I. Introduction

This chapter summarizes legislative and judicial developments in the area of family law, including decisions of the Kansas Supreme Court and the Kansas Court of Appeals from April 2017 to March 2018. Unpublished opinions related to family law tend to have persuasive value with respect to issues not otherwise addressed in published opinions, and can be helpful to district court judges and family law practitioners. Accordingly, this chapter will briefly summarize relevant unpublished opinions as well.

II. Legislative Developments.

Several important changes in 2017 recognize the impact of domestic and sexual violence on our communities. The Protection from Abuse Act (PFAA) and Protection from Stalking Act (PFSA) were both amended to broaden protection under the Acts to include victims of sexual assault. The PFSA is now the Protection from Stalking or Sexual Assault Act (PFSSAA). The definition of sexual assault, codifies *Kerry G. v. Stacy C.*, 53 Kan. App. 2d 218, 386 P.3d 921 (2016) and defines sexual assault as 1) a nonsexual sexual act; or 2) An attempted sexual act against another by force, threat of force, or duress, or when the person is incapable of giving consent.

Of particular importance to family law practitioners, the Kansas Legislature expanded the definition of domestic abuse for purposes of the best interest of the child analysis. The factors listed in K.S.A. 23-3201 previously required the court to consider "evidence of spousal abuse, either emotional or physical." The revised language requires the court to consider evidence of domestic abuse, including but not limited to: (A) A pattern or history of physically or emotionally abusive behavior or threat thereof used by one person to gain or maintain domination and control over an intimate partner or household member; or (B) an act of domestic violence, stalking or sexual assault.

The Legislature also made changes in criminal law, broadening the relationship requirement for a domestic battery beyond family or household members, to include those who are or have been in a dating relationship.

III. Judicial Developments.

A. Extension of Final Protection Orders

In *Kerry G. v. Stacy C.*, _____ Kan. _____, 411 P.3d 1227 (2018) the court of appeals revisited the protection from abuse action filed by Kerry G. against Stacy C. (*Kerry G. v. Stacy C.*, 53 Kan. App. 2d 218, 386 P.3d 921 (2016)), covered in this

chapter last year). Kerry requested a one-year extension of the PFA order pursuant to K.S.A. 2016 Supp. 60-3107(e)(1), which provides that upon "motion of the plaintiff," a PFA order "may be extended for one additional year." The district court granted the request without a hearing. Stacy filed a motion to set the extension aside, claiming his due process rights were violated because he was not served with the motion and therefore had no notice or opportunity to be heard on the issue. The district court held that Stacy was not entitled to notice of the motion, was not entitled to a hearing before the order was extended, and that it was within the discretion of the Court to issue an extension without notice or a hearing.

On appeal, the panel considered not only the language of K.S.A. 2016 Supp. 60-3107(e)(1), but the broader application of the code of civil procedure to all proceedings under the PFAA. Pursuant to K.S.A. 2016 Supp. 60-207(b), a request for a court order must be made by motion, which must (A) be in writing, unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought. A written motion, except one that may be heard ex parte, must be served on the defendant, generally at least seven days prior to the hearing if the motion includes a hearing date. K.S.A. 2016 Supp. 60-207(a)(a)(1)(D); K.S.A. 2016 Supp. 60-206(c)(2). Because Stacy was represented by an attorney in the matter, service must be made on the attorney as required by K.S.A. 2016 Supp. 60 205(b)(1).

Kerry's motion failed to set forth "with particularity the grounds for" the extension of the order; it stated only that the plaintiff requested an extension. The panel noted that even if Stacy had been served properly with the motion prior to the hearing, "its contents were woefully inadequate to put him on notice as to why Kerry believed an extension of the PFA order was necessary." Stacy's statutory right to notice and an opportunity to be heard at a meaningful time and in meaningful manner, a right that mirrors his constitutional right to due process, was violated.

Moreover, if Kerry had been properly served with the motion to extend the PFA order, he would have had a right, although not a duty, to file a response, which response must be served on the plaintiff at least one day prior to the hearing. K.S.A. 2016 Supp. 60-206(c)(2). The code of civil procedure gives the trial court discretion to grant an extension of time, an option not afforded to Stacy because he had no advance notice of the motion or the hearing. See K.S.A. 2016 Supp. 60-206(b).

