Approved: February 21 1994
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael O'Neal at 3:30 p.m. on January 13, 1994 in Room 313-S of the Capitol.

All members were present except:
Representative David Heinemann - Excused
Representative Joan Wagnon - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
George Barbee, Kansas Association of Financial Services
Paul Shelby, Office of Judicial Administration
Ron Smith, Kansas Bar Association
Chip Wheelen, Kansas Medical Society

Others attending: See attached list

Chairman O'Neal announced that the Committee would take up requests for bill introductions.

George Barbee, Kansas Association of Financial Services, appeared before the Committee with a bill request amending K.S.A. 60-469 which would add the wording "optical disk image" (see attachment 1).

Representative Adkins made a motion to introduce this request as a committee bill. Representative Mays seconded the motion. Jill Wolters, Revisor of Statutes, stated that a similar bill has been requested, by John Smith, Department of Revenue, with another addition to this statute which states that "the information being transferred cannot be altered by the transmitting machine". The motion carried.

Paul Shelby, Office of Judicial Administration, appeared before the Committee with two bill requests. The first would amend Chapter 61 process of services. In large jurisdictions sheriff officers are not able to serve all the petitions in the time frame which is set aside, causing trials to be rescheduled. This proposed bill would allow more time to serve the petitions. It would change the 'in county' answer date to not less than 10 and no more than 21 days and changes the 'out of county' to not less than 11 and no more than 40 days, (see attachment 2). The second bill request dealt with marriage license applications to simplify record keeping. This would require the district court issuing the marriage license application to keep a record of the resulting marriage, (see attachment 3).

Representative Carmody made a motion to introduce these two requests as committee bills. Representative Macy seconded the motion. The motion carried.

Ron Smith, Kansas Bar Association, appeared before the Committee with a bill request that would allow the division of KPERS pensions for the purposes of child support, (see attachment 4).

Representative Carmody made a motion to introduce this request as a committee bill. Representative Macy seconded the motion. The motion carried.

HB 2579 - suspension of driving privileges and the use of interlock devices.

Chairman O'Neal stated that the Committee would take up **HB 2579** - Suspension of driving privileges and the use of interlock devices, for discussion and possible action. There is some additional information in regard to the Section 408 & 410 funding. One of the ways the State qualifies for funding under Section 408 is by having an average of 45 days to administer the suspension and a hard 60 day suspension. Under Section 410, there is a suspension criteria, which we would not qualify for funding but there is another criteria called "self-sustaining" which we could qualify for funding under. However, the State is currently receiving Section 408 funding and if the proposed bill would become effective on July 1, 1994, the State would lose the second half of the funding. If the effective date is changed to January 1, 1995 the bill would not effect the funding.

Representative Mays questioned page 4, line 39, that reads that there is a reduction in the period of suspension from one year to 90 days. The suspension is being replaced with an interlock. The Chairman stated that this is the action that is taken by the Department of Revenue for test failure and the period of suspension is reduced but the period that the person is on the interlock takes over the period of suspension, the theory being that suspension is not working. They continue to drive, but by placing an interlock on their vehicle they are at least not driving drunk.

There were questions raised regarding the conflict with the habitual violator's act. Jill Wolters explained that there could be a problem. The conflict is on a third occurrence one could start the three years of revocation earlier than under the Habitual Violators act. However, the problem would be taken care of in HB 2133, or the Committee could amend the statute to state that under no circumstance can someone's license be revoked for more than three years. The Chairman responded that the interim committee this summer reported HB 2133 adversely.

Representative Rock made a motion to make clear the public policy that the period of license revocation would be no greater than three years. Representative Goodwin seconded the motion. The motion carried.

Jill Wolters explained a balloon draft that was handed out in Committee, (see attachment 5). On page 4 of the draft new language would be added that would require a person to have evidence of insurance on file with the Director of Vehicles when using an interlock. This would also require the individual to have insurance for three years when they are eligible to have their license reinstated.

Representative Mayans stated that currently, when anyone has a DUI violation they have to submit a SR 22 letter to show that they currently have insurance. Chairman O'Neal stated that this is a new requirement for interlocks and it needs to be made clear that the current requirement of insurance applies to the interlocks.

Representative Robinette made a motion to have the proposed insurance requirement applicable to interlocks amended into the bill. Representative Scott seconded the motion. The motion carried.

Chairman O'Neal stated that he requested an amendment regarding diversions, (see attachment 6). There are a lot of diversions being approved and that maybe a condition of diversion should be that they have the interlock on their vehicle for the period of diversion. The one's that draw attention the most are the juveniles that are qualifying for diversions, even though they are not legally allowed to have any alcohol.

Representative Adkins stated that diversions are becoming limited to the wealthy and by adding the additional expense of an interlock would allow even less people to participate.

The Chairman stated that in looking at the paper he noticed that a 17 year old had received diversion. He questioned why diversions are available to juveniles. Representative Adkins responded that the prosecutor doesn't have to give it to them. Chairman O'Neal stated that maybe he has a policy that as long as you don't blow more than a .02 then you are entitled to a diversion. However, for juveniles for whom consumption of alcohol is a crime, diversion shouldn't be available. There was no interest was shown at this time for an amendment effecting diversions.

Representative Garner made a motion to change the effective date to January 1, 1995. Representative Rock seconded the motion. The motion carried.

Representative Macy questioned why on the 1st & 2nd refusal for testing offenders receive the same punishment. Representative Garner responded that current law states that all test refusals are a one year suspension.

Representative Macy made a motion to change the one year revocation on the second refusal to a two year revocation period. Representative Pauls seconded the motion. The motion carried.

Representative Adkins made a motion to report **HB 2579** favorably as amended. Representative Carmody seconded the motion. The motion carried.

Substitute HB 2490 - Amendments to the Anatomical Gift Act.

Chip Wheelen, Kansas Medical Society, appeared before the Committee to request that if the Committee decides to work the ULC bill they would have several amendments to the bill. Chairman O'Neal stated that the Committee would be using **Substitute HB 2490** and not the Uniform Law Commission's proposed bill.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S Statehouse, at 3:30 p.m. on January 13, 1994.

Jill Wolters, Revisor of Statutes, handed out a balloon draft, (see attachment 7). She explained that an amendment on page 3 would clear up that the durable power of attorney has the authority to make such decisions if stated in the document.

Representative Adkins made a motion to adopt the proposed balloon draft. Representative Carmody seconded the motion. The motion carried.

Representative Plummer made a motion to strike the language on page 2, lines 23 - 25, which states that 'the gift shall become invalidated upon expiration, cancellation, revocation or suspension of the license, and the gift must be renewed upon renewal of each license.' If a license is revoked or suspended one should still be able to use the license to be a donor. Representative Garner seconded the motion. The motion carried.

Representative Rock questioned if the only time someone can sign-up to be a donor is when they go in to renew their drivers license. Chairman O'Neal responded that they can go into the license office anytime and get a license reissued with it on or with it off.

Representative Rock made a motion that would make it clear that no technical defect in the designation would destroy the gift if the intent is otherwise clearly expressed. Representative Smith seconded the motion.

Representative Pauls made a substitute motion to take the sticker which reads "Donee" off the front of the license. Representative Ruff seconded the motion.

Chairman O'Neal stated that he preferred the first motion because it is an appropriate administrative function to try to address some uniformity of having the donor designee on the license. However, both proposed amendments would accomplish the purpose.

The substitute motion failed. On the motion regarding the technical defect, the motion carried.

Representative Carmody made a motion to report **Substitute HB 2490** favorably for passage as amended. Representative Adkins seconded the motion. The motion carried.

The Committee meeting adjourned at 5:30 p.m. The next meeting is scheduled for January 18, 1994.

GUEST LIST

HOUSE JUDICIARY COMMITTEE

DATE January 13, 1994

NAME	ADDRESS	ORGANIZATION
Sarah Mosier	1518 Lilac Ln Lawrence	Intern
Greg Rose	Topeka	KPOE
Brent Haines	Topeka Wichita	Wichita Hospitals
Rosalie Thornburgh	Topeka	KDOT
Nancy Bogina	Topeka	KDOT
Chip Wheelen	Topeka	Ks Medical Soc.
Tom Bell	Topeka	Ks. Hosp. Assn.
Paul Shelby	Topeka	OJA
KEITH R LANDIS	TOPEKA	CHRISTIAN SCIENCE COMM ON PUBLICATION FOR KS
Kathie Sparks	Topeka	DOB
JAMES CLOTHIER	TOPEKA	KCDAA
Rachael Kennedy Schneider	Lawrence	Intern
Douglas Johnston	Wichita	Planned Parenthood of KS
	HUTCHINSON	LIFEGUARD
MARLIE KIM	2334 CLINTON PARKWAY	INTERN
Mel Cathey	Topeka	BIDS

KANSAS

60-469. Photographic copies to prove content of business and public records. The content of any admissible writing made in the regular course of "a business" as defined by K.S.A. 60-459 or in the regular course of duty of any "public official" as defined by said section, may be proved by a photostatic, microfilm, microcard, miniature photographic or other photographic copy, optical disk image, or reproduction or by an enlargement thereof, when duly authenticated, if it was in the regular course of such business or official activity to make and preserve such copies or reproductions as a part of the records of such business or office. The introduction of such copy, reproduction or enlargement does not preclude admission of the original writing if it is still in existence.

House Judiciary
Attachment 1
1-13-94

P/S

DRAFT ch. 61 PROCESS BILL

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

Section 1. K.S.A. 1993 Supp. 61-1802 is hereby amended to read as follows: 61-1802.

(a) The summons shall be signed by the clerk, dated the day it is issued, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time when the law requires the defendant to either appear or plead to the petition, and shall notify such defendant that, in case of such defendant's failure to do so, judgment by default will be rendered against such defendant for the relief demanded in the petition. The summons shall be in substantially the form prescribed in the appendix to this act.

(b) The time stated in the summons requiring the defendant to either appear or plead to the petition shall be determined by the court, ~~but where all defendants may be served personally in the county where the action is commenced~~ such time shall be not less than ~~10~~ 11 nor more than ~~20~~ 40 days after the date the summons is issued. ~~When all the defendants cannot be so served, the time for appearance or pleading to the petition by all defendants shall be not less than 21 nor more than 28 days from the date of the summons.~~

Sec. 2. K.S.A. 1993 Supp. 61-1805 is hereby amended to read as follows: 61-1805.

(a) ~~In actions where all the defendants may be served in the county where the action is commenced,~~ service shall be effected ~~within not more than seven days from the date the summons is issued. When all the defendants cannot be so served, service shall be effected within not more than 15 days from the date of the summons.~~ promptly and, in any event, in time to make a timely return of service as required by K.S.A. 61-1807, and any amendments thereto.

