transcript of an oral settlement agreement satisfies the requirement for a writing under the Statute of Frauds. If the parties are present in the court room and acknowledge the oral settlement, their signature on an agreement is not needed. *In re Marriage of Takusagawa*, 38 Kan.App.2d 401, 166 P.3d 440 (2007).

Mieko and Fusao Takusagawa appeared in Douglas County District Court and announced an oral settlement of their contested divorce. Both parties were present, and Mieko responded affirmatively when asked by Judge Shepherd, "Ma'am, is that your understanding of the agreement?" Mieko later contended the agreement was void for a variety of reasons, but most critically for this decision because it was not written and signed by the parties, thereby violating the Statute of Frauds.

The Court of Appeals framed the issue: "May a party use the Statute of Frauds to avoid enforcement of an oral divorce settlement agreement that was recited and acknowledged on the record in court if an agreement to transfer land title was a part of the deal?" *Id.* at p. 407, 166 P.3d 445. In a well reasoned opinion, relying on authority from the Tenth Circuit, the Uniform Electronic Transactions Act (UETA), K.S.A. 16-1601 *et seq.*, the Uniform Commercial Code

(UCC), K.S.A. 84-2-201, and *Whitlow v. Board of Education*, 108 Kan. 604, 196 P. 772 (1921), the Court wrote that since Kansas law allows for oral divorce settlement agreements, "It would be odd, indeed, if a settlement agreement incorporated under statutory authorization into a court order were to be held unenforceable for failure to comply with the Statute of Frauds—at least when that oral settlement was placed on the record and acknowledged by the parties in open court." *Id.* at 411, 166 P.3d 447.

Whitlow held that Board of Education meeting minutes were a "sufficient memorandum" of a contract to bind parties under the Statute of Frauds. A transcript of a district court record, properly certified, "is superior to the minutes taken down by the school board's clerk in *Whitlow*." *Id.* at 409, 166 P.3d 446. The Court held, "Thus, we find that a signature is unnecessary when there is a court transcript providing the terms of the agreement and the oral assent of the party to be charged with the agreement that has been fairly stated on the record of that proceeding." *Id.*

Other issues covered by this opinion will be of interest to divorce practitioners. In addition to rejecting appellant's statute of fraud claims, the Court dismissed claims of coercion and the adequacy of the Court's inquiry into the fairness of the agreement. Relying on *In re Marriage of Kirk*, 24 Kan.App.2d 31, 941 P.2d 385 (1997), the Court wrote if there is sufficient evidence in the record for the court to determine there is a valid contractual agreement and that it is fair, "no more is required." *Id.* at 405, 166 P.3d 444. Domestic Relations Affidavits had been filed, and the parties had complied with Douglas County Local Court Rules requiring a statement of the proposed division, with values. The Court noted that the parties in a divorce action "have the ability to craft a settlement that does not equally divide their property or otherwise apply mechanical rules in determining the proper outcome." *Id.*

B. **Motion for Relief From Judgment**

A motion for relief from judgment filed under K.S.A. 60-260(b)(6), requesting to set aside a final judgment for "any other reason justifying relief from the operation of the judgment," must state grounds different from the other specific categories set forth in the statute. An allegation of fraud, newly discovered evidence or mistake are time barred by the one year statute of limitations in K.S.A. 60-260(b), which limitation cannot be circumvented by filing a motion under the general catch-all provision (b)(6). *In re Marriage of Reinhardt*, 38 Kan.App.2d 60, 161 P.3d 235 (2007).

Dilene Reinhardt filed a motion for relief from judgment more than four years after the decree of divorce and separation agreement were filed by the Court. She alleged her former husband Scott had concealed an interest in a farm in Russell County and thereby committed fraud. Ms. Reinhardt contended the Court had power under K.S.A. 60-260(b)(6) to "equitably distribute the marital

property not previously distributed prior to judgment." *Id.* at p. 61, 161 P.3d 236. There was apparently no provision in the Separation Agreement that would have allowed the Court to distribute undisclosed or newly discovered property to the parties as a part of contract enforcement. Even though Dilene used K.S.A. 60-260(b)(6) as the authority for her motion, the record disclosed "she overtly accused Scott of committing fraud by failing to reveal his ownership interest in real property." *Id.* at p. 62, 161 P.3d 237.

