# FAMILY LAW UPDATE

## APPELLATE CASES FALL, 2019 – OCTOBER 16, 2020

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**ADOPTION-PROCEDURE AND JURISDICTION.** *In the Matter of the Adoption of E.D.*,57 Kan. App. 2d 500, 453 P. 3d 1202, review denied February 27, 2020, Docket No. 120,797, 2019 WL _____ (Nov. 2019-Johnson County Dist. Ct.). Adopting parents filed a petition to terminate mother's parental rights for failure to assume parental duties under K.S.A. 59-2136(h)(1)(G), for the two years before filing the petition to terminate parental rights, and to adopt E.D., then 14 years old. The evidentiary standard, clear and convincing evidence, was met, that mother failed to assume such duties. The adoptive parents sought and received a finding that mother's consent to the adoption was not needed because she failed to assume her parental duties. Once the district court terminated mother's parental rights, the adoptive parents, who were E.D.'s legal guardians, could then consent to the adoption, subject to court approval. The legal guardians/adoptive parents brought one, rather than a separate, petition, in which they both sought to terminate mother's parental rights and for the court's approval for the legal guardians to adopt. The appellate court found no issue with this approach, nor with mother's claim that consents by the legal guardians were not filed with the petition. Mother's claim that the district court lacked jurisdiction because of this failure to file the consents at the time the petition was filed (they were actually filed the next day or shortly thereafter) did not carry the day. Substantial compliance regarding filing the consents was sufficient. *In re Adoption of X.J.A.* 284 Kan. 853, 863, 166 P. 3d 396 (2007).

**ATTORNEY FEES ON APPEAL.** *In the Matter of Henson and Henson,* 58 Kan. App. 2d 167, 464 P.3d 963, 2020 WL _____, Docket No. 120,543 (April, 2020-Sedgwick-trial court reversed). Strict compliance with Rule 7.07 is required. Rule 7.07(b)(2) lists three items which must be included, in an **affidavit, not just a verified motion,** attached to the motion. The appellate court notes "...the attorney's verification of a motion, signed by a deputy clerk, [does not] constitute either an affidavit, or a declaration under penalty of perjury, which has the same effect as an affidavit." K.S.A. 53-601. Had the attorney used the declaration suggested by K.S.A. 53-601 instead of a verification for his motion, the affidavit requirement apparently would have been satisfied.

**ATTORNEY FEES ON APPEAL.** *In the Matter of the Marriage of Lask v. Lask*, Docket No. 122,147, 2020 WL 5849366 (Unpublished Ct. of App. Oct. 2020-Johnson- J. O'Grady affirmed). An analysis of the factors the appellate court considers appears on pages 26-29 of the opinion. The request for attorney fees was made under Supreme Court Rule 7.07(b)(1), which allows the appellate court to award attorney fees for services on appeal in a case where the district court had authority to award attorney fees, which authority for family law cases is found at K.S.A. 23-2715.

**CHILD SUPPORT—EFFECTIVE DATE OF MODIFICATION.** *In the Matter of the Marriage of Gronlie and Lynn*, Docket No. 121,023, 2020 WL 5849357, (Unpub. Ct. of App. October, 2020-Sedgwick). The standard on appeal is abuse of discretion in determining whether the district court set the correct effective date for modification of a child support order. The general rule, K.S.A. 23-3005(b), is that orders modifying child support are "retroactive to the first day of the month following the filing of the motion to modify." That was the rule the district court followed in this case. However, under K.S.A. 23-3001(b), child support automatically terminates once a child gains majority unless the parties have entered into a contrary written agreement approved by the court. *Brady v. Brady*, 225 Kan. 492, 592 P. 2d 865 (1979), by which child support was reduced pro rata when a child "aged out," (for example, if the order was $100.00 per month for two children, it became $50.00 per month when a child reached 18, graduated from high school, or other conditions were met) is no longer applicable in light of the adoption of the child support

guidelines, which call for recalculation of child support once one child is no longer receiving support. In this case, father continued to pay a support amount higher than he would have paid after recalculation, so the district court applied the rule of K.S.A. 23-3005(b), even though a child had "aged out" long before that date.