(b) As used in this section, "serving" means making service by any of the methods described in K.S.A. 61-1803, and amendments thereto, unless a specific method of making service is prescribed in this section. Except for service by publication, service of process shall be made as follows:

(1) Service upon an individual other than a minor or disabled person shall be made by serving the individual or by serving an agent authorized by appointment or by law to receive service of process, but if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. Service by certified mail shall be addressed to an individual at the individual's dwelling house or usual place of abode and to an authorized agent at the agent's usual or designated address.

House Judiciary
Attachment 2
1-13-94

(2) Service upon a minor, disabled person, as defined by K.S.A. 59-3002, and amendments thereto, foreign or domestic corporations, partnerships, insurance companies or associations shall be made in accordance with the applicable provisions of K.S.A. 60-304 and amendments thereto.

(3) Service upon a governmental entity shall be made in accordance with the applicable provisions of K.S.A. 60-304 and amendments thereto.

(c) If the plaintiff, the plaintiff's agent or attorney shall file an affidavit that to the best of the affiant's knowledge and belief the defendant is a nonresident who is employed in this state, or that the place of residence of the defendant is unknown, then the affiant may direct that the service of summons or other process shall be made by the sheriff or other duly authorized person by directing an officer, partner, managing or general agent, or the person having charge of the office or place of employment at which the defendant is employed, to make the defendant available for the purpose of permitting the sheriff or such other duly authorized person to serve the summons or other process.

Sec. 3. K.S.A. 1993 Supp. 61-1807 is hereby amended to read as follows: 61-1805.

(a) *Personal and residence service.* (1) Every officer to whom summons or other process shall be delivered for service within or without the state, shall make return thereof in writing stating the time, place and manner of service of such writ, and shall sign such officer's name to such return.

(2) If such process is directed to and delivered to a person other than by an officer for service, such person shall make affidavit as to the time, place and manner of such person's service thereof.

(b) *Service by mail.* Service by certified mail shall be proven in the manner provided by subsection (e) of K.S.A. 60-308 or subsection (b) of K.S.A. 61-1803, and amendments thereto.

(c) *Publication service.* Service by publication shall be proven by an affidavit showing the dates upon, and the newspaper in which the notice of publication was published. A copy of the notice shall be attached to the affidavit which shall be filed in the cause. When mailing of copies of the publication notice is required in accordance with subsection (e) of K.S.A. 60-307, and amendments thereto, the proof of such mailing shall be by affidavit of the person who mailed such copies and such affidavit shall be filed with the clerk of the court in which the action has been filed. Any return receipt shall be made a part of the affidavit and filed therewith.

(d) *Time for return.* ~~Where all defendants may be served within the county where the action is commenced, the officer or other person receiving a summons or other process shall make return of service promptly and in any event within two days after the service is effected, but where all defendants cannot be so served, or where service is required in another county or another state, return of service shall be made within five days after service is effected.~~ If the process cannot be served as directed it shall be returned to the court forthwith with a statement of the reason for the failure to serve the same.

(e) *Amendment of return.* At any time in the judge's discretion and upon such terms as the judge deems just, the judge may allow any process, return or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

The officer or other person receiving a summons or other process in forcible detainer cases shall make return of service promptly and in any event no later than three days before the date stated in the summons for the defendant to either appear or plead to the petition. In all other cases return of service shall be made promptly and in any event no later than five days before the date stated in the summons for the defendant to either appear or plead to the petition.

Sec. 4. K.S.A. 1993 Supp. 61-2605 is hereby amended to read as follows: 61-2605.

APPENDIX OF FORMS

Form No. 1: SUMMONS FOR SERVICE WITHIN STATE AND RETURN

(To be used for personal, residence or certified mail service)

In the _____ Court of _____ County, Kansas.

_____
Plaintiff.

vs. No._____

_____
Defendant.

SUMMONS

To the above-named defendant:

You are hereby notified that an action commenced against you will be on this court's docket at ___ o'clock ___ M., on the _____ day of _____, 19___. Should you either fail to appear before this court, personally or by counsel, at such time, or prior to such time file with this court a pleading in response to the petition which is herewith served upon you, judgment by default will be taken against you for the relief demanded in the petition. Any pleading filed with this court must also be served on the plaintiff or the plaintiff's attorney, whose name and address appears below, prior to the above time should you fail to appear at such time, and your responsive pleading may state as a counterclaim any related claim which you may have against the plaintiff.

To the sheriff of _____County, Kansas:

~~This summons must be served by _____, 19___, and your return made within _____ days thereafter.~~

This summons must be served and your return of service made promptly; in any event, your return is due no later than ☐ 3 days ☐ 5 days before the date stated in the summons for the defendant to either appear or plead to the petition.

_____
(Signature), Clerk

Dated: _____

[Seal of the court]

_____

_____

(Name and address of plaintiff's attorney)

RETURN ON SERVICE OF SUMMONS

I hereby certify that I have served this summons:

(1) *Personal Service.* By delivering a copy of such summons and a copy of the petition to each of the following defendants on the dates indicated:

_____ _____, 19____ _____ _____, 19____

(2) *Residence Service.* By leaving a copy of such summons and a copy of the petition at the usual place of residence of each of the following defendants with some person of suitable age and discretion residing therein on the dates indicated:

_____ _____ _____, 19____
_____ _____ _____, 19____

(Name) (Address) (Date)

(3) *Agent Service.* By delivering a copy of such summons and a copy of the petition to each of the following agents authorized by appointment or by law to receive service of process on the dates indicated:

_____ _____, 19____
_____ _____, 19____

(Name) (Date)

(4) *Residence Service and Mailing.* By leaving a copy of such summons and a copy of the petition at the usual place of residence of each of the following defendants and mailing by first-class mail on the dates indicated a notice that such copy has been so left:

_____ _____ _____, 19____
_____ _____ _____, 19____

(Name) (Address) (Date)

(5) *Certified Mail Service.* I hereby certify that I have served the within summons: (1) By mailing on the _____ day of _____, 19____, a copy of the summons and a copy of the petition in the above action as certified mail return receipt requested to each of the within-named defendants; (2) the name and address on the envelope containing the process mailed as certified mail return receipt requested were as follows: _____

_____

By _____

(6) *Certified Mail Service Refused.* I hereby certify that on the _____ day of _____, 19____, I mailed a copy of the summons and petition in the above action by first-class mail, postage prepaid, addressed to _____ at _____

By _____

(7) *No Service.* The following defendants were not found in this county:

_____

_____

(Signature and Title of Officer)

Dated: _____

Sec. 5. K.S.A. 1993 Supp. 61-1802, 61-1805, 61-1807 and Form 1 of 61-2605 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

DRAFT MARRIAGE LICENSE BILL

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

Section 1. K.S.A. 23-106 is hereby amended to read as follows: 23-106.

The clerks of the district courts or judges thereof, when applied to for a marriage license by any person who is one of the parties to the proposed marriage and who is legally entitled to a marriage license, shall issue a marriage license in substance as follows:

MARRIAGE LICENSE

(Name of place where office located, month, day and year.)

TO ANY PERSON authorized by law to perform the marriage ceremony,

Greeting:

You are hereby authorized to join in marriage A B of _____, date of birth _____, and CD of _____, date of birth _____, (and name of parent or guardian consenting), and of this license, duly endorsed, you will make due return to this office immediately after performing the ceremony.

E F, (title of person issuing the license).

No clerk or judge of the district court shall issue a marriage license before the third calendar day (Sunday and holidays included) following the date of the filing of the application therefor in such clerk's or judge's office except that in cases of emergency or extraordinary circumstances, a judge of the district court may upon proper showing being made, permit by order of the court the issuance of such marriage license without waiting three days. Each district court shall keep a record of all ~~applications filed for marriage licenses~~ which record shall show the ~~name of the person applying for such license, the date of the filing of such application and the names of the parties to the proposed marriage.~~ No clerk or judge shall issue a license authorizing the marriage of any person under the age of 18 years without the express consent of such person's father, mother or legal guardian. If not given in person at the time of the application, the consent shall be evidenced by a written certificate subscribed thereto and duly attested. Where the applicants or either of them are under age and their parents are dead and there is no legal guardian then a judge of the district court may, after due investigation give consent and issue the license authorizing the marriage. Where such consent shall have been given as herein provided, no license shall be issued to any person under the age of 18 years without the consent of the judge in addition thereto. The judge or clerk may issue a license upon the affidavit of the party personally appearing and applying therefor, to the effect that the parties to whom such license is to be issued are of lawful age, as required by this section, and the judge is hereby authorized to administer oaths for that purpose.

marriages resulting from licenses issued by the court,

names of the persons who were married and the date of the marriage.

House Judiciary
Attachment 3
1-13-94

Every person swearing falsely in such affidavit shall be guilty of a misdemeanor and shall be punished by a fine not exceeding $500. A clerk or judge of the district court shall state in every license the birth dates of the parties applying for the same, and if either or both are minors, the name of the father, mother, or guardian consenting to such marriage.

Every marriage license shall expire at the end of six months from the date of issuance if the marriage for which the license was issued does not take place within the six-month period of time.

Sec. 2. K.S.A. 23-106 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

1882

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (913) 234-5696
FAX (913) 234-3813

Memorandum

TO: House Judiciary Committee Members

FROM: Ron Smith, General Counsel

SUBJ: Qualified Domestic Relations Orders, KPERS

DATE: January 11, 1994

The Bar would like to have one bill introduced as a committee bill this year.

Steve Blaylock of Wichita has suggested, and the Family Law Section and Board of Governors of KBA have approved, the idea that KPERS retirement pensions should be subject to Qualified Domestic Relations Orders the same as other pensions. This requires legislation. The sections to amend, and proposed language, is attached.

In Kansas, when a judge divides property pursuant to divorce, the spouses have an interest in the retirement amounts of each other. If the employee works for Boeing, the judge can issue a Qualified Domestic Relations Order (QDRO) and divide the employee's interest in the retirement plan. Upon certain conditions, the spouse is then entitled to his or her portion.

That is what happens with retirement plans of private sector businesses. KPERS is a public sector retirement plan. We already divide KPERS retirement plans for purposes of child support. The Family law section believes such plans should be capable of division for other purposes in a divorce. As background, please see In the Matter of the Marriage of Sedbrook, which makes it clear municipal pensions are considered property for division of property upon dissolution of marriage. This legislation transfers the same concept to KPERS pensions.

The reasons will all be explained in the hearings.

enc/

House Judiciary
Attachment 4
1-13-94

K.S.A. 12-5005(e):

(amend to read as follows)

(e) Every pension or other benefit received by any special member pursuant to subsection (c) or (d) is hereby made and declared exempt from any tax of the state of Kansas or any political subdivision or taxing body of this state; shall not be subject to execution, garnishment, attachment or any other process or claim whatsoever, except such pension or benefit or any accumulated contributions due and owing from the system to such special members are subject to claims of an "alternate payee" under a "qualified domestic relations order." As used in this subsection, the terms "alternate payee" and "qualified domestic relations order" shall have the meaning ascribed to them in section 414(p) of the Federal Internal Revenue Code of 1954, as amended. The provisions of this subsection shall apply to any qualified domestic relations order which was filed or amended on or after July 1, 1992.