In reversing the trial court's decision to reopen the division of property, the Court of Appeals wrote that the "general catch-all" provision in K.S.A. 60-260(b)(6), which allows a trial court to vacate a judgment for "any other reason justifying relief from the operation of the judgment" is "mutually exclusive" from the specific grounds found in K.S.A. 60-260(b)(1), (2), and (3), which are: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under K.S.A. 60-259(b); and (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. *Id.* Consequently, a motion, the basis of which is fraud, is time bound by the one year statute of limitations, and cannot be boot strapped into the general catch-all phrase "any other reason justifying relief." If there is newly discovery evidence, that evidence must be discovered within one year.

It is difficult to imagine the circumstances left to plead for "any other reason" as allowed by the statute. This case makes it clear the grounds must not be covered specifically elsewhere in K.S.A. 60-260(b), or the one year limitations period will apply. The catch-all phrase was written to give a court some latitude in extraordinary situations, but in the divorce context, if a party could have discovered the property or income they are likely to be subject to strict proof that the claim is for some other reason than mistake, new evidence or fraud. Including a paragraph in the Separation Agreement that gives the Court continuing jurisdiction to divide undisclosed or newly disclosed property as a matter of contract enforcement, rather than relying on general civil procedure, is highlighted by the ruling here. In holding the trial court did not have jurisdiction to reopen the divorce, redistribute property, or distribute Scott's real property, the Court wrote, "A party cannot circumvent the 1-year limitation applicable to the first three grounds of K.S.A. 60-260(b) by invoking the residual clause. K.S.A. 60-260(b)(6) is not available if the asserted grounds for relief are within the coverage of another provision of K.S.A. 60-260(b)", citing *In re Marriage of Leedy*, 279 Kan. 311,323, 109 P.3d 1130 (2005). *Id.*

III. MODIFICATION OF SPOUSAL MAINTENANCE

If maintenance is awarded by the trial court, the court always has jurisdiction to modify the award, even if the maintenance ordered was in a lump sum. *In re Marriage of Evans*, 37 Kan.App.2d 803, 157 P.3d 666 (2007). Relying on the very recent Court of Appeals case *In re Marriage of Ehringer*, 34 Kan.App.2d

583, 121 P.3d 467 (2005), the court held K.S.A. 60-1610(b)(2) and (3) give the trial court jurisdiction to modify maintenance payments "which have been ordered by the trial court where there has been no separation agreement between the parties." *Id*. at 805, 157 P.3d 668.

This issue should now be well settled Kansas law. There were several twists in the *Evans* case, however, that add to *Ehringer* in making it clear maintenance ordered in a court tried case is always modifiable. There were three special needs children, which most certainly led to the initial trial court ruling that the "lump sum spousal maintenance is *not* subject to modification." (emphasis in original). A new judge heard the subsequent motion to modify maintenance filed by the former husband. And the original order was for a lump sum, as allowed by K.S.A. 60-1610(b)(2), but the lump sum award was to be paid monthly until paid in full. The latter point was deemed by the Court of Appeals to not constitute a "meaningful distinction between court-ordered monthly maintenance payments and a lump sum maintenance award payable in monthly installments." *Id*. at 806, 157 P.3d 669.

The parties, John and Cheryl Evans, had a long term marriage of 23 years. During the course of the marriage the parties adopted three children with special needs, including a daughter with cerebral palsy, epilepsy, asthma and vision problems, which "will require in-depth care for her entire life." *Id*. at 804, 157 P.3d 667. The wife was designated the primary residential parent, and had been the primary caregiver. After a trial to the court, the trial court ordered John to pay Cheryl a lump sum maintenance award of $143,264, payable at the rate of $1,184 per month until the sum had been paid in full. As stated above, the original decree of divorce provided that the spousal maintenance was not subject to future modification.