**CHILD SUPPORT ENFORCEMENT—FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS ACT.** *In the Matter of Henson and Henson,* 58 Kan. App. 2d 167, 464 P.3d 963, 2020 WL _____, Docket No. 120,543 (April, 2020-Sedgwick). The Full Faith and Credit for Child Support Orders Act, 28 USC 1738B(a)(1) establishes a general rule requiring a state to enforce the child support order of another state. It further prohibits a state from modifying another state's child support order if the issuing state has continuing, exclusive jurisdiction over the matter. A similar provision regarding custody matters appears in the UCCJEA, and K.S.A. 23-37,202(a). The issuing state retains continuing, exclusive jurisdiction to modify child support orders as long as one of the parties to the order continues to reside in the initiating state, unless all parties file written consent to jurisdiction in another state. *Compare* UCCJEA provision K.S.A. 23-37,202(a)(2). A void judgment is an absolute nullity and cannot serve as the basis for a valid judgment. **Highly** summarized: the parties were divorced. Kansas entered the initial child support orders. Mother and the children stayed in Kansas. Father moved, first to California, then to Colorado. California modified the Kansas order by substantially increasing it. The California judgment was registered as a Kansas judgment. Father did not object to that registration and Kansas took steps to enforce it. Years later, father moved to set aside the 2005 default Kansas judgment registering the California judgment, on grounds including that it was void, because, among other things, California had no jurisdiction to modify the initial Kansas child support judgment. The appellate court agreed; found the California court did not have jurisdiction to modify the Kansas child support order; found father's jurisdictional claim was not untimely because subject matter jurisdiction can be raised at any time; that father did not acquiesce by paying on a void judgment; and that the FFCCSOA preempts URESA (which at the time of the California modification was the law in California). The district court decision was reversed, and the case was remanded.

**CHILD SUPPORT—MEDICAL EXPENSE REIMBURSEMENT.** *In the Matter of the Marriage of Lask v. Lask,* Docket No. 122,147, 2020 WL 5849366 (Unpublished Ct. of App. Oct. 2020-Johnson- J. O'Grady affirmed). Child support awards are reviewed for abuse of discretion. The court has authority to determine how the parties will pay children's medical expenses. KCSG § IV.D.4.b. *In re Marriage of White,* Docket No. 118,050, 2018 WL 3077086*2 (Ct. of App. 2018, Unpublished). Under the Guidelines, medical expenses not covered by insurance are generally divided based on each parent's percentage of the parties' total income. The trial court entered a substantial judgment against father for unreimbursed medical expenses. Father's appeal argued (1) many of the claimed expenses were not "necessary" medical expenses (for example residential treatment for emotional issues); (2) that there should be a financial limit on uninsured medical costs to avoid "catastrophic liability for 'out-of-state' therapeutic educational facilities...." (3) expenses for transporting a child to and from residential treatment facilities; (4) ongoing therapy expenses; and (5)chiropractic expenses. The trial and appellate courts determined all these were reasonable and necessary expenses. Father also claimed mother waived reimbursement under the doctrine of laches by waiting too long to claim reimbursement for some expenses (incurred from 2009 through 2018). Both courts determined any delay by mother in presenting expenses for reimbursement was not unreasonable and father was not prejudiced by such delay. The judgment was for $92,299.92.

Father's post-divorce (2002) income increased to $700,000 annually by April, 2009, both factors the courts likely considered in determining the reasonableness of the parties' positions.

**CHILD SUPPORT—SANCTIONS FOR FAILURE TO REPORT INCOME INCREASE.** *In the Matter of the Marriage of Creagh and Hoff*, Docket No. 120,522, 2019 WL 6798969 (Unpub. Ct. of App. Dec. 13, 2019--Riley Dist. Ct.) The Riley district court's award of sanctions and attorney fees for ex-husband's failure to disclose change of income was upheld. Husband made unsuccessful argument that calculating his arrearages in child support, based on a higher support amount resulting from his increased income, for a period of time before his ex-wife filed a motion for child support modification constituted a retroactive child support modification not permitted by K.S.A. 23-3005(b). The appellate court also awarded attorney fees for the appeal and upheld the district court attorney fee award.