K.S.A. 12-111a:

(amend to add to existing statute)

Provided further that any pension benefit or annuity accruing to services of a policeman or fireman by a charter ordinance under this section shall not be exempt from claims of an alternate payee under a qualified domestic relations order. As used in this section, the terms "alternate payee" and "qualified domestic relations order" shall have the meaning ascribed to them in section 414(p) of the Federal Internal Revenue Code of 1954, as amended. The provisions of this section shall apply to any qualified domestic relations order which was filed or amended on or after July 1, 1992.

K.S.A. 13-14a10:

(amend to add to existing statute)

Provided further that any pension benefits or annuities accruing under the provisions of K.S.A. 13-14a01 *et seq.* or K.S.A. 14-10a01 *et seq.* shall not be exempt from claims of an alternate payee under a qualified domestic relations order. As used in this section, the terms "alternate payee" and "qualified domestic relations order" shall have the meaning ascribed to them in section 414(p) of the Federal Internal Revenue Code of 1954, as amended. The provisions of this section shall apply to any qualified domestic relations order which was filed or amended on or after July 1, 1992.

K.S.A. 74-4923(b):

(amend to read as follows)

(b) Any annuity, benefits, funds, property or rights created by, or accruing to any person under the provisions of K.S.A. 74-4901 et seq. or 74-4951 et seq., and any acts amendatory thereof or supplemental thereto, shall be exempt from any tax of the state of Kansas or any political subdivision or taxing body of the state; shall not be subject to execution, garnishment or attachment, or any other process or claim whatsoever, except such annuity or benefit or any accumulated contributions due and owing from the system to such person are subject to claims of an "alternate payee" under a "qualified domestic relations order." As used in this subsection, the terms "alternate payee" and "qualified domestic relations order" shall have the meaning ascribed to them in section 414(p) of the Federal Internal Revenue Code of 1954, as amended. The provisions of this subsection shall apply to any qualified domestic relations order which was filed or amended on or after July 1, 1992.

factors enumerated in K.S.A. 21–4606 and thus abused its discretion. Our review of these factors, however, indicates most are inapplicable to the crime for which defendant was being sentenced, possession of marijuana.

The district court did consider defendant's prior criminal record, pursuant to K.S.A. 21–4606(2)(a). Furthermore, our review of the record indicates the sentencing court was well aware that defendant was convicted of possession of marijuana. The sentencing court's reference to the large number of growing plants found in defendant's possession indicates the court was merely considering the nature and circumstances of defendant's crime pursuant to K.S.A. 21–4606(1). The defendant's sentence of one year in the county jail is within the statutory limits. The district court did not abuse its discretion.

Affirmed.

16 Kan.App.2d 668

In the Matter of the MARRIAGE OF Luanne SEDBROOK, Appellant,

and

Delbert Sedbrook, Appellee.

No. 66410.

Court of Appeals of Kansas.

March 13, 1992.

Review Denied April 29, 1992.

Spouses brought divorce action. The Sedgwick District Court, James G. Beasley, J., divided property, and then later disallowed maintenance, and wife appealed. The Court of Appeals, Larson, P.J., held that: (1) trial court could not deny wife maintenance based on her cohabitation with unrelated male; (2) determination of maintenance and division of property should be made at same time; and (3) husband's pension was divisible marital property.

Reversed and remanded with instructions.

1. Divorce ⇐238, 252.2

Fault of either party to marriage is not to be considered in determining financial aspects of dissolution of marriage unless conduct is so gross and extreme that failure to penalize would, itself, be inequitable.

2. Divorce ⇐237

Determination of allowance of maintenance must be based on realistic evaluation of parties' circumstances, future income, and needs.

3. Divorce ⇐238

Trial court could not preclude former wife from receiving spousal maintenance solely because she cohabited with unrelated male, where there was no indication that former wife and cohabitant considered themselves wife and husband after divorce was final.

4. Marriage ⇐54

Any marriage contracted by party with any other person before judgment of divorce is final is voidable. K.S.A. 60–1610(c)(2).

5. Divorce ⇐238

Finding of cohabitation may not be equated with conclusion that relationship has become that of wife and husband, and is not by itself sufficient to justify denial of spousal maintenance.

6. Divorce ⇐238

Trial court's denial of spousal maintenance as penalty for marital infidelity was abuse of discretion.

7. Divorce ⇐237

Determination of whether maintenance is to be allowed must be arrived at by considering requisite factors, with exception of fault.

8. Divorce ⇐237

It is not improper for trial court to consider nature and extent of financial contribution of unrelated party, or that which he or she may be capable of assuming, in order to maintain relationship with spouse seeking continued maintenance from former spouse.

9. Divorce ⇐237, 247, 252.3(1)

"Division of property" operates retrospectively to adjust rights of parties to property already accumulated, while "maintenance" is prospective and deals with future support; although maintenance and division of property are separate and distinct concepts, neither can be intelligently fixed by itself without giving appropriate consideration to the other.

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

10. Divorce ⇐239, 249.7, 253(1)

Determination of maintenance and division of property should be made at the same time, but, if separately determined, allowance of maintenance or lack thereof should be considered before making division of property. K.S.A. 60–1610(b)(1).

11. Divorce ⇐252.3(4)

Municipal firefighter's pension was divisible marital property, even though not specifically defined as such by statute. K.S.A. 23–201.

12. Appeal and Error ⇐842(2)

Court of Appeals' review of trial court's conclusions of law is unlimited.

13. Divorce ⇐252.3(4)

To extent earned during marriage, retirement benefits represent compensation for marital effort and are substitutes for current earnings which would have increased marital standard of living or would have been converted into other assets divisible at dissolution of marriage.

14. Divorce ⇐252.3(4)

Status of retirement benefits as divisible marital property does not depend upon whether participant contributed or whether benefits were vested.

15. Divorce ⇐252.3(4)
Exemptions ⇐49

Antialienation provisions of city charter ordinance did not prevent division of municipal firefighter's pension as marital property; spouse was dependent to be protected under plan and not treated as creditor. K.S.A. 12–111a, 12–5005(e), 13–14a01 et seq., 13–14a10, 74–4923, 74–4923(b).

16. Divorce ⇐252.3(1)
Exemptions ⇐62

Exemption and antialienation provisions restricting garnishment, attachment, execution, and prohibition of assignment are designed to protect benefits from creditors and do not apply to claims of spouse at time of marital dissolution.

17. Divorce ⇐252.3(4)

Municipal pensions are considered marital property for purpose of making division of property upon dissolution of marriage. K.S.A. 23–201(b), 60–1610(b).

18. Divorce ⇐253(3)

Municipal firefighter's retirement benefit had determinable value.

Syllabus by the Court

1. The fault of either party to a marriage is not to be considered in determining the financial aspects of the dissolution of the marriage unless the conduct is so gross and extreme that the failure to penalize therefor would, itself, be inequitable. *In re Marriage of Sommers*, 246 Kan. 652, 658–59, 792 P.2d 1005 (1990).

2. The determination of the allowance of maintenance must be based on a realistic

evaluation of the parties' circumstances, future income, and needs.

3. A finding of cohabitation may not be equated with the conclusion the relationship has become that of wife and husband and is not, by itself, sufficient to justify denial of spousal maintenance.

4. It is not improper for the trial court to consider the nature and extent of the financial contribution of an unrelated party, or that which he or she may be capable of assuming, in order to maintain a relationship with a spouse seeking continued maintenance from a former spouse.

5. The determination of maintenance and the division of property should be made at the same time, but, if separately determined, the allowance of maintenance or the lack thereof should be considered before making a division of property. K.S.A.1991 Supp. 60–1610(b).

6. To the extent earned during the marriage, retirement benefits represent compensation for marital effort and are substitutes for current earnings which would have increased the marital standard of living or would have been converted into other assets divisible at dissolution of the marriage.

7. Exemption and anti-alienation provisions restricting garnishment, attachment, execution, and prohibition of assignment are designed to protect benefits from creditors and do not apply to the claims of a spouse at the time of the dissolution of a marriage.

8. Municipal pensions are considered as marital property under K.S.A. 23–201(b) for the purpose of making the division of property upon the dissolution of a marriage as provided under K.S.A.1991 Supp. 60–1610(b).

9. Under the facts and circumstances of this case, the trial court erred in denying spousal maintenance solely on the grounds of cohabitation with an unrelated member of the opposite sex. The trial court further erred in ruling, as a matter of law, that a municipal firefighter's pension benefits were not marital property subject to equitable division upon the dissolution of a marriage.

Stephen J. Blaylock and Cindy Cleous–Stang, of Woodard, Blaylock, Hernandez, Pilgreen & Roth, Wichita, for appellant.

David J. Lund, of Dewey & Lund, Wichita, for appellee.

Before LARSON, P.J., ELLIOTT, J., and NELSON E. TOBUREN, District Judge, assigned.

LARSON, Presiding Judge:

This is a divorce action in which Luanne Sedbrook appeals the trial court's ruling that she is ineligible to receive maintenance from Delbert Sedbrook because she was cohabiting with an unrelated male. Luanne also claims the trial court erred by ruling Delbert's City of Wichita firefighter's pension is not a marital asset subject to division and may only be considered as a source of funds for the payment of child support or maintenance.

The parties married in August of 1964. After 25 years, the parties separated and Luanne filed for divorce in November of 1989.

Delbert commenced his firefighting employment in May of 1963. Wichita established by charter ordinance its police and fire retirement system on January 1, 1965, which after numerous amendments became Charter Ordinance No. 131. Delbert became a member of the system and continued his uninterrupted employment until he retired in April of 1985 with a monthly pension for life of $1,022.94. Cost of living adjustments increased his monthly pension to $1,084.29 by the time of trial.

Luanne's contention that Delbert's pension was marital property subject to division was resolved adversely to her as a matter of law by the trial court in January 1991.

At the time of trial in late January and early February of 1991, Delbert was a mechanical maintenance engineer for St. Joseph Medical Center, earning approximately $1,500 gross per month in addition to his Wichita retirement pay. Luanne was a receptionist at Family Physicians and earned approximately $1,200 gross per month. She was 44 years old; he was 50 years old.

Luanne had been a homemaker for 14 years of the marriage. Three of the parties' four children were adults and the youngest was 17 at the time of the trial. Luanne has worked for Sears and Montgomery Ward, and had a variety of other jobs during the marriage.

During the pendency of the divorce, an auction liquidated the real and much of the personal property of the parties. After giving credit for payment of debts, the cash monies were divided: $17,414.85 to Luanne and $19,118.81 to Delbert.