Less than two years after the decree was entered, John filed a motion to modify the spousal maintenance because he was unemployed. A different judge denied John's motion, apparently without a hearing, and ruled the Court did not have authority to modify the lump sum award, even though it was payable in installments, because the Court felt it was obligated to "honor the previous judge's decision". *Id*. at 804, 157 P.3d 668.

On appeal, the Court of Appeals cited K.S.A. 60-1601(b)(2), which states, "[A]t any time, on a hearing with reasonable notice to the party affected, the Court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due,…" Relying on *Ehringer*, the Court of Appeals reaffirmed that a trial court retains the power to modify court ordered maintenance at any time, "even if the right to modify is not specifically stated in its order establishing maintenance." *Id*. at 805, 157 P.3d 668. Consequently, on John's motion to modify maintenance, "the trial court's attempt to make the maintenance payment nonmodifiable was contrary to statute and case law." *Id*. at 805, 157 P.3d 668. Clearly if a case is tried to the court, and the court orders maintenance, any payment that has not

become due is subject to modification "retroactive to a date at least 1 month after the date that the motion to modify was filed." *Id*.

IV. CHILD SUPPORT

A. ADJUSTMENT FOR LONG DISTANCE PARENTING TIME COSTS

The Court of Appeals reversed and remanded a decision by the trial court in *In re Parentage of Joshua F. Brown* (No. 98,125), ____ Kan.App.2d ____, ___ P.3d ___ (2008), because the judge misapplied the Kansas Child Support Guidelines to the case. The father in the *Brown* case lives in New Jersey, while the mother and child live in Colby, Kansas. The costs to the father to visit his son are substantial, and so he sought to adjust his child support downward in order to compensate for his long distance parenting time expenses.

The parties agreed in mediation that the father would visit Colby a minimum of four times each year. The court determined that the total cost to father for these four trips was $2316. Instead of simply dividing $2316 by twelve months to arrive at a monthly adjustment to the support, the trial court examined the gross income of the father. It determined that the annual travel expenses were 3.3% of father's gross income. The trial court then took 3.3% of the annual travel costs of $2316 and arrived at an adjustment of $18 per month. The trial court noted that his approach was based upon the Child Support Guidelines.

The Court of Appeals disagreed that the Guidelines required the application of the percentage of the expenses compared to father's income in calculating a parenting time adjustment. The Guidelines merely state that "[a]ny substantial and reasonable long-distance transportation/communication costs directly associated with parenting time shall be considered by the court. The amount allowed, if any, should be entered on Line E.1" of the child support worksheet. Guidelines Sec. IV.E.1 (2007 Kan.Ct.R.Annot. 121).

The Court of Appeals reversed and remanded the case, and noted that the court should apply the provisions of *In re Marriage of McPheter*, 15 Kan.App.2d 47, 50, 803 P.2d 207 (1990), which requires that the court consider four factors when arriving at an adjustment for long distance travel: (1) which party moved away; (2) reasonableness of the expense; (3) amount of expense incurred to visit the child; and (4) other relevant factors. It also noted that the trial court should not apply a ratio of the travel expenses to father's income, as this approach was not supported by either the Guidelines or by case law.

B. ADJUSTMENT FOR SHARED RESIDENCEY

Shared custody continues to be an area of family law that fosters much litigation. In the case of *In the Matter of the Marriage of Atchison*, 38 Kan.App.2d

1081, P.3d ___ (2008), the Court of Appeals supported a trial court's decision to increase a father's child support because he was not sharing the children's expenses with the mother.

In Atchison, the parties agreed to share residency of their children on an equal or nearly equal basis. Child support was calculated on a shared residency basis because not only were the children living with each parent equal amounts of time, but also because the parents had a detailed expense sharing plan in place. The expense sharing plan required that each parent provide the other by the 10th of the month with a compilation of the expenses he/she had incurred, including the date, the item purchased, and the cost. The plan required the other parent to reimburse the expenses by the 23rd of the month. In *Atchison*, the mom dutifully provided her expenses on a monthly basis. Dad didn't. Dad then "sometimes" reimbursed mom by sending a check with the children. Mom testified the parties argued as much now as when they were married, and that sharing residency of the kids "had been a source of tension and stress between the parties."