The panel then considered whether an evidentiary hearing must be conducted to determine if the PFA order should be extended for one year. K.S.A. 2016 Supp. 60-3107(e)(1) does not require an evidentiary hearing, but Supreme Court Rule 133(c)(1) permits a party to request oral argument, either in the motion or in a response. A court is not required to grant the request and may simply state that oral argument would not aid the court materially. If neither party requests oral

argument, the court may set the matter for hearing or rule on the motion immediately. Supreme Court Rule 133(c)(2). Had he been properly served, Stacy may have requested oral argument, although it may not have been granted.

Ultimately the court of appeals vacated the order granting the extension. The violation of Stacy's statutory rights was not harmless "because it subjected Stacy to an order that limited his movement and subjected him to potential criminal and civil penalties—all without notice of the allegations against him and an opportunity to present his disagreement to the district court."

Stacy's final argument on appeal, that K.S.A. 2016 Supp. 60-3107(e)(1) is unconstitutionally vague, was unsuccessful. While K.S.A. 2016 Supp. 60-3107(e)(1) does not contain clear language as to what conduct would result in an extension of the protective order, the provision gives fair warning to those subject to it, when read in context of the PFAA as a whole. K.S.A. 60-3101 et. seq. A defendant subject to a PFA order as a result of abusing an intimate partner or household member may also be subject to an extension of the order. And while the statute provides the trial court with broad discretion over extensions, the trial court's decision must be based on good cause shown and be reasonably necessary for the protection of the plaintiff from bodily injury or threats of bodily injury.

In *Dreiling v. Dreiling*, No. 115,469, 2017 WL 1426046 (Kan. App. April 21, 2017) (unpublished opinion), the court of appeals addressed the extension of a protection from abuse order under K.S.A. 2015 Supp. 60-3107(e)(2). K.S.A. 2015 Supp. 60-3107(e)(2) states that following an evidentiary hearing "the court shall extend a protective order for not less than two additional years and may extend the protective order up to the lifetime of the defendant" if the plaintiff establishes the defendant had been convicted of a person felony against the plaintiff or someone in plaintiff's household. The initial PFA order protected the plaintiff and the parties' two minor children. Despite being personally served with the petition for protection from abuse and notice of hearing on the matter, defendant failed to appear at the final hearing and the order was granted for an initial period of one year. Plaintiff moved the trial court to extend the order for a minimum of two or more years, citing defendant's conviction for aggravated burglary against plaintiff in 2014. Defendant objected to the extension on several grounds. In this answer, he also stated that if the trial court ultimately granted the plaintiff's motion, he requested the trial court consider modifying the PFA order to exclude his minor children from the extension.

K.S.A. 2015 Supp. 60-3107(e)(2) states that courts "shall" grant the extension of the PFA order if the plaintiff can establish the defendant committed a person felony against the plaintiff or someone in the plaintiff's household. Relying to the clear language of the statute, the trial judge believed he was barred from considering defendant's motion to amend the PFA order because he was required to extend the order as to the minor children pursuant to K.S.A. 2015 Supp. 60-3107(e)(2).

On appeal, defendant argued the trial court improperly failed to exercise its discretionary authority to consider his motion to exclude his minor children from the PFA order. His conviction was not against the minor children, it was against plaintiff. And the trial court is authorized to amend its order of protection at any time upon motion filed by either party. K.S.A. 2015 Supp. 60-3107(f). The court of appeals agreed, reversed the trial court's decision and remanded the matter with directions to exercise its discretionary authority to consider defendant's motion to exclude his minor children from the extended PFA order.

B. Protection from Stalking Against Neighbors and Co-Workers

In the first of two neighbor stalking cases, the Kansas Court of Appeals addressed the standard under which to evaluate allegations of stalking from a minor child's perspective. In *C.M. for & on behalf of A.M. v. McKee*, 54 Kan. App. 2d 318, 398 P.3d 228 (2017), Mother and Father both filed protection from stalking petitions against their neighbor of 10 years. Mother also filed a petition on behalf of her 11- year-old daughter. The relationship with the neighbor had evidently become strained due to complaints about yard conditions. The deterioration of the relationship culminated in the entry of a final protection from stalking order against McKee on behalf of the child. The parents' petitions were denied. On appeal, McKee claimed there was insufficient evidence of stalking as that term is defined by K.S.A. 2016 Supp. 60-31a02(a)-(c).