A hearing on the maintenance issue was held in late February, and in early April the trial court ruled:

"The Court finds that the petitioner has been continuously cohabiting with a gentleman since approximately September, 1990. As a result, the Court finds that this conduct makes the petitioner ineligible to receive payment of spousal maintenance from the respondent. Therefore, the petitioner's motion for a determination of spousal maintenance is denied."

Luanne appeals. We reverse.

The trial court abused its discretion in holding Luanne was precluded from receiving spousal maintenance solely because she cohabited with an unrelated male.

"The trial court has wide discretion when it comes to matters relating to alimony, and its judgment in awarding alimony will not be disturbed absent a clear abuse of discretion." *Parish v. Parish*, 220 Kan. 131, 134, 551 P.2d 792 (1976). K.S.A.1991 Supp. 60–1610(b)(2), which relates to maintenance, provides in part: "The decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree."

Many of the statutory considerations relating to the division of property by case law are required to be considered in the determination of maintenance. Justice Herd, in *Powell v. Powell*, 231 Kan. 456, 460, 648 P.2d 218 (1982), stated:

"[T]he judicial considerations regarding alimony are well settled. They were capsulized in *Williams v. Williams*, 219 Kan. 303, 306, 548 P.2d 794 (1976):

'Fault is but one element which may be considered in fixing alimony. Other matters which may be considered include the age of the parties, their present and prospective earning capacities, the length of the marriage, the property owned by them [citation omitted], the parties' needs [citation omitted], the time, source and manner of acquisition of property, the family ties and obligations [citation omitted], and the parties' overall financial situation [citation omitted]. There is no fixed rule on the subject and the district court in a divorce action is vested with wide discretion in adjusting the financial obligations of the parties. Thus, its exercise of that discretion will not be disturbed on appeal in the absence of a showing of clear abuse.'

See also *Parish v. Parish*, 220 Kan. at 134 [551 P.2d 792]."

Other than fault, which has been eliminated by the legislature as a factor, the foregoing provisions are similar to those in K.S.A. 60–1610(b)(1), setting forth considerations in the division of property, which include the allowance of maintenance or lack thereof.

The Kansas Supreme Court in *In re Marriage of Sommers*, 246 Kan. 652, 658–59, 792 P.2d 1005 (1990), determined that fault may no longer be considered in the division

of property, award of maintenance, or award of attorney fees when the divorce is sought and granted on the ground of incompatibility, except in rare and unusual situations.

In *Sommers*, over the husband-petitioner's objection, evidence was admitted that he was having an extramarital affair. In a memorandum opinion the trial court stated:

" 'The Court specifically finds that the primary cause of the destruction of the marriage was the Petitioner's involvement with [name deleted], which the Court finds relevant to the issue of maintenance.

....

" 'While this Court recognizes that this is a no-fault divorce case, nonetheless, there is still some room in these cases for fault....' " 246 Kan. at 654, 792 P.2d 1005.

Following a discussion of Maxwell, *In the Best Interests of the Divided Family: An Analysis of the 1982 Amendments to the Kansas Divorce Code*, 22 Washburn L.J. 177 (1983), Justice McFarland concluded: "[I]n domestic relations actions it was the legislative intent that, in all but extremely gross and rare situations, financial penalties are not to be imposed by a trial court on a party on the basis of fault." 246 Kan. at 657, 792 P.2d 1005. The court further stated:

"It is difficult to conceive of any circumstances where evidence of marital infidelity would be a proper consideration in the resolution of the financial aspects of a marriage. Consideration of such evidence could result only on a decision of whether or not to impose a penalty for such conduct, as it does not relate to the present or future financial circumstances of the parties or the award of any particular property." 246 Kan. at 658, 792 P.2d 1005.

[1] The court held: "Fault, as a term of art, is not to be considered in the determination of the financial aspects of the dissolution of the marriage, nor should a penalty be imposed as a result of such consideration. The only exception would be some rare and unusual situation where a party's conduct is so gross and extreme that failure to penalize therefor would, itself, be inequitable." 246 Kan. at 658–59, 792 P.2d 1005.

The parties' divorce was granted in our case on the ground of incompatibility. When the trial court determined the amount, if any, of maintenance to be allowed, there was no mention in the court's order of the consideration of anything other than fault. After finding Luanne had been cohabiting with an unrelated male since September of 1990, the trial court stated: "As a result, the Court finds that *this conduct* makes the petitioner ineligible to receive payment of spousal maintenance from the respondent." (Emphasis added.)

[2, 3] The trial court did not express indignation or criticize Luanne's cohabitation, but found that it alone was sufficient to deny maintenance. It appears the trial court resolved the issue of maintenance on the single factor of cohabitation and failed to conduct a realistic evaluation of the parties' circumstances, future income, and needs as is required by *Sommers*, 246 Kan. at 658, 792 P.2d 1005.

Delbert argues the trial court committed no error because maintenance is terminable as well as modifiable, and since Sedgwick County courts have consistently terminated maintenance upon the continuous cohabitation with an unrelated person of the opposite sex, it would have been a waste of the trial court's time to make all the necessary considerations, allow maintenance, and immediately find that it is terminated. We disagree.

[4] The divorce in this case was not granted until February 6, 1991, and it is clear that under K.S.A.1991 Supp. 60–1610(c)(2) any marriage contracted by a party with any other person before the judgment of divorce is final is voidable. There is no indication that Luanne and her cohabitant considered themselves wife and husband after the divorce was final.

The trial court's denial of maintenance appears to be based solely upon Luanne's cohabitation. This brings into issue the nature of her relationship and its legal effect.

In discussing cohabitation, Professor Linda H. Elrod in 1 Elrod, Kansas Family Law Handbook § 10.083 (rev. ed. 1990), states:

"Without a provision in a decree or agreement, most courts have found that cohabiting with another is not by itself a sufficient change of circumstances to justify termination of maintenance. [*Van Gorder v. Van Gorder*, 110 Wis.2d 188, 327 N.W.2d 674 (1983); *Overson v. Overson*, 125 Wis.2d 13, 370 N.W.2d 796 (Wis.App.1985), *appeal after remand* 140 Wis.2d 752, 412 N.W.2d 896 (Wis. App.1987).] Cohabitation is only one factor to consider in assessing the needs of the recipient. If the recipient is in fact being supported by the cohabitant, there may be a strong case for termination based on need no longer [being] present."

In *In re Marriage of Wessling*, 12 Kan. App.2d 428, 429, 747 P.2d 187 (1987), the husband and wife entered into a settlement agreement which became incorporated into their divorce decree and provided that the husband's support obligations be reduced upon the wife's "continuous and continual cohabitation with an unrelated male." The wife admitted to having a sexual relationship but claimed that she had an understanding with the unrelated male that they were free to date other people, that they never held themselves out as husband and wife, and that they had no plans to marry. The wife testified they had done household chores and favors for each other but they maintained separate residences, had no jointly owned property, and did not purchase groceries together or share mortgage or credit card payments.

Our court adopted the following definition of cohabitation from *Biltgen v. Biltgen*, 121 Kan. 716, 250 P. 265 (1926):

" ' "The act or state of dwelling together, or in the same place with another; living together as husband and wife; a living together as man and wife. A condition or status of the parties, a status resembling that of the marital relation. Cohabitation is not a sojourn, nor a habit of visiting, nor even a remaining with for a time; the term implies continuity." ' 121 Kan. at 721 [250 P. 265] (quoting 11 C.J. 952)." *Wessling*, 12 Kan.App.2d at 431 [747 P.2d 187].

We held that since the ex-wife and unrelated male did not intend to marry, never maintained a home together, and never shared living expenses nor jointly owned any property, they were not cohabiting.

In *Fleming v. Fleming*, 221 Kan. 290, 559 P.2d 329 (1977), the husband and wife entered into a separation agreement providing for alimony terminating upon the wife's death or remarriage. Husband claimed his ex-wife had entered into a common-law marriage with an unrelated male and, if a marriage was not found to exist, it was nonetheless contrary to public policy to compel him to pay alimony when his former wife was openly cohabiting with another man.

The trial court in *Fleming* found no common-law marriage existed because no present agreement to marry was established. This was affirmed on appeal and our Supreme Court further found the ex-wife had no implied legal obligation of support from the unrelated male. Chief Justice Fatzer found no fault with the quotes from *Herzmark v. Herzmark*, 199 Kan. 48, 54, 427 P.2d 465 (1967), that it was distasteful to permit a divorced wife to hold her former husband and present husband to a duty of support and that it is contrary to public policy for a woman to receive support from both a former and present husband, but said:

"[H]owever, here we are not dealing with a former and present husband. We are dealing with a former husband and a present boy friend with no obligation to support. Alimony is based on the obligation to support an ex-wife and is not to be measured in the future by her chasti-

ty or moral conduct." *Fleming*, 221 Kan. at 293, 559 P.2d 329.

A similar holding that did not disadvantage a divorced wife who permitted an unrelated male to live with her and pay rent and half of the household expenses is found in *In re Marriage of Arndt*, 239 Kan. 355, 719 P.2d 1236 (1986).

[5] In our case, the trial court's finding of cohabitation may not be equated with the conclusion that Luanne's relationship with an unrelated male has become that of wife and husband and is not, by itself, sufficient to justify denial of spousal maintenance.

[6, 7] The legislative intent statement of *Sommers*,

> "Generally, it is the legislative intent that fault not be considered by a trial court in considering the financial aspects of the dissolution of a marriage pursuant to K.S.A.1989 Supp. 60–1610(b), as any consideration involves a determination of whether or not to impose a penalty for misconduct and is inconsistent with the desire that the dissolution of a marriage occur with minimal hostility and vituperation. The only exception to this rule would be some rare and unusual situation where the misconduct is so gross and extreme that failure to penalize therefor would, itself, be inequitable." 246 Kan. 652, Syl. ¶ 2, 792 P.2d 1005,

makes the trial court's order an abuse of discretion because Luanne is being penalized for marital infidelity. The determination of whether maintenance is to be allowed must be arrived at by considering the *Powell*, 231 Kan. at 460, 648 P.2d 218, and *Williams v. Williams*, 219 Kan. 303, 548 P.2d 794 (1976), factors, with the exception of fault.

[8] It is not, however, improper for the trial court to consider the nature and extent of the financial contribution of an unrelated party, or that which he or she may be capable of assuming, in order to maintain a relationship with the spouse seeking continued maintenance from a former spouse.

[9, 10] Maintenance and division of property are separate and distinct concepts, but neither can be intelligently fixed by itself without giving appropriate consideration to the other. *Almquist v. Almquist*, 214 Kan. 788, Syl. ¶ 6, 522 P.2d 383 (1974). A division of property operates retrospectively to adjust the rights of the parties to property already accumulated, while maintenance is prospective and deals with future support. *Beck v. Beck*, 208 Kan. 148, 149, 490 P.2d 628 (1971). The issue is not raised in this appeal, but we do not approve the deciding of the division of property first and then, in a later hearing, the determination of maintenance.