**COHABITATION—FAILURE TO MEET BURDEN OF PROOF.** *In the Matter of the Marriage of Wells*, Docket No. 120,839, 2019 WL 6634281 (Dec. 13, 2019 Unpublished Ct. of App.-Chase Dist. Ct.). The district court denied ex-husband's motion to terminate maintenance because wife was cohabiting. That decision was affirmed by the appellate court. A hearing was held in district court. The district court held husband failed to meet his burden of proof. **The Court of Appeals standard of review of a NEGATIVE finding by the district court is that the district court arbitrarily disregarded undisputed evidence or based its decision on some extrinsic consideration such as bias, prejudice, or passion.** The district court had to determine from the facts whether the couple was cohabiting. The appellate court won't reweight the evidence. **HOWEVER, THE APPEALS COURT SAID IT WOULD HAVE FOUND COHABITATION FROM THE SAME EVIDENCE FROM WHICH THE DISTRICT COURT DID NOT FIND COHABITATION, but because of the appellate review standard, would not reverse the decision.** Cases finding no cohabitation were cited, and include *Marriage of Kuzanek*, 279 Kan. 156, Syl. 1 (2005); *Marriage of Wessling*, 12 Kan. App. 2d 428, 432, 747 P.2d 187 (1987); *In re Marriage of Kopec*, 30 Kan. App. 2d 735, 737-8, 47 P. 3d 425 (2002); and *In re Marriage of Cragh and Hoff*, Docket No. 119,705, 2019 WL 3978561 (2019). Cases finding cohabitation include *In re Marriage of Knoll*, 52 Kan. App. 2d 930, 933, 935-36, 381 P. 2d 490 (2016) and *In re Marriage of Solar*, Docket No. 102,631, 2010 WL 4156761 at *1-3(Kan. App. 2010). Financial gain appears to be a deciding factor in the cases, whether or not the parties actually live under the same roof.

**CUSTODY AND PARENTING TIME—MOVE AWAY—STANDARDS OF REVIEW**. *In the Matter of the Marriage of Smith*, Docket No. 120,758, 2019 WL 5475172 (Unpublished Ct. of App. October 25, 2019-Reno Dist. Ct.). A district court's decision to grant or deny a motion to modify a child custody or residency order will not be disturbed in the absence of an abuse of discretion. *In re Marriage of Grippin*, 39 Kan. App. 2d 1029, 1031, 186 P. 3d 852 (2008). An appellate court reviews the evidence in the light most favorable to the prevailing party to determine if the district court's factual findings are supported by substantial competent evidence and whether they support the court's legal conclusions. The children's best interests is the legal test. K.S.A. 23-3201. In this case, because father did not take steps to prevent his former step-daughter's access to sexually explicit photos, **even though there was no testimony the teen-aged girl suffered any emotional trauma from such exposure**, the district court, upheld by the appellate court, found the child's emotional needs were better met by mother, and that father, while he did not know how the girl obtained access to the photos, "should have known," and that "parents have a responsibility to monitor the information and images to which their children are exposed." **In this case, the child who was exposed to the photos was not the subject of the dispute.** The subject child's parents had a shared custody arrangement. Mother moved to pursue an employment opportunity. Father moved to modify the arrangement, asking the district court to modify it to make him the "permanent primary

residential custodian" and essentially leave her with father while mother moved. The motion was denied for the reason(s) set out.