The 11 year-old child described three incidents involving McKee. First, she said McKee "jumped out of the bushes" as she was walking home with a friend in an alley behind McKee's home. Second, she said he frightened her by "yelling at her and her friends from his yard" when she kicked an old plastic bottle over the fence and into his yard. And third, she said she was in a car driven by her Father when McKee drove toward them in his truck from the opposite direction. She said he took his hands off the steering wheel and his truck swerved towards the car she was in. Father's testimony regarding the third incident was that he saw McKee driving toward him while "waving, laughing, and pointing" at Father. In its ruling granting the petition on behalf of the child, the district court specifically noted the evidence regarding the second and third incidents was sufficient to enter a protection from stalking order.

"Stalking" is the "intentional harassment of another person that places the other person in reasonable fear for that person's safety." K.S.A. 2016 Supp. 60-31a02(a). "Harassment" is "a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose." K.S.A. 2016 Supp. 60-31a02(b). And a "course of conduct" is "conduct consisting of two or more separate acts over a period

of time, however short, evidencing a continuity of purpose which would cause a reasonable person to suffer substantial emotional distress." K.S.A. 2016 Supp. 60-31a02(c). The statute also contains a provision excluding "constitutionally protected activity" from the definition of course of conduct. As with other civil cases, these facts need only be proved by a preponderance of the evidence, meaning it is more likely than not that the facts are true. See K.S.A. 2016 Supp. 60-31a05(a).

In deciding whether stalking has taken place when the plaintiff seeking a protection from stalking order is a child, the court must view the circumstances from the viewpoint of a reasonable child of the plaintiff's age, not a reasonable adult. McKee argued on appeal the two acts noted by the trial court- yelling over a fence and McKee's driving his truck toward Father's car- should not cause a reasonable 11-year-old to fear for her safety or suffer substantial emotional distress. The panel found it difficult to reach that conclusion as well, but relied instead on the other two "separate acts" to affirm the trial court's final PFS order, noting the district judge found A.M. a credible, truthful witness. The child's testimony about McKee jumping out of a bush satisfies the definition of stalking; it was intentional and directed at the child, had no legitimate purpose, and "would be alarming to a reasonable 11-year-old girl."

Complaints of encroaching plants and a confrontation at library story time led to the neighbor dispute in *Haixu Li v. Jing Yang*, 399 P.3d 883, 2017 WL 3327096 (Kan. Ct. App. 2017)(unpublished opinion). In support of her petition for protection from stalking against her next-door neighbor, Li testified she was afraid Yang would hit her and afraid when Li blocked her exit during a conflict at the public library. Although her testimony on cross-examination was somewhat conflicting, the court of appeals declined to reweigh the conflicting evidence, citing *Wentland v. Uhlarik*, 37 Kan. App. 2d 734, 159 P.3d 1035 (2007). Because Li actually testified that Yang's actions made her afraid for her physical safety, the evidence was sufficient to support the district court's finding that Yang's conduct made Li afraid. The further found the evidence was sufficient to satisfy the objective component of a protection from stalking claims; the determination that a person is seriously alarmed, annoyed, tormented, or terrorized is to be based both on the victim's subjective conclusion as well as the objective standard of whether a reasonable person would be in fear for his or her safety. *Smith v. Martens*, 279 Kan. 242, 106 P.3d 28 (2005).

The primary issue in *Cordova v. Coldiron*, No. 117,471, 2017 WL 5907662 (Kan. App. Dec. 1, 2017) (unpublished opinion) was whether the defendant in a protection from stalking action had committed two or more separate acts of stalking directed at the plaintiff. Cordova and Coldiron worked for the same employer, in the same department. It was alleged that Coldiron's husband had cheated on her with Cordova's sister 15 years ago. The plaintiff testified about several interactions with defendant that she claimed constituted stalking. The district court ruled that an

incident that occurred on February 9th was actually two separate incidents- a conversation in a private room and then a separate conversation soon after at Cordova's desk, which were sufficient to create fear in a reasonable person's mind. And although a third incident could be interpreted as having a legitimate, work-related purpose, when considered in the context of the February 9th incident, the same comment could be interpreted as a physical threat. On appeal, the trial court's determination that the February 9th incidents constituted two separate acts of stalking was upheld. The language of K.S.A. 2016 Supp. 60-31a02 clearly states the separate acts may occur over a period of time, however short. The required separation need not be substantial. Such a reading aligns with the Act's "guiding directive that it should be liberally construed in favor of stalking victims." The defendant's conduct must evidence a "continuity of purpose which would cause a reasonable person to suffer substantial emotional distress." K.S.A. 2016 Supp. 60-31a02(c). Cordova disengaged from the conversation in the private room and returned to her desk, thus separating the two incidents.