K.S.A.1991 Supp. 60–1610(b)(1) provides that in making a property division one of the things to be considered is "the allowance of maintenance or the lack thereof." The determination of maintenance and the division of property should be made at the same time but, if separately determined, in the reverse order to the manner decided by the trial court herein.

The trial court erred in finding Delbert's firefighter's pension was not marital property.

[11] Luanne contends the trial court erred when it determined Delbert's pension as a retired Wichita firefighter was not divisible marital property.

Citing as authority our decision in *Grant v. Grant*, 9 Kan.App.2d 671, 685 P.2d 327, *rev. denied* 236 Kan. 875 (1984), the trial court ruled, as a matter of law, that the pension could only be considered as a source of funds in determining Delbert's ability to pay spousal support because (1) it was not specifically defined as marital property pursuant to K.S.A. 23–201, (2) it was governed by an anti-alienation city ordinance, and (3) it had no present determinable value.

Based primarily on the Kansas Supreme Court decisions in *In re Marriage of Sadecki*, 250 Kan. 5, 825 P.2d 108 (1992), and *Sommers*, 246 Kan. 652, 792 P.2d 1005, and our opinion in *In re Marriage of Harrison*, 13 Kan.App.2d 313, 769 P.2d 678 (1989), plus the overwhelming number of decisions on this issue throughout the United States, we decline to give *Grant* the credence which it was given by the trial court.

[12] Our review of the trial court's conclusions of law is unlimited. *Hutchinson Nat'l Bank & Tr. Co. v. Brown*, 12 Kan.App.2d 673, 674, 753 P.2d 1299, *rev. denied* 243 Kan. 778 (1988). We further believe that this is a matter of first impression in Kansas because our appellate courts have not determined previously if a municipal firefighter's pension is divisible marital property.

The statutory basis for division of property in Kansas is provided by K.S.A.1991 Supp. 60–1610(b), which states:

> "(1) *Division of property.* The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouse's joint efforts, by: (A) a division of the property in kind; (B) awarding the property or part of the property to one of the spouses and requiring the other to pay a just and proper sum; or (C) ordering a sale of the property, under conditions prescribed by the court, and dividing the proceeds of the sale. In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets, and such other factors as the court considers necessary to make a just and reasonable division of property."

K.S.A. 23–201(b) defines "marital property" in the following manner:

> "All property owned by married persons, including the present value of any vested or unvested military retirement pay, whether described in subsection (a) or acquired by either spouse after marriage, and whether held individually or by the spouses in some form of co-ownership, such as joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment. Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60–1610 and amendments thereto."

Our court in *Grant* held military retirement pay was nothing more than a future stream of income with speculative future value and was not a marital asset subject to division. 9 Kan.App.2d at 676, 685 P.2d 327.

The result in *Grant* (and its precedential value, in our view) was eliminated by the Kansas Legislature in 1987 when it amended K.S.A. 23–201(b) (Ensley 1981) by adding the words "including the present value of any vested or unvested military retirement pay" after the introductory phrase "[a]ll property owned by married persons." L.1987, ch. 120, § 1.

We recognized this in *In re Marriage of Harrison*, 13 Kan.App.2d at 315, 769 P.2d 678, when we held that military retirement pay, whether vested or unvested, is marital property subject to division upon the dissolution of a marriage.

Because remand was necessary to make a new property division in *Harrison*, we suggested the trial court either determine the present cash value of the asset, reserve jurisdiction to divide the asset as it is received, or use other methods of valuation and disposition which might better address the interests and needs of the parties. We recognized: "The key to an equitable distribution of marital assets is fairness, not

mathematical precision." 13 Kan.App.2d at 317, 769 P.2d 678.

The Kansas Supreme Court next addressed this issue in *Sommers*, 246 Kan. 652, 792 P.2d 1005, when it held United States Postal Service vested retirement benefits were marital property. After quoting K.S.A. 23-201(b), Justice McFarland recognized that the reference to military retirement pay was added to the statute because of *Grant*, and then chose to expand the scope of K.S.A. 23-201(b) by stating:

> "The language of K.S.A. 23-201(b) appears to be inclusive rather than exclusive. There is no logical reason why one type of retirement benefits for federal services should be treated differently from another. We conclude that K.S.A. 23-201(b) is broad enough to include retirement benefits from the U.S. Postal Service and that the trial court had authority for its consideration thereof." *Sommers*, 246 Kan. at 660, 792 P.2d 1005.

Justice Six wrote a concurring and dissenting opinion in *Sommers* which was joined by Chief Justice Miller and Justice Lockett, but their disagreement extended only to the fault issues. The *Sommers* court was unanimous in its expansion of the provisions of K.S.A. 23-201(b).

In the most recent Kansas Supreme Court case on this issue, *In re Marriage of Sadecki*, 250 Kan. 5, 825 P.2d 108, the trial court was held not to have abused its discretion in the manner in which it considered a major league baseball retirement pension.

In *Sadecki*, the total value of the property and judgment awarded to the wife exceeded $90,000, while the net value of the property granted to the husband, after deduction of indebtedness and the wife's judgment, was $7,950. The wife argued the baseball retirement plan had not been deemed an asset subject to division and was only considered as income in comparing the relative incomes of the parties. The husband asserted there was no evidence as to the retirement plan's value and that it was considered by the trial court as marital property.

Chief Justice Holmes, writing for a unanimous court, ruled the trial court properly considered the benefits under the retirement plan as an asset based on the trial court's statement: " 'I think that this disparity and the division of the property adequately compensate the wife for the contribution she made toward the creation of the asset which is the baseball retirement.' " *Sadecki*, 250 Kan. at 10, 825 P.2d 108.

The wife complained the trial court abused its discretion in not employing the "reserve jurisdiction" method to divide the proceeds of the retirement plan, which was one of the methods we described and approved in *Harrison*. Chief Justice Holmes' opinion described both the present cash value/immediate offset distribution scheme and the "reserve jurisdiction" method in *Sadecki* as our court had in *Harrison*, but distinguished *Harrison* because there expert testimony was presented by a professor of finance who calculated present value actually adjusted for inflation and discounted by a historic rate of interest, while the wife in *Sadecki* did not present any evidence of the present value of the baseball retirement benefits, which were currently approximately $2,000 per month.

The trial court in *Sadecki* did not abuse its discretion in failing to adopt the reserve jurisdiction approach. The wife could not complain about the division of property because she failed to establish any present value of the retirement benefits. 250 Kan. at 12, 825 P.2d 108.

Throughout the *Sadecki* opinion, all of the comments concerning the benefits under the major league baseball retirement plan treat it as an "asset," which is tantamount to a holding that it is marital property subject to division.

We will not attempt to cite every case throughout the United States considering this issue, but the following is a representative sample of the majority of the states

that consider retirement benefits property subject to equitable division at the dissolution of a marriage. See, *e.g.*, *Rice v. Rice*, 757 P.2d 60, 61 (Alaska 1988) ("[T]o the extent retirement benefits have been earned during the marriage, they constitute marital assets and are subject to equitable division."); *Koelsch v. Koelsch*, 148 Ariz. 176, 180, 713 P.2d 1234 (1986) (" '[T]he retirement benefits provided under the [Public Safety Personnel Retirement System] are deferred compensation for services previously rendered and are therefore property acquired during marriage' " subject to division by the court.); *In re Marriage of Hackett*, 113 Ill.2d 286, 292-93, 100 Ill.Dec. 790, 497 N.E.2d 1152 (1986) (Proceeds of vested interest in Fireman's Pension Fund were properly classified as marital property.); *In re Marriage of Oler*, 451 N.W.2d 9, 11 (Iowa App.1989) ("[P]ension benefits [, including Iowa Public Employees Retirement System benefits,] are treated as marital property and are properly subject to equitable distribution."); *Davolt v. Davolt*, 764 S.W.2d 497, 499 (Mo.App.1989) (Pension benefits earned during the marriage must be considered part of the marital property subject to division in marital dissolution proceedings.); *Olson v. Olson*, 445 N.W.2d 1, 11 (N.D. 1989) (Unless there is some specific restriction in the plan, pension or retirement benefits accumulated during the marriage are marital property divisible at divorce.); *Rice v. Rice*, 762 P.2d 925, 926 (Okla.1988) ("[P]ension benefits [, including police officer's pension,] which have accumulated during marriage may be considered as jointly acquired property subject to equitable division in a divorce.") For a comprehensive collection of the cases on this issue, see Annot., Pension Rights-Division on Dissolution, 94 A.L.R.3d 176, and the supplement thereto.

[13] The rationale for including pension benefits as marital property subject to equitable division has been stated in *Stevenson v. Stevenson*, 511 A.2d 961, 965 (R.I. 1986):

> " 'To the extent earned during the marriage, the benefits represent compensation for marital effort and are substitutes for current earnings which would have increased the marital standard of living or would have been converted into other assets divisible at dissolution. Subjecting the benefits to division is just, because in most cases the retirement benefits constitute the most valuable asset the couple has acquired and they both have relied upon their pension payments for security in their older years.' 3 Rutkin, *Family Law and Practice* § 37.-07[1] at 37-81 (1985)."

[14] We do not deem it necessary to attempt to make distinctions between retirement benefits based on contribution by the participant or the lack thereof; nor do we hold that a different rule must be applied to vested or unvested benefits.

We note in this case that Delbert had contributed $15,104.55 toward his pension benefits during his employment, all of which was recovered in approximately 15 months. We do not deem it critical to our decision that Delbert's rights under his Wichita firefighter's pension were in lieu of any social security benefits which, had they existed, Luanne would have been entitled to share in due to the long term of the parties' marriage.

[15] Delbert finally contends the pension is not divisible because this is prohibited by Kansas statutes and Wichita charter ordinance anti-alienation provisions.

Pursuant to home rule powers, the City of Wichita, through Charter Ordinance No. 131, exempted itself from K.S.A. 13-14a01 *et seq.*, the state statutes governing fire and police retirement systems. Charter Ordinance No. 131, § 16, provided:

> "**EXEMPTIONS.** The right to a service retirement annuity, disability annuity, death annuity or any annuity or benefit under the provisions of this ordinance by whatever name called, or a refund, is personal with the recipient thereof, and the assignment or transfer of any such

annuity or benefit or any part thereof shall be void, except as may be provided herein. Any such annuity or benefit shall not answer for debts contracted by the person receiving the same, and it is the intention of this ordinance that they shall not be subject to execution, attachment, garnishment, or affected by any judicial proceedings."

Similar anti-assignment or anti-alienation provisions relative to state and local government retirement benefits are found at K.S.A. 12-111a, K.S.A. 12-5005(e), K.S.A. 13-14a10 and K.S.A.1991 Supp. 74-4923(b). K.S.A. 12-5005(e) (Kansas Police and Firemen's Retirement System) and K.S.A.1991 Supp. 74-4923 (Kansas Public Employees Retirement System [KPERS]) both specifically provide that benefits thereunder are not subject to execution, garnishment, attachment or any other process or claim whatsoever, except such annuity, pension, or benefit or any accumulated contributions due and owing from the system to such person(s) or special member *"are subject to decrees for child support or maintenance, or both, as provided in K.S.A. 60-1610 and amendments thereto."* (Emphasis added.)