The trial court terminated shared residency, ordered the father to pay full child support, but gave him a fifteen percent (15%) reduction for the fact that the children spent significant time with him. Father felt that since they were sharing the children on a nearly-equal basis, the court could not terminate shared residency. The Court of Appeals found that the trial court acted properly in terminating shared residency because shared residency is only appropriate when parents both share time with the children, and also share expenses for the children. Since mom had born the bulk of the expenses for the children, it was not appropriate to leave shared residency in place.

The case was remanded, though, because the trial court thought that the maximum adjustment it could give to Dad against his child support obligation was fifteen percent (15%). The Court of Appeals pointed out that the guidelines allow for a trial court to exercise its discretion when awarding an adjustment. If it exceeds the fifteen percent (15%) reduction in support set forth in a table in the guidelines for when the parent has the children 45-49% of the time, then the trial court must make specific findings in the journal entry as to why it is allowing more or less than fifteen percent (15%). Since the trial court did not think it could adjust the support any more or less than fifteen percent (15%), the case was remanded.

Of interest in this case is the comment by the appellate court that shared residency is not for everyone. "This case provides a good example of why the revised Guidelines caution parents against using a shared expense formula. Such a parenting plan will only succeed with the mostly highly motivated parents, and it did not work for the Atchisons." *Id*., at 1087. This comment is referring to amendments to the Child Support Guidelines which took effect January 1, 2008. Said amendments caution parties against using a shared expense formula, and

instead allow for one parent to bear all of the direct expenses for the children, and require the other parent to pay full child support with a twenty percent (20%) reduction because they are sharing residency of the children on a nearly equal basis. Time will tell if this amendment reduces litigation in the shared residency area of family law.

C. **SELF EMPLOYMENT INCOME AND EXTENDED GUIDELINES**

Several years ago, the Kansas Supreme Court provided guidance to family law practitioners trying to establish a parent's income who has an ownership interest in a Subchapter S corporation in the case *In re Marriage of Brand*, 273 Kan. 346, 44 P.3d 321 (2002). The major holding of *Brand* was that when a parent owns a minority interest in such a corporation, the court should consider a number of factors when deciding the amount of the corporation's income which should be attributed to the parent for child support purposes. The factors include an examination of percentage of ownership interest, how profits have historically been distributed, and how much influence the parent has in the distribution of corporate profits.

Another case providing guidance on income from Subchapter S corporations is *In re Marriage of Unruh*, 32 Kan.App.2d 770, 88 P.3d 241 (2004), where the Court of Appeals applied the principals of *Brand* and noted that "[a] case-by-case inquiry should be made to determine what income is actually 'received' when determining" income for child support purposes. *Id*, at 774.

Both of these cases were considered by the Court of Appeals when it took up *In re Marriage of Leoni*, 122 P.3d 1221 (2007). [Note: Leoni is an unpublished decision of the Kansas Court of Appeals and is, therefore, not to be cited as precedent]. In *Leoni*, the parties both sought modification of father's post-divorce child support obligation for three children. The father was the sole owner and stockholder of a Subchapter S corporation. When calculating child support, the trial court used father's income as reflected on his personal income tax return, less the salary paid to his employee-wife, plus business expenses that the court determined were unreasonable. The unreasonable business expenses which were added to father's income included annual country club dues of $3900, and other expenses for eating dinner with his wife, rounded off to $20,000 per year.

Mother challenged the approach used by the trial court, complaining that the trial court had not included retained earnings in father's income. The Court of Appeals disagreed with mother, noting that by including the income from the corporation in father's income, the trial court had actually included both profits which were distributed and profits which were retained by the corporation in father's income. The Court of Appeals also examined the principles from *Brand* and *Unruh*, and found that the trial court had made proper findings with respect to father's income.