C. Voluntary Acknowledgment of Paternity (VAP)

In *State ex rel. Sec'y of Dep't for Children & Families v. Smith*, 306 Kan. 40, 392 P.3d 68 (2017), the Kansas Supreme Court considered the effect of a voluntary acknowledgment of paternity (VAP) as defined by K.S.A. 2016 Supp. 23–2204. Smith signed a VAP at the hospital shortly after I.M.S.'s birth on May 18, 2000. Notably, neither Smith, the minor child's mother, the State, nor anyone else asserts—or has ever asserted—that Smith is actually I.M.S.'s natural (or biological) father.

The State of Kansas *ex rel.* the Secretary of Social and Rehabilitation Services (now the Department for Children and Families [DCF]) filed a Petition for Support against Smith on behalf of I.M.S. after the minor child's mother assigned I.M.S's support claim pursuant to K.S.A. 2008 Supp. 39–709. Smith consistently denied paternity of I.M.S., and denied reading the VAP before signing it. After an evidentiary hearing, the district court concluded Smith was I.M.S.'s father based on the VAP because he failed to prove his signature had been obtained by duress, coercion, fraud, or a mistake. Because Kansas law was properly reflected in the disclosures and those disclosures had given notice of Smith's legal duties as a father, the district court concluded the document was nevertheless legally binding under K.S.A. 2016 Supp. 23–2204 and established Smith as the legal father. The court further ruled that Smith's motion was time-barred, as he failed to revoke the acknowledgment within the statutory time period. Smith's failure to date the form or sign it in front of a notary public or judge did not invalidate the VAP. Lastly, based on the evidence presented and the testimony of the guardian ad litem, the court concluded it was in I.M.S.'s best interest to find that Smith was I.M.S.'s legal father.

The court of appeals reversed the district court. *State ex rel. Secretary of DCF v. Smith*, No. 114306, 2016 WL 3031277 (Kan. App. 2016) (unpublished opinion). The panel acknowledged K.S.A. 2015 Supp. 23–2204 and its provisions imposing a 1–year limitation on a revocation action. However, the panel held revocation is not the only way to obtain a court order ending that parental relationship. The other option, found at K.S.A. 2015 Supp. 23–2208(a)(4), recognizes that a VAP creates a presumption of paternity that can be rebutted by clear and convincing evidence. The panel explained that because this presumption arises from the statute and not from facts "that have any probative value as evidence of the existence of the presumed fact, *i.e.*, actual paternity of I.M.[S.]" Therefore, the fact of paternity " 'shall be determined from the evidence exactly as if no presumption was or had ever been involved.' " 2016 WL 3031277, at *8 (quoting K.S.A. 60–414[b]). The panel held that because both Smith and Mother confirmed the paternity acknowledgment was false, Smith successfully rebutted the presumption of paternity by clear and convincing evidence. The reversal ended the father-child relationship.

The State's petition for review with the Kansas Supreme Court was granted. As a preliminary matter, the Court noted that the intention of paternity the VAP program is to establish a simple process for paternity, by providing a means for unmarried parents to name a father on the birth certificate. See K.S.A. 2016 Supp. 65–2409a. The Court further explained that "[t]he VAP form sets up a situation by which an individual may become a legal parent even though not a biological or adoptive one."

The Court considered whether the VAP procedure created a permanent parent and child relationship or merely created a rebuttable presumption of such a relationship. Reversing the court of appeals, the Court held the acknowledgment signed by Smith complied by the statute, even if the signatures were not notarized, and the acknowledge was enforceable even though Smith claimed not to have read it or understood its terms. The Court explained that, "[c]learly, the legislature intended to impose strict limitations on the two individuals who sign the VAP form. It seems contrary to this intent to allow either of those parties the ability to sidestep the VAP's terms—to effectively seek its revocation—by rebutting a presumption or raising a conflicting presumption, such as would arise through genetic testing, under K.S.A. 2016 Supp. 23–2208(a)(5)."