The Kansas Supreme Court in *Mahone v. Mahone*, 213 Kan. 346, 348, 352, 517 P.2d 131 (1973), held the anti-alienation provisions in K.S.A. 74-4923 (Weeks), which then provided that KPERS funds "shall not be subject to execution, garnishment, or attachment, or any other process or claim whatsoever, [including decrees for support or maintenance,] and shall be unassignable," was inapplicable to a claim for past-due child support.

Justice Prager looked to the purposes of KPERS as enabling public employees to accumulate reserves for themselves and their dependents in stating:

"In arriving at this conclusion we have applied the principle that a statute is not to be given an arbitrary construction, according to the strict letter, but one that will advance the sense and meaning fairly deducible from the context. 'It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul.' [Citation omitted.] The whole purpose and policy of our exemption laws has been to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges. [Citation omitted.] In construing statutory exemptions this court has consistently taken into consideration this purpose and policy. We have by judicial construction exempted from the application of certain statutory exemptions, persons and situations not falling within that purpose." *Mahone*, 213 Kan. at 350, 517 P.2d 131.

Last year our court in *In re Marriage of Knipp*, 15 Kan.App.2d 494, 809 P.2d 562, *rev. denied* 248 Kan. 995 (1991), held that federal law (42 U.S.C. § 407[a] [1988]) precluded a Kansas court from dividing a lump sum social security disability award, but did not prohibit considering the value of the award in dividing marital property. The exemption section there involved provided:

"'(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and *none of the moneys paid or payable* or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.' (Emphasis added.)" 15 Kan.App.2d at 495, 809 P.2d 562.

Interestingly, the party prevailing in our court petitioned for review, claiming our decision permitted, and indeed encouraged, the trial court to do indirectly what it could not do directly. The petition for review was not granted.

An earlier Supreme Court decision on a companion issue, *Mariche v. Mariche*, 243 Kan. 547, 758 P.2d 745 (1988), citing *Mahone* as authority, held social security disability benefits payable to a parent are

subject to garnishment to satisfy past-due child support payments, and that such garnishment is not precluded by what is now K.S.A.1991 Supp. 60-2308(a). The true purpose of the exemption statute, to protect the funds necessary to support a pensioner and his family, precluded strict application of the exemption statute. 243 Kan. at 551-52, 758 P.2d 745.

We find no decisions directly relating to the construction of the Wichita ordinance and thus look to decisions from other states.

Community property states have held not only is each spouse the owner of the other's pension (a position we might reach by a literal reading of the language of K.S.A. 23-201(b) that "[e]ach spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60-1610 and amendments thereto"), but also the anti-alienation provisions were designed to protect benefits from creditors and not from spouses and family members. See *Koelsch v. Koelsch*, 148 Ariz. 176, 180, 713 P.2d 1234 (1986); *Collida v. Collida*, 546 S.W.2d 708, 710 (Tex.Civ.App.1977).

Illinois held in *In re Marriage of Hackett*, 113 Ill.2d at 292-93, 100 Ill.Dec. 790, 497 N.E.2d 1152, that enactment of anti-alienation provisions was to protect retired firefighters and their beneficiaries from creditors and that benefits could be divided between divorcing parties. See *Rice v. Rice*, 762 P.2d at 927 (anti-alienation provision is a "spendthrift" provision to protect a pensioner's income from the claims of creditors; as spouse in divorce proceedings is not a creditor, benefits accumulated during marriage are subject to division as jointly acquired property).

There have been earlier cases which hold to the contrary, but the recent trend is in accordance with the cases above cited.

In *Graham v. Graham*, 396 Pa.Super. 166, 578 A.2d 459 (1990), a state employee's pension was deemed subject to attachment through a qualified domestic relations order in a divorce action notwithstanding a statute exempting benefits from any process whatsoever. *Young v. Young*, 507 Pa. 40, 488 A.2d 264 (1985), was quoted by the *Graham* court in setting forth two reasons why state or municipal pensions were not excluded from equitable distribution with the court, stating:

"[First], '[r]etirement funds ... are created for the protection of not only the employee, but for the protection of his family as well. Hence, the provisions exempting assignments and attachments contained therein are to relieve the person exempted from the pressure of claims that are hostile to his *and to his dependents' essential needs', citing Fowler v. Fowler*, 116 N.H. 446, 362 A.2d 204, 205, 93 A.L.R.3d 705 (1976).

"[Second], we note that a family loses its ability to spend a portion of its income when that income is deferred and placed in a pension. It would be terribly unfair to read an exemption statute, which was created to protect a pension for the benefit of a retired employee's family, in such a way that the exemption would bar children *or a former spouse* from receiving support from the very fund created for their benefit, and would once again deny them the benefits of the income they sacrificed to a pension years before. *Id.*, 507 Pa. at 47-50, 488 A.2d at 267-69 (emphasis added)." 396 Pa.Super. at 170-71, 578 A.2d 459.

[16] Wichita Charter Ordinance No. 131 sets forth in § 2 that the system provides "retirement annuities, survivors' annuities, death benefits and other benefits for police and fire officers of the City of Wichita *and their dependents.*" (Emphasis added.) We believe a spouse must be considered as a dependent to be granted protection under the plan and not treated as a creditor. A spouse is a member of the family unit the retirement plan is designed to protect. We hold the anti-alienation provisions, in particular those relating to exemption from gar-

nishment, attachment, and prohibition of assignment, do not apply to the claims of a spouse at the time of the marital dissolution.

An excellent collection of cases from the increasing number of states that by statute and decision have conferred on divorce courts authority to make an equitable distribution of joint and separate property and have recognized spousal claims to an interest in retirement and pension benefits is set forth in Baxter, Marital Property § 11.2 (1991 Supp.).

While there is ample authority for our decision here in the prior Kansas decisions we have cited, especially *Sadecki*, 250 Kan. 5, 825 P.2d 108; *Sommers*, 246 Kan. 652, 792 P.2d 1005; and *Harrison*, 13 Kan. App.2d 313, 769 P.2d 678, the logic of those opinions and ours herein is bolstered by some of Professor Baxter's observations:

> "The most timely issue regarding the economics of divorce is the question of spousal claims to an interest in retirement or pension benefits of the other spouse....
>
> ....
>
> "More important, in our typical case, the wife has a just claim to a share of the benefit derived from joint contributions, albeit her contributions were of a different order. She already has earned her right to a share and paid for it with her past services. Thus she has a present accrued interest, not a contingent claim such as is involved in alimony.
>
> ....
>
> "... The spread of no-fault grounds requires that the economics of divorce be fair and equitable, otherwise the homemaker wife may be victimized and impoverished.
>
> "... Not only has alimony been desexed, it also has come to be regarded as an interim stipend which is available for a relatively short time while a former spouse in need prepares for the labor market.... In short, the current law of divorce in most states has upset the former equilibrium and requires new approaches to the concepts of marital property and the future financial security of broken families." Baxter, Marital Property § 11.2, pp. 26–28.

[17, 18] We hold that none of the three reasons given by the trial court justifies the refusal to consider Delbert's firefighter's retirement benefits as marital property because:

(1) *Sommers* and *Sadecki* support our finding that K.S.A. 23–201(b) includes a municipal pension as marital property;

(2) the anti-alienation provisions of the Wichita ordinance must not be applied to disadvantage spouses and family members; and

(3) *Harrison* and *Sadecki* provide ample authority that the retirement benefit has a determinable value.

Luanne claims the trial court has authority to make her an alternate payee under Delbert's pension plan pursuant to K.S.A. 1991 Supp. 60–2308(b) and (c). We will not reach or decide this issue for two reasons. This was not an issue before the trial court and will not be considered for the first time on appeal. *Kansas Dept. of Revenue v. Coca Cola Co.*, 240 Kan. 548, 552, 731 P.2d 273 (1987). There is also an insufficient record to determine if the statutory requirements are met. See *Dickinson, Inc. v. Balcor Income Properties Ltd.*, 12 Kan. App.2d 395, 399, 745 P.2d 1120 (1987), *rev. denied* 242 Kan. 902 (1988).

We also decline to remand, as Luanne requests, with instructions that the retirement benefits be divided equally, in kind. The trial court may divide property as set forth in K.S.A.1991 Supp. 60–1610(b)(1). We will not make an order limiting or confining the trial court's options.

We recognize the large burden which trial courts bear in following the provisions of K.S.A.1991 Supp. 60–1610(b), but they must be free to reach decisions that are fair, just, and equitable under all of the circumstances in accordance with the evidence which may be presented and the contentions and arguments which are made.

Reversed and remanded for determination of the property division and allowance of maintenance, if any, in accordance with the directions of this opinion.

Session of 1994

HOUSE BILL No. 2579

By Committee on Judiciary

1-10

AN ACT concerning driving privileges, relating to alcohol or drug related convictions; amending K.S.A. 8-255 and 8-1017 and K.S.A. 1993 Supp. 8-259, 8-1014 ~~and~~ 8-1015 and repealing the existing sections.

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

Section 1. K.S.A. 8-255 is hereby amended to read as follows: 8-255. (a) The division is authorized to suspend or revoke a person's driving privileges upon a showing by its records or other sufficient evidence the person:

(1) Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;

(2) has been convicted of three or more moving traffic violations committed on separate occasions within a 12-month period;

(3) is incompetent to drive a motor vehicle;

(4) has been convicted of a moving traffic violation, committed at a time when the person's driving privileges were suspended or revoked; or

(5) is a member of the armed forces of the United States stationed at a military installation located in the state of Kansas, and the authorities of the military establishment certify that such person's on-base driving privileges have been suspended, by action of the proper military authorities, for violating the rules and regulations of the military installation governing the movement of vehicular traffic or for any other reason relating to the person's inability to exercise ordinary and reasonable control in the operation of a motor vehicle.

(b) The division shall suspend a person's driving privileges when required by K.S.A. 8-262, and amendments thereto, and K.S.A. 8-1014, and amendments thereto, and shall disqualify a person's privilege to drive commercial motor vehicles when required by K.S.A. 8-2,142, and amendments thereto.