**CUSTODY AND PARENTING TIME—MOVE AWAY.** *In the Matter of the Marriage of Fireoved*, Docket No. 120,893, 2019 WL 5474302, (Unpublished Ct. of App. October 25,2019-Leavenworth Dist. Ct.). The parents of a female child divorced. Mother had residential custody. Father had parenting time. A few years later, mother moved from Basehor to Wichita. Father filed a motion for residential custody. Father won at both the district court and appellate court levels. According to the CCI, both parents had good relationships with their daughter. The CCI recommended father. The child had "her" room at her father's home; and his neighborhood is "her" neighborhood. Her friends lived closed to father's home. In Wichita, she would be 3 hours from her father. It would be difficult for him to travel to Wichita. In other words, the court did not want, and saw no reason, to remove the child from that part of the state that was her "home." She would continue in the same school; sleep in the same house she had slept in; and would have family around. "Stability" was the key according to the district court.

**CUSTODY AND PARENTING TIME—MOVE AWAY.** *In the Matter of the Marriage of Ray and Fellers*, Docket No. 121,011, 2020 WL 2502234 (Unpublished Ct. of App. May 15, 2020-Saline Dist. Ct.). The parties were divorced in Saline County. Temporary orders in the case granted mother residential custody, but provided the parties' son, born in 2014, could not be moved from Saline County without further order of the court. The opinion says mother and father were married in 2012. Their son was born in 2014. Mother filed for divorce in Saline County in 2017 "which the District Court granted in 2018." While the divorce was pending, the District Court issued a temporary order granting mother and father joint custody of their son, with mother as the residential parent. The temporary order provided their son could not be moved from Saline County without further order from the District Court and ordered father to pay $623.00 per month in child support during the pendency of the case. Mother filed a motion for modification of the temporary child support order, requesting father be required to pay daycare expenses for their son, which would result in a monthly child support payment of $1,074.00. The District Court denied her motion, stating its temporary orders would remain in effect. The parties reached an agreed permanent parenting plan by way of mediation in June, 2018. On July 6, 2018, less than two weeks after the permanent parenting plan agreement was reached, mother sent father her written notice she intended to move with their son to Tulsa, Oklahoma or Lawrence, Kansas. Father filed an objection to mother's proposed move and further requested the District Court grant him residential custody of the child. After a three day hearing on mother's request to move, and father's request for change of custody, the District Court issued a written order denying mother's request to move and father's request for residential custody. Among other things, the court found a move further away from father would further deteriorate the bond between father and the child. In affirming the District Court, the Court of Appeals, besides the usual basics, pointed out that **the burden of proof is on the party seeking a change in the current child custody order.** Here, mother was seeking a change in an existing order to the extent it required the child remain in Saline County. The District Court properly placed the burden on her to justify moving to Lawrence. **Father had the burden to show a material change in circumstances warranted a change in the District Court's order as to the residential parent, not the location of the child's residence. Mother had the burden on the location of the child's residence.** Both parties failed. The statutes at issue were K.S.A. 23-3222(c), setting forth the requirements for a change in the child's residence, and K.S.A. 23-3203(a), which the court would have to use to decide custody. Further, because the court determined that its child support order was temporary, the Appellate Court had no jurisdiction to consider its modification. The

case is instructive, therefore, on the burdens of proof and on the court's jurisdiction to modify a so-called temporary order, even though the "temporary order" to which the Appellate Court referred was the temporary order entered when the case was filed, and even though the divorce had been granted. It appears the parties were still operating under the temporary child support order, the granting of the divorce notwithstanding.

**CUSTODY AND PARENTING TIME—23-3203 FACTORS.** *Peralta-Diaz v. Ortega*, Docket No. 120,291, 2020 WL 593938 (Unpublished Ct. of App. Feb.7,2020-Sedgwick Dist. Ct.). "Although the district court ought to assess all of the relevant factors, its final order need not catalogue each of them or recapitulate in detail the evidence pertinent to each....The order may sweep more broadly in describing the evidence and the reasons for the ultimate custody determination."