The statute does not permit a revocation of an acknowledgement more than one year after the child's birth; an individual who signs a K.S.A. 2016 Supp. 23–2204 voluntary acknowledgment of paternity may only revoke the acknowledgment by satisfying the requirements in K.S.A. 2016 Supp. 23–2209(e). If those requirements are not timely satisfied, those who executed the document cannot attempt to revoke the acknowledgment, attempt to rebut the presumption of paternity that arises from the acknowledgment, or attempt to establish the existence of a conflicting presumption through, for example, genetic testing. As between a man and a mother

who signed the voluntary acknowledgment of paternity without a timely satisfaction of the statute, a permanent father and child relationship is created. And based on evidence presented to the district court, substantial evidence supported the finding that the best interest of the minor child was for Smith to remain the legal father.

D. PUBLISHED COURT OF APPEALS DECISIONS

A. Subject Matter Jurisdiction and Comity

In *Ward v. Hahn*, 54 Kan. App. 2d 476, 400 P.3d 669, 671 (2017), Kirk Hahn and Cheri Ward were married and lived together in Nebraska. Hahn owned a one-half undivided interest in real property in Osborne County, Kansas. Hahn's parents owned the other one-half undivided interest. When Ward filed for divorce in Nebraska, the Nebraska court equitably divided Hahn's and Ward's property and directly assigned the Kansas land to Ward, stating: "The above-described real estate is now the property of [Ward]," and its order "shall be recorded in the real estate records of Osborne County, Kansas to effectuate the transfer of the ... real estate to [Ward].

Following the divorce, Ward petitioned the Kansas district court to enforce the Nebraska order and to partition the land between her and Hahn's parents. The Kansas district court found the Nebraska court lacked subject matter jurisdiction to directly transfer legal title of Kansas land to Ward; therefore, the order was not entitled to enforcement under the Full Faith and Credit Clause of the United States Constitution. However, the Kansas district court enforced the Nebraska order under the principle of comity, stating: "The parties have given no reason, and this Court can think of no reason, why enforcing the Nebraska order would violate the public policy of Kansas." Accordingly, the district court partitioned the land, assigning a one-half undivided interest to Ward and the other one-half undivided interest to Hahns' parents.

The parents timely appealed, arguing the Kansas district court abused its discretion by enforcing the Nebraska property division under the doctrine of comity, as the allowance of foreign courts to assign Kansas land is repugnant to Kansas public policy and would disrupt real estate markets.

The Kansas Court of Appeals reversed, citing *Hoppe v. Hoppe*, 181 Kan. 428, 312 P.2d 215 (1957). In *Hoppe*, the Kansas Supreme Court held that courts of one state generally cannot directly affect the legal title to land situated in another state. 181 Kan. at 433, 312 P.2d 215. Here, the court held "…the portion of the divorce decree which purports to act in rem so as to directly affect title to Kansas land is inoperative in Kansas. While it is well-settled that another court cannot directly affect the legal title to land located in another state, a sister state may indirectly

affect title to land located in another state by ordering a litigant over whom it exercises personal jurisdiction to transfer title to another. If that party does not comply, the court may enforce its order by holding the disobedient party in contempt. *Hoppe*, 181 Kan. at 433, 312 P.2d 215.

The court next addressed the question of whether the district court abused its discretion by enforcing the Nebraska property division under the doctrine of comity. The principle of comity permits a court to enforce a foreign judgment even though the court is not required to do so under the Full Faith and Credit Clause of the United State Constitution. Here, the granting of comity violated the public policy of Kansas, because the specific right of a divorcing party to have the district court in one state directly transfer title to real estate in another state is not among the rights recognized by Kansas courts, and any such attempt is an usurpation of authority and all such judicial proceedings are void. Thus, the district court made a mistake of law and abused its discretion by finding that enforcement of the Nebraska order would not offend Kansas public policy.

B. Property Division and Military Retired Pay

In *In re Marriage of Johnston*, 54 Kan. App. 2d 516, 402 P.3d 570 (2017), the parties entered into a pro se property settlement agreement (Agreement), with the former husband receiving the majority of the assets and debts, and the former wife receiving $100,000 from former husband's 401(k), along with $1,000 per month in spousal maintenance unless she remarried. The Agreement mentioned that Husband was receiving $3,546 a month in military retirement pay, and in two places it indicated that Husband's $1,000 spousal maintenance payments to Wife would come out of those military retirement benefits.