(c) When the action by the division suspending, revoking or disqualifying a person's driving privileges is based upon a report of *a* conviction *or convictions* from the convicting court ~~of a violation~~

and 22-2909

House Judiciary
Attachment 5
1-13-94

within 10 days after the effective date of the order and venue of the action for review is the county where the administrative proceeding was held or the county where the person was arrested. In all other cases, the time for filing the petition is as provided by K.S.A. 77-613, and amendments thereto, and venue is the county where the licensee resides. The action for review shall be by trial *de novo* to the court. The court shall take testimony, examine the facts of the case and determine whether the petitioner is entitled to driving privileges or whether the petitioner's driving privileges are subject to suspension, cancellation or revocation under the provisions of this act. The court on review shall consider the petitioner's traffic violations record and liability insurance coverage before granting a stay or other temporary remedy pursuant to K.S.A. 77-616, and amendments thereto. If a stay is granted, it shall be considered equivalent to any license surrendered. If a stay is not granted, trial shall be set upon 20 days' notice to the legal services bureau of the department of revenue. No stay shall be issued if a person's driving privileges are canceled pursuant to K.S.A. 8-250, and amendments thereto.

(b) The clerk of any court to which an appeal has been taken under this section, within 10 days after the final disposition of such appeal, shall forward a notification of the final disposition to the division.

Sec. 3. K.S.A. 1993 Supp. 8-1014 is hereby amended to read as follows: 8-1014. (a) Except as provided by subsection ~~(e) and K.S.A.~~ (d) 8-2,142, and amendments thereto, if a person refuses a test, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall ~~suspend~~ *revoke* the person's driving privileges for one year *on a first or second occurrence and shall revoke the person's driving privileges for 3 years on a third or a subsequent occurrence.*

(b) Except as provided by subsection ~~(e)~~ and K.S.A. 8-2,142, and (d) amendments thereto, if a person fails a test *or has an alcohol or drug-related conviction in this state*, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall:

(1) On the person's first occurrence, ~~suspend~~ *revoke* the person's driving privileges for 30 days, then restrict the person's driving privileges as provided by K.S.A. 8-1015, and amendments thereto, for an additional ~~60 days~~ *180 days*; and

(2) on the person's second ~~or a subsequent~~ occurrence, ~~suspend~~ *revoke* the person's driving privileges for ~~one year.~~

~~(c) Except as provided by subsection (c) and K.S.A. 8-2,142, and amendments thereto, if a person has an alcohol or drug-related conviction in this state, the division shall:~~

5-2

drug-related conviction in this state.

~~(g)~~ *(f)* Upon restricting a person's driving privileges pursuant to this section, the division shall issue without charge a driver's license which shall indicate on the face of the license that restrictions have been imposed on the person's driving privileges and that a copy of the order imposing the restrictions is required to be carried by the person for whom the license was issued any time the person is operating a motor vehicle on the highways of this state. ~~If the person is a nonresident, the division shall forward a copy of the order to the motor vehicle administrator of the person's state of residence.~~

Sec. 4. K.S.A. 1993 Supp. 8-1015 is hereby amended to read as follows: 8-1015. (a) ~~A driver whose violations were committed in a commercial motor vehicle is exempt from utilizing the below-stated restrictions.~~ When subsection (b)(1) *or (b)(2)* of K.S.A. 8-1014, and amendments thereto, requires *or authorizes* the division to place restrictions on a person's driving privileges, the division shall restrict the person's driving privileges to driving only ~~under the following circumstances: In going to and returning from the person's place of employment and in going to and returning from a mandated alcohol education or treatment program~~ *a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed and maintained at the person's expense*.

~~(b) (1) When subsection (c)(1) of K.S.A. 8-1014, and amendments thereto, requires the division to place restrictions on a person's driving privileges, the division shall restrict the person's driving privileges to driving only under the following circumstances for a period of 60 days: In going to and returning from the person's place of employment and in going to and returning from a mandated alcohol education or treatment program.~~

~~(2) Upon expiration of the 60-day period provided by subsection (b)(1), the division shall restrict the person's driving privileges as provided by K.S.A. 8-292, and amendments thereto, for an additional 270 days, unless the convicting court, in lieu of such restrictions, has ordered the restrictions set out in subsection (b)(3).~~

~~(3) Upon convicting a person of an alcohol or drug related offense, the convicting court, in lieu of the restrictions set out in subsection (b)(2), may restrict the person's driving privileges to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed~~

and maintained at the person's expense. Any fine imposed by the court for the conviction shall be reduced by the court in an amount equal to the expense incurred by the person for obtaining, installing and maintaining the ignition interlock device.

(4) Upon a person's second or subsequent conviction for an alcohol related offense and the person had an alcohol concentration of .15 or more in the person's blood or breath, the convicting court shall restrict the person's driving privileges to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed and maintained at the person's expense. Any fine imposed by the court for the conviction may be reduced by the court in an amount equal to the expense incurred by the person for obtaining, installing and maintaining the ignition interlock device.

(e) [(b)] Upon expiration of the period of time for which restrictions are imposed pursuant to this section, the licensee may apply to the division for the return of any license previously surrendered by the licensee. If the license has expired, the person may apply to the division for a new license, which shall be issued by the division upon payment of the proper fee and satisfaction of the other conditions established by law, unless the person's driving privileges have been suspended or revoked prior to expiration.

(d) Violation of restrictions imposed under this section is a misdemeanor subject to punishment and suspension of driving privileges as provided by K.S.A. 8-291, and amendments thereto.

Sec. 5. K.S.A. 8-1017 is hereby amended to read as follows: 8-1017. (a) No person shall:

(1) Tamper with an ignition interlock device for the purpose of circumventing it or rendering it inaccurate or inoperative;

(2) request or solicit another to blow into an ignition interlock device, or start a motor vehicle equipped with such device, for the purpose of providing an operable motor vehicle to a person whose driving privileges have been restricted to driving a motor vehicle equipped with such device; or

(3) blow into or start a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to a person whose driving privileges have been restricted to driving a motor vehicle equipped with such device; *or*

(4) operate a vehicle not equipped with an ignition interlock device during the restricted period.

(c) (b) In addition to any other requirements of this section, the director of vehicles shall require a person to acquire insurance and for such person's insurance company to maintain on file with the division evidence of such insurance for a period of three years from the date such person's driving privileges are otherwise eligible to be reinstated after such person has been placed under restrictions pursuant to subsection (b) (1) or (b)(2) of K.S.A. 8-1014, and amendments thereto, or K.S.A. 22-2909, and amendments thereto.

The company of the insured shall immediately mail notice to the director whenever any policy required by this subsection to be on file with the division is terminated by the insured or the insurer for any reason. The receipt by the director of such termination shall be prima facie evidence that no financial security exists with regard to the person concerned.

{requested by Tuc Duncan, KS Wine and Spirits wholesaler and John Smith, Division of Vehicles}

54

(b) Violation of this section is a class ~~C~~ *A, nonperson* misdemeanor.

(c) In addition to any other penalties provided by law, upon receipt of a conviction for a violation of this section, the division shall revoke the person's driving privileges for a period of two years.

~~Sec. 6.~~ K.S.A. 8-255 and 8-1017 and K.S.A. 1993 Supp. 8-259, 8-1014 ~~and~~ 8-1015 are hereby repealed.

~~Sec. 7.~~ This act shall take effect and be in force from and after its publication in the statute book.

Sec. 6. K.S.A. 1993 Supp. 22-2909, see attached.

and 22-2909

Sec. 6. K.S.A. 1993 Supp. 22-2909 is hereby amended to read as follows: 22-2909. (a) A diversion agreement shall provide that if the defendant fulfills the obligations of the program described therein, as determined by the attorney general or county or district attorney, such attorney shall act to have the criminal charges against the defendant dismissed with prejudice. The diversion agreement shall include specifically the waiver of all rights under the law or the constitution of Kansas or of the United States to a speedy arraignment, preliminary examinations and hearings, and a speedy trial, and in the case of diversion under subsection (c) waiver of the rights to counsel and trial by jury. The diversion agreement may include, but is not limited to, provisions concerning payment of restitution, including court costs and diversion costs, residence in a specified facility, maintenance of gainful employment, and participation in programs offering medical, educational, vocational, social and psychological services, corrective and preventive guidance and other rehabilitative services. If a county creates a local fund under the property crime restitution and compensation act, a county or district attorney may require in all diversion agreements as a condition of diversion the payment of a diversion fee in an amount not to exceed $100. Such fees shall be deposited into the local fund and disbursed pursuant to recommendations of the local board under the property crime restitution and victims compensation act.

(b) The diversion agreement shall state: (1) The defendant's full name; (2) the defendant's full name at the time the complaint was filed, if different from the defendant's current name; (3) the defendant's sex, race and date of birth; (4) the crime with which the defendant is charged; (5) the date the complaint was filed; and (6) the district court with which the agreement is filed.

(c) If a diversion agreement is entered into in lieu of

further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567, and amendments thereto, the diversion agreement shall include a stipulation, agreed to by the defendant, the defendant's attorney if the defendant is represented by an attorney and the attorney general or county or district attorney, of the facts upon which the charge is based and a provision that if the defendant fails to fulfill the terms of the specific diversion agreement and the criminal proceedings on the complaint are resumed, the proceedings, including any proceedings on appeal, shall be conducted on the record of the stipulation of facts relating to the complaint. In addition, the agreement shall include a requirement that the defendant:

(1) Pay a fine specified by the agreement in an amount equal to an amount authorized by K.S.A. 8-1567, and amendments thereto, for a first offense or, in lieu of payment of the fine, perform community service specified by the agreement, in accordance with K.S.A. 8-1567, and amendments thereto; ~~and~~

(2) enroll in and successfully complete an alcohol and drug safety action program or a treatment program, or both, as provided in K.S.A. 8-1008, and amendments thereto, and specified by the agreement, and pay the assessment required by K.S.A. 8-1008, and amendments thereto; and

(3) accept and successfully complete restricted driving privileges for 180 days to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed and maintained at the defendant's expense. The defendant is also required to file evidence of insurance pursuant to K.S.A. 8-1014, and amendments thereto.

(d) If a diversion agreement is entered into in lieu of further criminal proceedings on a complaint alleging a violation other than K.S.A. 8-1567 and amendments thereto, the diversion agreement may include a stipulation, agreed to by the defendant, the defendant's attorney if the defendant is represented by an attorney and the attorney general or county or district attorney, of the facts upon which the charge is based and a provision that if the defendant fails to fulfill the terms of the specific

diversion agreement and the criminal proceedings on the complaint are resumed, the proceedings, including any proceedings on appeal, shall be conducted on the record of the stipulation of facts relating to the complaint.

(e) If the person entering into a diversion agreement is a nonresident, the attorney general or county or district attorney shall transmit a copy of the diversion agreement to the division. The division shall forward a copy of the diversion agreement to the motor vehicle administrator of the person's state of residence.

(f) If the attorney general or county or district attorney elects to offer diversion in lieu of further criminal proceedings on the complaint and the defendant agrees to all of the terms of the proposed agreement, the diversion agreement shall be filed with the district court and the district court shall stay further proceedings on the complaint. If the defendant declines to accept diversion, the district court shall resume the criminal proceedings on the complaint.