At trial, mother asked that the court use the extended income formula when calculating child support, because the combined incomes of the parties exceeded the highest income reflected on the schedules for the child support guidelines. The trial court, in keeping with the holding in the case of *In re Marriage of Patterson*, 22 Kan.App.2d 522, 920 P.2d 450 (1996), noted that there is no presumption that the child support amount must be the amount calculated using the extended income formula, but that the resulting amount of support must be considered when the parents' incomes exceed the schedules. The trial court has discretion to determine the appropriate amount of support beyond the schedules.

Thus, the trial court determined the amount of support which would be owed by the father using the extended income formula and compared the amount to the amount not using the formula. The trial court then found that while it thought that using the formula was appropriate in this particular case, it did not feel that the resulting support should exceed $5000 per month. Otherwise, the mother would be receiving a windfall that was not necessarily related to the best interests of the children, particularly since she had already received a portion of the business which generated such income for father as part of the divorce decree. The trial court used the extended income formula to calculate support, but then made a downward adjustment to the support under Line E6 (Overall Financial Condition) to bring support to $5000 per month.

The Court of Appeals upheld all of the trial court's decisions in the matter.

V. **CHILDREN'S ACCOUNTS**

A parent may use custodial accounts established under the Uniform Transfer to Minors Act (UTMA), K.S.A. 38-1701 *et seq*., to pay expenses for the minor's benefit, "even when the expenses are for necessities a parent is generally obligated to provide for his or her child." *Wilson v. Wilson*, 37 Kan. App.2d 564,573,154 P.3d 1136,1145 (2007). Finding that such expenditures are "expressly authorized under K.S.A. 38-1714(a) and K.S.A. 38-1715(a)", the Court also found the statute to require a custodian to use "the standard of care that would be observed by a prudent person dealing with property of another", K.S.A. 38-1713(b), and must "expend the funds for the use and benefit of the minor, K.S.A. 38-1715(a)." *Id*. at 574, 154 P.3d 1145. But these holdings didn't help the appellant-father from being required to reimburse to his children UTMA funds taken by him, or to avoid an award of punitive damages against him for his conduct.

Michael and Penny Wilson were divorced in 1998. At the time of the divorce, the parties had established UTMA accounts for their three children. The Wilsons also had opened certificates of deposit for each of the children at an area bank. Critical to the trial court's decision was that at no time during the divorce proceedings did the parties list or claim any ownership interest in the UTMA accounts or certificates of deposit. Michael did not contend in the divorce

proceeding that he considered the accounts and deposits to be assets of the marriage, nor did he state or prove that he was owed money from the children for expenses he had paid on their behalf. Also important to the district court's findings, and on appeal, was the fact that Michael had "failed to maintain contemporaneous records of the expenses" he had paid for the children. *Id*. at 573,154 P.3d 1144. The district court found that the "proximity of Michael's actions to the divorce settlement was not coincidental, and that his actions "were in retaliation against his former wife and his children." *Id*.

The Court of Appeals noted there were no Kansas appellate decisions "addressing whether a parent custodian under the UTMA can use custodial property to pay expenses for the minor's benefit when the expenses are for necessities a parent is generally obligated to provide for his or her child." *Id*. Even though the Court concluded "there are no provisions in the Kansas UTMA prohibiting a parent custodian from using custodial property to pay expenses for the minor's benefit," the Court held the act imposed two requirements: (1) the person removing the funds must act as a "prudent person dealing with the property of another", and the custodian must expend the funds "for the use and benefit of the minor." *Id*. at 574, 154 P.3d.1145. But since Michael had not kept contemporaneous records and had, in the view of the trial court and Court of Appeals, "converted the funds for his own use", the Court of Appeals affirmed the district court's order that Michael reimburse the funds removed from the UTMA accounts to his children with interest.

Mr. Wilson had also cashed in certificates of deposit titled in joint tenancy with the children. Even though the Court found the certificates were properly jointly titled, there was evidence of fraud, which allowed the admission of parol evidence "to establish a contrary intent of the parties regarding ownership and control of the CD's." *Id*. at 576, 154 P.3d. 1146. This parol evidence established a fiduciary relationship, even though the Court found that "the mere relationship of parent and child does not raise a presumption of a confidential and fiduciary relationship", citing *Olson v. Harshman*, 233 Kan. 1055,1057, 668 P.2d 147 (1983). *Id*. In affirming the district court, the Court found there was support in the record that Michael and Penny had treated the CD's as the sole property of their children, and "neither claimed the CD's in their divorce proceedings." *Id*. at 577, 154 P.2d 1147. Michael had a duty to act for the benefit of his children, and the district court's order that the CD funds be restored to the children was affirmed.