Husband subsequently filed a motion to terminate his spousal maintenance obligation, alleging that Wife was living in a "marriage like relationship." After an evidentiary hearing, the district court denied Husband's motion because the Agreement stated that the maintenance payments would only end in Wife's remarriage. The district court, on the belief that K.S.A. 2016 Supp. 23-2904 prohibits spousal maintenance for more than 121 months, unilaterally ordered that Husband's spousal maintenance payments would end after 121 months.

Wife did not appeal this order; instead, she filed a motion to find Husband in contempt for past due payments, along with a request to re-open the divorce, because the Agreement failed to divide Husband's military retirement benefits, pursuant to K.S.A. 2016 Supp. 60-260(b)(4). After denying Wife's contempt motion, the district court determined the Agreement was ambiguous with regard to the military retirement benefit, as the text of the Agreement improperly combined the military retirement with spousal maintenance. Citing K.S.A. 2016 Supp. 60-260(b)(6), the court re-opened the divorce judgment, and divided the military retirement benefits

equally between the parties; however, it did not alter the prior spousal maintenance order.

On appeal, Husband claimed the district court lacked authority to modify the Agreement, and the court of appeals agreed. Under K.S.A. 2016 Supp. 60-260, the catch-all provision cannot be invoked as a means of relief if the real basis for relief exists under one of the specific provision of 60-260(b). Because Wife's true basis for relief was mistake under K.S.A 2016 Supp. 60-260(b)(1), she must seek relief within a reasonable period of time, but no longer than 1 year.

Military retirement pay, although divisible as marital property, has all the hallmarks of taxable income. The separation agreement reflected the parties' agreement that the income generated by Husband's military retirement pay was sufficient for the purposes of determining the equities of the Agreement. Thus, no evidence was missing, and the district court erred in modifying the Agreement.

Finally, the Court considered whether the district court had jurisdiction to reexamine the Agreement. While a district court cannot award maintenance beyond 121 months, parties may contract for a longer term. The Court reversed and vacated the orders of the district court and returned the Agreement to its original and unmodified state.

C. Indirect Contempt

In *Paternity of S.M.J. By & Through Jacobs v. Ogle,* 54 Kan. App. 2d 618, 402 P.3d 607 (2017) the Kansas Court of Appeals reversed the district court's contempt finding against father because the contempt hearing was held in the absence of father or father's attorney.

Due to father's repeated accusations that mother was involved in Colombian drug cartels, the district court ordered him to stop sharing his accusations with the parties' child, as well as third parties. For two years, father continued to press the issue, and the trial court continued to order him to refrain from sharing the allegations. Even after his parenting time was restricted to supervised visits, father persisted in telling others, including mother's employer, that she participated in drug cartel activity. Mother eventually filed a motion requesting the district court hold father in contempt for violating the order not to share his allegations with third parties. Neither father nor his attorney appeared for the contempt hearing, although both admitted they had known about it. The district court found father in contempt and ordered him to pay mother's attorney fees related to the matter. It also imposed a 30-day jail sanction that would be suspended upon payment of fees as directed by the trial court.

On appeal, father argued the district court should not have held the contempt hearing without him or his attorney present. The court of appeals agreed. K.S.A. 2016 Supp. 20–1204a governs indirect-contempt proceedings. "Indirect" contempt means that the contemptuous action took place outside of the court, rather than in front of the judge; it usually occurs when a person fails to follow one of the court's orders. See *In re Marriage of Shelhamer*, 50 Kan.App.2d 152, 155, 323 P.3d 184 (2014). Under the indirect-contempt statute, a court can order a person accused of contempt to attend a hearing and "show cause why such person should not be held in contempt." K.S.A. 2016 Supp. 20–1204a(a). The general procedure for contempt hearings is governed by subsection (b), which requires the court to notify the person accused of contempt when the hearing will take place and what contemptuous conduct has been alleged. Then, at the contempt hearing, the court can give the person more time to comply with its order or can impose some sort of punishment intended to coerce the person to comply. K.S.A. 2016 Supp. 20–1204a(b).

When a person accused of indirect contempt fails to appear for the contempt hearing, the court can issue a bench warrant and proceed with the contempt hearing "when such person is brought before the court." Citing this language from the statute and in reading the indirect contempt statute as a whole, the court held the trial court cannot hold a civil-contempt hearing in the absence of the person accused of contempt. K.S.A. 2016 Supp. 20–1204a(c).