**CUSTODY AND PARENTING TIME-SHARED RESIDENCY.** *Marriage of Brownback*, Docket No. 121,089, 2020 WL 2296943 (Unpublished Ct. of App., May, 2020 – Linn Dist. Ct.) Mother appealed the District Court's order that mother and father share residency of their son born in January, 2017. They were married in September, 2014. In August, 2017, father filed for divorce. There were allegations of domestic battery, for which father was arrested and charged, but for which, after he completed an anger management course, the charge was dismissed; and there were other allegations of incidents of domestic violence. The court, contrary to the GAL's recommendation, refused to designate a residential parent due to concerns that the residential parent would use the child's residency as a weapon against the other parent, and ordered a shared parenting time schedule, with the parties alternating weekly the minor's residency. Citing the broad discretion of the trial court, and that the District Court does not need to make specific factual findings on the record about each factor listed in K.S.A. 23-3203, the Appeals Court held "we cannot conclude that no reasonable person would agree with the district court's shared residency order as being in [the child's] best interest," found there was no abuse of discretion by the District Court, and affirmed its decision.

**MAINTENANCE TERMINATION v. MODIFICATION—COHABITATION CLAUSE IN PSA.** *Welter v. Welter,* Docket No. 121,605, _____ Kan. App. 2d _____, _____ P. 3d _____, 2020 WL 5490930 (September 18, 2020-Miami Dist. Ct.-- Trial court reversed). *Syl 1.* Spousal maintenance payments automatically cease upon the payee's cohabitation when the judgment awarding maintenance so provides, in the absence of statutory provisions to the contrary. *Syl. 2*. When a divorce decree states that a certain event shall terminate maintenance and the district court finds that terminating event occurred, which in this case was ex-wife's cohabitation, the district court lacks the power to modify, rather than terminate, maintenance. *Syl. 3* The district court has wide discretion to adjust the financial obligations of the parties **in initially determining maintenance**, within the limits of the statutes governing maintenance. Once the divorce decree is filed, the court's ability to "do equity" is curtailed by the express provisions of the divorce decree and by the governing statutes. The court abuses its discretion by trying to do under its equitable powers that which is contrary to the terms of the divorce decree or maintenance statutes. Even though the district court found the ex-wife had violated the cohabitation termination condition in the divorce decree, and the ex-wife admitted at hearing that she received a material financial gain or benefit from her relationship and residence with her boyfriend, the district court reduced the term of husband's maintenance by nine months rather than terminating it. Nine months was the period of time during which ex-wife had cohabited with her by then ex-boyfriend.

On review, the issues are (a) whether the trial court's factual findings are supported by substantial

competent evidence, and (b) whether the trial court abused its discretion, which the Court of Appeals found it did.

**MAINTENANCE--MEDIATION AGREEMENT EFFECT**. *Nelson v. Nelson*, Docket No. 120,745, 2020 WL 2296959 (Unpublished Ct. of App. May, 2020 – Saline Dist. Ct.). The issue in this case is whether mother may now collect "unpaid maintenance," when she entered into a mediated settlement agreement with the father of her children that father's maintenance obligation would be offset by mother's child support obligation, such that neither party would make a payment to the other through the minorities of the children. The District Court concluded she could not. The Court of Appeals agreed.

The agreement of the parties said "the parties agree to and accept the Child Support Worksheet which is attached to this agreement. This Worksheet provides that Dad owes maintenance to Mom in the amount of $549.00 per month and Mom owes child support to Dad in the amount of $565.00 per month. The agreement provides "*The parties agree that these amounts will offset each other so that neither party makes a payment to the other party throughout the minority of the minor children*. In the event that Dad makes a request for child support, Dad shall automatically be ordered to pay maintenance in the amount that offsets the amount of child support that was ordered to be paid by Mom." At the time this agreement was entered into, Mom and Dad had joint custody of their children, and Dad had primary residential custody. Thereafter, father moved out of state; mother was granted primary residential custody of the children by agreement; and two years later mother filed a "motion to modify parenting plan and child support, and a motion to enforce order for maintenance and a motion for judgment." Pointing out that the District Court did not modify either child support or maintenance when she was granted residential custody of the children, she alleged she had received no financial assistance from the father in the two years since she had been granted residential custody. The trial court modified the parties' child support obligation going forward but denied mother's request for unpaid maintenance through July, 2017, because the mediation agreement showed the parties intended a maintenance provision as an offset for child support, meant to nullify mother's child support obligation. K.S.A. 23-2712(b) limit the court's ability to modify a number of matters, including maintenance, settled by agreement in a divorce. The appellate court found the District Court did not err in concluding mother was using maintenance-which the parties never intended to enforce-as a "proxy" for a previously non-existent child support obligation.