This case is of increased interest because the district court awarded punitive damages against Michael for his conversion of the UTMA Accounts and certificates of deposit, which punitive damage award was affirmed by the Court of Appeals. In this case, Michael's three children were each awarded punitive damages against him, in addition to the restoration of the funds.

VI. **STEPPARENT ADOPTION**

The Court of Appeals urged the legislature to clarify its amendment to a statute affecting stepparent adoptions in a recent case. In 2006, the Kansas legislature added language to K.S.A. 59-2136(d), stating that the court may consider the best interests of the child and the fitness of the nonconsenting parent when determining whether a stepparent adoption should be granted. That language is hard to reconcile with the rest of the statute which provides that either the biological parent must consent to the adoption or the court must find that he or she failed or refused to assume the duties of a parent for two consecutive years preceding the filing of the petition for adoption.

In *In the Matter of the Adoption of G.L.V. and M.J.V.*, 38 Kan.App.2d 144, 163 P.3d 344 (2007), the stepfather of twin boys wanted to adopt them. The father did not consent. The trial court denied stepfather's petition because father had provided substantial financial support for the children in the two years preceding the filing of the petition for stepparent adoption.

Stepfather appealed, citing the language added to K.S.A. 59-2136(d) by the legislature, and argued that the court should have considered the best interests of the boys as the "overriding factor" in determining whether the adoption should be granted. He felt that the court had misconstrued the statute, as amended by the legislature,

The Court of Appeals disagreed, noting that the new language states a court "may" consider the best interests of the child, and that by using the word "may" instead of "shall" the consideration of best interests was permissive, not mandatory. As such, the trial court was not required to consider best interests, and was thus correct in applying the two-ledger test developed by the Kansas Supreme Court in several previous decisions.

The two ledger test refers to the court's consideration whether a parent has failed or refused to assume parental duties for the two years prior to the adoption filing. In making the determination, the appellate courts have stated the father must have failed to provide both love and affection (one side of the ledger sheet) as well as financial support (the second side of the ledger sheet) for the child, before the court may grant a stepparent adoption over the nonconsenting parent's objection. *In re Adoption of K.J.B.,* 265 Kan. 90, 959 P.2d 853 (1998), *In re Adoption of C.R.D.*, 21 Kan.App.2d 94, 897 P.2d 181 (1995), *In re B.M.W.,* 268 Kan. 871, 2 P.3d 159 (2000). Thus, if a parent pays a substantial portion of the child support owed in the two year period, even if it is involuntarily through income withholding, the adoption cannot be granted over his objection. Such was the reasoning for denying the adoption by the trial court in *G.L.V. and M.J.V.*:

> [T]he court may consider the best interests of the child and the fitness of the nonconsenting parenting in a stepparent adoption case, but it can only grant the adoption without the natural parent's consent if the natural parent has failed to fulfill his or her parental duties under the statute. *Id.,* at 152.

The Court of Appeals then noted that by tacking on the language at the end of 59-2136(d) about considering the best interests of the child and the fitness of the nonconsenting parent, the legislature had made the statute more difficult to apply. It noted that the statute now needs further clarification by the legislature.

VII. GRANDPARENT VISITATION

A grandparent visitation case with very sad facts was considered by the Court of Appeals. In *In re Cathey*, 38 Kan.App.2d 368, 165 P.3d 310 (2007), the trial court applied the provisions of K.S.A. 38-131.

Rebecca Cathey was born to Steven and Holli. Holli was killed in an automobile accident when Rebecca was only four years old. Prior to her death, Holli had filed several Protection from Abuse (PFA) actions against Steve, alleging terrible physical abuse by Steve against Holli, including his punching her in the head while nursing Rebecca. Holli also filed for divorce and both the divorce and a PFA action were pending at Holli's death.