Although the decision conflicts with the holding of the panel in *Bond v. Albin*, 29 Kan.App.2d 262, 28 P.3d 394 (2000), the prior case involved slightly different facts, and this panel concluded the holding aligns with basic concepts of fairness and due process. At a minimum, a person accused of civil contempt has a right to be present at the contempt hearing at which fines or fees night be assessed or a coercive jail term imposed.

E. UNPUBLISHED COURT OF APPEALS DECISIONS

Matter of Marriage of Rutz-Uehling & Uehling, No. 116,466, 2017 WL 1369958 (Kan. App. April 14, 2017) (unpublished opinion).

Father's verified motion to change residential custody alleged that 1) Over 7 years had passed since the last order concerning custody and parenting time; (2) the child was 12 years old at the time of the present motion; and (3) the child was of sufficient age and maturity to reasonably express her desires. The district court, relying on K.S.A. 60-1628 (now K.S.A. 2016 Supp. 23-3219), held the verified allegations in the motion did not amount to a *prima facie* showing of a material change in circumstances. The court of appeals reversed, noting that although the case was a "close call," it is "better to error on the side of giving the parties their day

in court."

Matter of Marriage of Clark & Daniels, No. 116,450, 2017 WL 1426454. (Kan. App. April 21, 2017) (unpublished opinion).

The parties' parenting plan dictated that Father was to have parenting time with the minor child on her birthday in 2016. After an evidentiary hearing, the district court found Mother interfered with Father's parenting time and found her in contempt. The district court sanctioned Mother with attorney fees and 48 hours in the county jail. Mother appealed, claiming the district court erred in finding her in contempt and interfered with her due process rights by imposing a jail sentence without advance notice. The court of appeals agreed. Mother's due process rights were violated when the district court failed to provide advance notice that a jail term was a possible sanction.

Matter of Marriage of Leming, No. 115,915, 2017 WL 1426051, (Kan. App. April 21, 2017) (unpublished opinion), *review denied* (Oct. 27, 2017).

Father was convicted of indecent liberties with a child. The victim was the parties' oldest daughter. He was sentenced to 122 months in prison. Mother filed for divorce. At the conclusive of the divorce trial, the district court, relying on *In re Marriage of Thurmond*, 265 Kan. 715, 962 P.2d 1064 (1998), set Father's child support income at his previous income of $120,000 per year. The district court also ordered the liquidation of Father's marital property to fund a trust for Mother to draw upon for child support. Father appealed, arguing that the district court abused its discretion when it liquidated his assets and put the money in a trust for child support and it set his child support income at $120,000 a year.

The Court of Appeals found that the district court did not abuse its discretion in liquidating Father's marital property and placing it in a trust for child support, based on the extraordinary underlying facts. As to the imputation of income, the Court of Appeals found that the district court erred and abused its discretion, when it set the permanent order of child support, as *Thurmond* addresses modification of a child support order, not the creation of a permanent order. 265 Kan. at 729-30. Thus, pursuant to the Kansas Child Support Guidelines § II.F (a) which addresses incarceration, Father's child support should have been set for an income of the federal minimum wage for a 40-hour work week, not his prior income of $120,000.

Matter of Marriage of Langley, No. 115,829, 2017 WL 1534853 (Kan. App. April 28, 2017) (unpublished opinion).

Father filed a contempt against Mother, along with a motion for sole legal custody of the parties' minor child. The district court dismissed Father's contempt without an evidentiary hearing. The district court did not err or abuse its discretion in denying

Father's request for an evidentiary hearing, because, in a matter of indirect civil contempt, K.S.A. 2016 Supp. 20-1204a controls, and affords a district court the authority to decline to issue a show cause order after reviewing the motion and supporting materials. K.S.A. 2016 Supp. 20-1204a(a). Further, even if a hearing is convened, the statute itself does not require an evidentiary hearing. As to Father's motion for sole legal custody of the minor child, the district court did not err when it denied said motion without referring it to the appointed case manager for consideration. Even where a case manager is appointed, the district court retains full authority to promptly address motions or other disputes without first engaging the case management process.

Fisher v. Davis, No. 116,291, 2017 WL 1826588, (Kan. App. May 5, 2017), review denied (Oct. 27, 2017) (unpublished opinion).