**MAINTENANCE—MODIFICATION**. *In the Matter of the Marriage of Calvert*, Docket No. 121,724, 2020 WL 3113004 (Unpublished Ct. of App. June, 2020-Johnson Dist. Ct.; J. Moriarty affirmed). The appellate review standards are: substantial competent evidence and abuse of discretion. In this case, Judge Moriarty entered a maintenance order in a **default hearing** in which husband failed to appear, as he did in subsequent matters initiated by wife. Due to a reduction in income, husband filed a motion to terminate maintenance. The court, based on husband's testimony, temporarily reduced husband's maintenance, but did not modify the original award, and ruled the original amount would resume unless husband provided additional evidence that he could not find a job at the level of income the court used in its initial award. While the statute, K.S.A. 23-2903, provides the district court "may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due," and that "maintenance may be reduced upon a showing of a material change of circumstances," *In re Marriage of Ehinger*, 34 Kan. App. 2d 583, 587, 121 P. 3d 467 (2005), *rev. denied* February 14, 2006, **in this case the material change of circumstances test did not apply because the district court's original maintenance order was granted by default considering only wife's testimony**. When a support order is entered by default, the court may consider evidence from the first proceeding

and enter an order **regardless** of whether a material change in circumstances exists. *Johnson v. Stephenson*, 28 Kan. App. 275, 281-82, 15 P. 3d 359 (2000).

**PARENTING TIME OUTSIDE THE U.S. DENIED.** *Davis v. Garcia-Bebek,* _____ Kan. App. 2d _____, _____P. 3d _____(Sedgwick County, trial court affirmed July 25, 2020), Docket No. 121,110, 2020 WL 4250034. Very highly summarized, the father left Kansas to live in Peru with "outstanding criminal charges pending in the United States District Court for the District of Kansas." The district court denied his request to exercise parenting time with his children in Peru. While father remained free to return to Kansas to exercise the parenting time set forth in the parenting plan approved by the court, he was not free to exercise it in Peru. Among other things, including prior guilty pleas to voter fraud, father was indicted for knowingly and intentionally procuring, contrary to law, naturalized U.S. citizenship, for failing to disclose felony crimes committed while in the U.S. on his naturalization application. The entitlement to reasonable parenting time set out in K.S.A. 23-3208(a) is a rebuttable presumption, overcome if the court finds, after hearing, "that exercise of parenting time would seriously endanger the child's physical, mental, moral or emotional health." Said the court: "It is undisputed there is an outstanding indictment in a criminal case for his arrest that could be issued at any time should he return to the United States. What more evidence does he want?"

**PARENTING TIME MODIFICATION.** *Marriage of Stockman*, Docket No. 121,818, 2020 WL 1814470 (Unpublished Ct. of App. April 10, 2020-Thomas Dist. Ct.). A modification of child custody, residency and parenting time must consider the best interests of the child, K.S.A. 23-3201, and the arrangements may be modified upon a showing of a material change of circumstances, K.S.A. 23-3218(a), so substantial and continuing so as to make the terms of the initial decree unreasonable. *In re Marriage of Whipp*, 265 Kan. 500, Syl. 3, 962 P. 2d 1058 (1998). Appellate courts review a district court's custody determination for an abuse of discretion. *In re Marriage of Rayman*, 273 Kan. 996, Syl.1, 47 P.3d 413 (2002). In this case, mother, the primary custodian, moved from Hayes, Kansas to Oregon, and then to Alaska. Father moved for a change of custody, for reasons including difficulty communicating with his son; increased travel time and expense; and issues with the long distance parenting time he did have. The district court denied father's motion, and the Court of Appeals affirmed the district court. Among other things, the court determined "there was no evidence that the moves had a detrimental effect on A.S. And though the move to Alaska might be inconvenient for A.S.'s readjustment and greater distance from [father] in Kansas, ...the benefits of the current arrangement outweighed the costs of changing A.S.'s primary residence." The district court reduced father's child support obligation and made orders concerning his alleged child support arrearage.