Rebecca spent much of her four years living with Holli's parents (the child's grandparents), due to the abuse and various legal filings. After Holli died, Steve promised Holli's parents that they could have a great deal of visitation with Holli, including nightly phone calls, two to three weekends per month, one or two weeks per summer, and extended visits during holidays. The visits only lasted about two weeks, then diminished to almost nothing.

The grandparents tried to discuss the visitation with Steve, but he would not take their calls. Finally, they filed a petition for grandparent visitation, pursuant to K.S.A. 38-131, which requires that the grandparents establish that there was a substantial relationship between them and Holli and that it is in her best interests to have visitation with her grandparents.

Prior to trial, the parties stipulated there was a substantial relationship between Rebecca and the maternal grandparents. The grandparents also agreed not to pursue a finding of unfitness by Steve. At trial, the court adopted Steve's proposed visitation for the grandparents, which included seven hours every other month, a weekly telephone call, and four hours within ten days of Rebecca's birthday and three major holidays. Steve's proposed visitation schedule also included seven restrictions of various actions by the grandparents during visitation, including how to refer to Rebecca's mother, how to describe her death, no baths and no visits to any third parties without Steve's prior written

approval. The judge commented that Steve's position was "conservative" but not "totally unreasonable" and that was the standard by which the court had to measure Steve's visitation plan.

The Court of Appeals disagreed with the trial judge's approach in requiring that the father's visitation plan of the grandparents be adopted unless it were totally unreasonable. The appellate court noted that "a totally unreasonable standard should not be adopted or endorsed by this court." *Id.,* at 376. (emphasis in original). Instead, the standard should be whether the father's proposal was reasonable under the totality of the circumstances of the particular case. The appellate court did not believe the trial judge had considered all circumstances when making its decision, and remanded the matter with instructions to have another judge consider the matter. The court commented that the restrictions placed upon the grandparents' access by Steve rendered the trial court's decision "totally unreasonable."

Of further interest is the issue of attorney's fees. The trial court ordered that the maternal grandparents pay Steve's attorneys fees of more than $12,000. Its ruling was based upon K.S.A. 38-131 which requires that the court must award reasonable attorneys fees to the respondent in a grandparent visitation matter unless just and equity otherwise require. The trial court specifically considered the financial position of each party and felt that it was appropriate to grant fees against the grandparents because Steve was defending against the grandparent's petition. The appellate court upheld the trial court's decision on fees as not being an abuse of discretion.

VIII. **STATUTORY CHANGES**

At the time of this writing the Kansas Legislature had not passed any new laws to change the divorce statutes, K.S.A. 16-1601 *et seq*. or any of the many statutes relevant daily to the family law practitioner. There were two proposals, one originating in the senate and another originating in the house, that would amend portions of the divorce and separation statute, but neither bill has passed the legislature or been approved by the Governor.

Senate Bill 545 recommended a change to K.S.A. 60-1607, related to interlocutory orders, by adding a new section (7) that would "require that each parent execute any and all documents, including any releases, necessary so that both parents may obtain information from and to communicate with any health insurance provider regarding the health insurance coverage provided by such health insurance provider to the child. The provisions of this paragraph shall apply irrespective of which parent owns, subscribes or pays for such health insurance coverage."

House Bill 2988 would amend K.S.A. 60-1616(a), relating to parenting time, visitation orders and enforcement, to allow a child to provide input into the parenting time and visitation schedule. The House bill proposed language as follows:

> "When determining a parenting time and visitation schedule, the weight to be given to a child's preference will depend upon the child's age, maturity, intelligence and the reasons the child can state for the preference. A clearly stated preference by a child over the age of 10 years may be persuasive with the Court."

Senate Bill 64 would increase by $25.00 the filing fee for post decree domestic relations filings, such as child support or custody modifications, which funds would purportedly be used to develop programs across the state to reduce conflict in child custody cases.

As stated above, none of these bills have been passed by the legislature at the time of this annual review of Kansas law.