(g) Except as provided in subsection (h), if a diversion agreement is entered into in lieu of further criminal proceedings alleging commission of a misdemeanor by the defendant, while under 21 years of age, under the uniform controlled substances act (K.S.A. 65-4101 et seq., and amendments thereto) or K.S.A. 41-719, 41-727, 41-804, 41-2719, 41-2720, 65-4152, 65-4153, 65-4154 or 65-4155, and amendments thereto, the agreement shall require the defendant to submit to and complete an alcohol and drug evaluation by a community-based alcohol and drug safety action program certified pursuant to K.S.A. 8-1008, and amendments thereto, and to pay a fee not to exceed the fee established by that statute for such evaluation. If the attorney general or county or district attorney finds that the defendant is indigent, the fee may be waived.

(h) If the defendant is 18 or more years of age but less than 21 years of age and allegedly committed a violation of K.S.A. 41-727, and amendments thereto, involving cereal malt beverage, the provisions of subsection (g) are permissive and not

mandatory.

(i) Except diversion agreements reported under subsection (j), the attorney general or county or district attorney shall forward to the Kansas bureau of investigation a copy of the diversion agreement at the time such agreement is filed with the district court. The copy of the agreement shall be made available upon request to the attorney general or any county, district or city attorney or court.

(j) At the time of filing the diversion agreement with the district court, the attorney general or county or district attorney shall forward to the division of vehicles of the state department of revenue a copy of any diversion agreement entered into in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567, and amendments thereto. The copy of the agreement shall be made available upon request to the attorney general or any county, district or city attorney or court.

Substitute for HOUSE BILL No. 2490

By Committee on Judiciary

1-10

AN ACT concerning anatomical gifts; amending K.S.A. 8-243, as amended by section 1 of chapter 280 of the 1993 Session Laws of Kansas, 65-3210, 65-3212, 65-3213 and 65-3214 and repealing the existing sections.

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

Section 1. K.S.A. 8-243, as amended by section 1 of Chapter 280 of the 1993 Session Laws of Kansas, is hereby amended to read as follows: 8-243. (a) Upon payment of the required fee, the division shall issue to every applicant qualifying under the provisions of this act the driver's license as applied for, which license shall bear thereon the class or classes of motor vehicles which the licensee is entitled to drive, a distinguishing number assigned to the licensee, which may be the licensee's social security number, the name, date of birth, residence address, and a brief description of the licensee, a colored photograph of the licensee, a facsimile of the signature of the licensee or a space upon which the licensee shall write such licensee's usual signature with pen and ink immediately upon receipt of the license and the statement provided for in subsection (b). No driver's license shall be valid until it has been so signed by the licensee, and except as provided, no driver's license issued by the division shall be valid until a colored photograph of such licensee has been placed on the driver's license. At the time a driver's license is issued the photograph of the licensee shall have a background of one color if the licensee is then a person under 21 years of age and a background of a different color if the licensee is a person 21 years of age or older. Such background colors shall be selected by the director of vehicles and the colors selected shall be used consistently. The secretary of revenue shall prescribe a fee of not more than $2 and upon payment of such fee the division shall cause a colored photograph of such applicant to be placed on the driver's license. Upon payment of such fee prescribed by the secretary of revenue, plus payment of the fee required by K.S.A. 8-246, and amendments thereto, for issuance of a new license, the division shall issue to such licensee a new license containing a colored photograph of such licensee. A driver's license which does not contain a colored photo-

graph of the licensee as required may be issued to persons exempted from such requirement. Any such license shall be valid for the purposes of the motor vehicle drivers' license act and the division shall set forth upon such driver's license the words "valid without photo." Any person who is outside the state and for whom the division provides for renewal of the driver's license by mail is exempt from the requirement to have a colored photograph of such person placed on such person's driver's license. Any person belonging to a religious organization which has a basic objection to having their picture taken may sign a statement to that effect and such person shall then be exempt from the picture requirements of this section.

(b) All Kansas drivers' licenses *issued to any person 16 years of age or older* shall contain a form which provides a statement for making a gift of all or any part of the body of the licensee in accordance with the uniform anatomical gift act, except as otherwise provided by this subsection. The statement to be effective shall be signed by the licensee in the presence of two witnesses who shall sign the statement in the presence of the donor. ~~One such witness shall be the licensee's next of kin and the division shall designate one witness signature line on drivers' licenses for such use.~~ The gift becomes effective upon the death of the donor. Delivery of the license during the donor's lifetime is not necessary to make a valid gift. The gift shall become invalidated upon expiration, cancellation, revocation or suspension of the license, and the gift must be renewed upon renewal of each license. Any valid gift statement executed prior to July 1, 1994, shall remain effective until invalidated. The word "Donor" shall be placed on the front of a licensee's driver's license, indicating that the statement for making an anatomical gift under this subsection has been executed by such licensee.

Sec. 2. K.S.A. 65-3210 is hereby amended to read as follows: 65-3210. (a) Any individual of sound mind and ~~eighteen (18)~~ *18* years of age or more may give all or any part of ~~his~~ *such person's* body for any purpose specified in K.S.A. 65-3211, *and amendments thereto,* the gift to take effect upon death.

(b) Any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purpose specified in K.S.A. 65-3211, *and amendments thereto*:

(1) *The agent for health care decisions established by a durable power of attorney for health care decisions pursuant to K.S.A. 1993*

7-2

Supp. 58-625, et seq., and amendments thereto,

(2) the spouse,

~~(2)~~ *(3)* an adult son or daughter,

~~(3)~~ *(4)* either parent,

~~(4)~~ *(5)* an adult brother or sister,

~~(5)~~ *(6)* a guardian of the person of the decedent at the time of ~~his~~ *such person's* death,

~~(6)~~ *(7)* any other person authorized or under obligation to dispose of the body.

(c) If the donee has actual notice of contrary indications by the decedent or that a gift by a member of a class is opposed by a member of the same or a prior class, the donee shall not accept the gift. The persons authorized by subsection (b) may make the gift after or immediately before death.

(d) A gift of all or part of a body authorizes any examination necessary to assure medical acceptability of the gift for the purposes intended.

(e) The rights of the donee created by the gift are paramount to the rights of others except as provided by ~~K.S.A. 65-3215(d)~~ *subsection (d) of K.S.A. 65-3215, and amendments thereto.*

Sec. 3. K.S.A. 65-3212 is hereby amended to read as follows: 65-3212. (a) A gift of all or part of the body under ~~K.S.A. 65-3210(a)~~ *subsection (a) of K.S.A. 65-3210, and amendments thereto,* may be made by will. The gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated, or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective.

(b) A gift of all or part of the body under ~~K.S.A. 65-3210(a)~~ *subsection (a) of K.S.A. 65-3210, and amendments thereto,* may also be made by document other than a will. The gift becomes effective upon the death of the donor. The document, which may be a card designed to be carried on the person, must be signed by the donor in the presence of two ~~(2)~~ witnesses who must sign the document in ~~his~~ *the donor's* presence. If the donor cannot sign, the document may be signed for ~~him~~ *the donor* at ~~his~~ *the donor's* direction and in ~~his~~ *the donor's* presence in the presence of two ~~(2)~~ witnesses who must sign the document in ~~his~~ *the donor's* presence. Delivery of the document of gift during the donor's lifetime is not necessary to make the gift valid.

(c) The gift may be made to a specified donee or without specifying a donee. If the latter, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to

if such power of attorney conveys to the agent the authority to make decisions concerning organ donation (John McCabe, ULC)

7-3

a specified donee who is not available at the time and place of death, the attending physician upon or following death, in the absence of any expressed indication that the donor desired otherwise, may accept the gift as donee. The physician who becomes a donee under this subsection shall not participate in the procedures for removing or transplanting a part.

(d) Notwithstanding ~~K.S.A. 65-3215(b)~~ *subsection (b) of K.S.A. 65-3215, and amendments thereto*, the donor may designate ~~in his~~ *by* will, card, or other document of gift the ~~surgeon or~~ physician to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the gift may employ or authorize any ~~surgeon or~~ physician for the purpose. *The physician may direct an individual under such physician's supervision to carry out the appropriate procedures.*

(e) Any gift by a person designated in ~~K.S.A. 65-3210(b)~~ *subsection (b) of K.S.A. 65-3210, and amendments thereto,* shall be made by a document signed by him or made by his telegraphic, recorded telephonic, or other recorded message.

Sec. 4. K.S.A. 65-3213 is hereby amended to read as follows: 65-3213. *(a) The following persons shall make a reasonable search for the limited purpose of determining if there is a document of gift or other information identifying the bearer as a donor or as an individual who has refused to make an anatomical gift:*

(1) A law enforcement officer, firefighter, ~~paramedic~~, or other emergency rescuer finding an individual who the searcher believes is dead or near death; and

attendant, as defined in K.S.A. 65-6112, and amendments thereto (Chip Whelen, KMS)

(2) a hospital, upon the arrival of an individual at or near the time of death, if there is not immediately available any other source of that information.

(b) If a document of gift or evidence of refusal to make an anatomical gift is located by the search required by subsection (a)(1), and the individual or body to whom it relates is taken to a hospital, the hospital must be notified of the contents and the document or other evidence must be sent to the hospital.

(c) If the gift is made by the donor to a specified donee, the will, card, or other document, or an executed copy thereof, may be delivered to the donee to expedite the appropriate procedures immediately after death. Delivery is not necessary to the validity of the gift. The will, card, or other document, or an executed copy thereof, may be deposited in any hospital, bank or storage facility, or registry office that accepts it for safekeeping or for facilitation of procedures after death. On request of any interested party upon or

after the donor's death, the person in possession shall produce the document for examination.

(d) A person who fails to discharge the duties imposed by this section is not subject to criminal or civil liability.

Sec. 5. K.S.A. 65-3214 is hereby amended to read as follows: 65-3214. (a) If the will, card, or other document or executed copy thereof, has been delivered to a specified donee, the donor may amend or revoke the gift by:

(1) the execution and delivery to the donee of a signed statement~~, or~~;

(2) an oral statement made in the presence of two ~~(2)~~ persons and communicated to the donee~~, or~~;

(3) a statement during a terminal illness or injury addressed to an attending physician and communicated to the donee~~,~~; or

(4) a signed card or document found on ~~his~~ *such* person or in ~~his~~ *such person's* effects.

(b) Any document of gift which has not been delivered to the donee may be revoked by the donor in the manner set out in subsection (a) or by destruction, cancellation, or mutilation of the document and all executed copies thereof.

(c) Any gift made by a will may also be amended or revoked in the manner provided for amendment or revocation of wills or as provided in subsection (a).

(d) An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death.

Sec. 6. K.S.A. 8-243, as amended by section 1 of chapter 280 of the 1993 Session Laws of Kansas, 65-3210, 65-3212, 65-3213 and 65-3214 are hereby repealed.

Sec. 7. This act shall take effect and be in force from and after its publication in the statute book.

7-5