**PRACTICE TIP—DECLARATIONS**. K.S.A. 53-601. These declarations may be used in place of verifications and affidavits. So, when having clients sign divorce petitions or motions or DRA's, for example, and there is no notary or they are being signed and scanned, emailed or faxed, have them sign the declaration instead of the notary. *In the Matter of Henson and Henson,* 58 Kan. App. 2d 167, 464 P.3d 963, 2020 WL _____, Docket No. 120,543 (April, 2020-Sedgwick Dist. Ct.). Declarations have the same effect as affidavits. They are not the same as verifications.

**PRENUPTIAL AGREEMENT—PAROL EVIDENCE—DEED LANGUAGE**. *In the Matter of the Marriage of Nelson,* ____ Kan. App. 2d _____, ____ P.3d _____, Docket No. 122,190, 2020 WL _____ (Oct. 2, 2020-Marion Dist. Ct.). Parol evidence is inadmissible to contradict, vary, change, or restrict the terms of a valid deed, except in instances of fraud or mutual mistake. When a deed indicates that land is owned by

"joint tenants with right of survivorship," courts must give effect to that intention. The parties' prenuptial agreement had a specific provision that "[a]ny properties titled in the names of the parties as joint tenants with rights of survivorship or as tenants in common shall be divided equally between them". Wife filed for separate maintenance from husband. Both husband and wife had brought separate property into the marriage. Husband claimed certain property purchased during the marriage by the parties, which they held as joint tenants with right of survivorship, had been purchased with proceeds from the sale of his separate pre-marital property, thus making it substitute separate property. Husband testified he **did not intend** for those properties to be jointly titled, the language of the deeds notwithstanding. While the trial court found the Antenuptial Agreement was ambiguous as to how the husband's premarital properties should be handled, **thus considering intent in the manner in which subsequently purchased property was titled,** the appellate court disagreed in reversing and remanding the case. The appellate court found there was no ambiguity in the language of the prenuptial agreement, which specifically stated "[a]ny properties titled in the names of the parties as joint tenants with rights of survivorship or as tenants in common shall be divided equally between them." Because husband **intended** the properties so titled to be titled differently than they were, as they were purchased with proceeds from the sale of his separate properties by definition under the terms of the prenup, that intent should be given effect. The appellate court disagreed.

**RECUSAL.** *Peralta-Diaz v. Ortega*, Docket No. 120,291, 2020 WL 593938 (Unpublished Ct. of App. February 7, 2020-Sedgwick Dist. Ct.). After a temporary order granting father primary residential custody, mother filed a motion for new trial or to amend the judgment, arguing the district judge was not impartial, because **at the pretrial conference**, the judge impermissibly favored father because the judge said he was "leaning toward placing primary custody with father." The Court of Appeals decided such language was not prejudicial, and that, under K.S.A. 20-311d, if mother wanted to pursue disqualification, she had to immediately file a legally sufficient affidavit (the requirements of which are recited in the opinion) with the chief judge, stating the grounds upon which she relied. Further, she did not file a timely motion to recuse before trial. K.S.A. 20-311f requires a party to move for a change of judge "within seven days after pretrial, or after receiving written notice of the judge before whom the case is to be heard, whichever is later." In this case, the pretrial was in early May. The evidentiary hearing on primary custody was in late June. **The motion for disqualification was filed July 23**, more than two months after the judge made the allegedly prejudicial comments, **3 days** after the temporary order granting father temporary primary residential custody. The court characterized this as a "**shabby litigation tactic**." Thus, the case had been heard and was under advisement when the motion was filed. **The specifics of what a legally sufficient affidavit should contain are outlined in this decision.**