Following a home paternity test, Fisher (presumed father) agreed to the entry of a journal entry of paternity as to the minor child. After the determination of paternity, a second home paternity test indicated he was not the biological father. He timely filed a motion to set aside the journal entry of paternity, pursuant to K.S.A. 2016 Supp. 60-260. The district court denied Fisher's motion, holding that he was "not entitled to a second bite at the apple." The court of appeals reversed, holding that the district court ruling made an error of law when it wholly failed to balance the need for finality of judgments against the interests of justice, and the error constituted an abuse of discretion.

Matter of Marriage of Dacus, No. 116,124, 2017 WL 2403345*,* (Kan. App. June 2, 2017) (unpublished opinion).

The court of appeals reversed the district court's decision regarding the residential custody of the child, finding that the absence of any clear reference to K.S.A. 2014 Supp. 23–3203 or the proper legal standard did not support a presumption that the district court made all of the necessary fact findings to support its decision.

Ragain v. Basu, No. 115,877, 2017 WL 2714924 (Kan. App. June 23, 2017), *review denied* (Oct. 25, 2017) (unpublished opinion).

The district court did not err when it declined to hold an evidentiary hearing on Father's motion for contempt. Further, the district court has authority to award attorney fees "as justice and equity may require" in post-judgment paternity motions, pursuant to K.S.A. 2016 Supp. 23–2216(a). The district court also has the authority to award and assess case manager fees related to the litigation, as justice and equity may require.

Trunck v. Pond, No. 116,548, 2017 WL 3001301 (Kan. App. July 14, 2017) (unpublished opinion), review denied (Oct. 27, 2017).

Mother did not provide Father a formal notice of a move in the manner prescribed by K.S.A. 2016 Supp. 23-3222(a), although Father was informed of the move more than 30 days prior to the event. The district court erred as a matter of law when it held that Mother's failure to comply with K.S.A. 2016 Supp. 23-3222(a) constituted a material change of circumstance.

Matter of Marriage of Biernacki, No. 115,624, 2017 WL 3001299 (Kan. App. July 14, 2017) (unpublished opinion).

Following a divorce trial, former husband appealed the district court's division of property, arguing the only evidence presented at trial was that the down payment on the parties' residence was a gift to him. The wife admitted she never testified that the gift was to both parties, but she maintained the division of property was fair and equitable. The court of appeals found the district court expressly based its decision on a mistaken finding regarding Wife's testimony. Thus, the division of the assets and debts was an abuse of discretion because it was based on an error of fact.

Matter of Marriage of Mallein, No. 115,852, 2017 WL 3575817 (Kan. App. Aug. 18, 2017) (unpublished opinion).

The parties, who had two minor children, were divorced in Missouri. Mother subsequently moved to New York with the children, while Father moved to Kansas. The Department for Children and Families (DCF), on behalf of the State of New York, filed a motion to modify child support, requesting an extension of child support for the adult child who had experienced a brain injury. Father filed a motion to emancipate the child and terminate child support. The district court held Missouri law governed the question of whether Father still owed a duty to support the adult child beyond the age of majority. Missouri law requires the consideration of a child's assets, income, and expenses and can require child support beyond the age of majority in certain instances. The district court ultimately ordered Father to continue paying child support for the injured child but awarded a downward adjustment. Mother appealed. The court of appeals found Kansas had jurisdiction over Mother, as she submitted to jurisdiction in Kansas by the filing of the motion to extend or modify child support in a Kansas court. The district court did not err in awarding Father a downward adjustment, as it was readily apparent the district court made the required findings when deviating from the Guidelines.

Matter of Marriage of Welliver & Dickerson, No. 116,567, 2017 WL 3822965 (Kan. App. Sept. 1, 2017) (unpublished opinion).

At the conclusion of the divorce trial, the district court directed Wife to pay Husband $11,395, which was paid into the clerk of the district court, in order to

satisfy the judgment. Husband filed a written request with the clerk of the district court, for distribution of the funds and received them the same day. Husband subsequently appealed the division of property. The court of appeals held Husband acquiesced in the judgment and lost the right to appeal when he voluntarily accepted the benefit of the judgment.

Matter of Marriage of Fawcett, No. 117,313, 2017 WL 4082249 (Kan. App. Sept. 15, 2017) (unpublished opinion).

In a post-decree motion, Mother, who was the non-custodial parent, filed a motion to establish a parenting plan and telephone contact with the minor child. On its own motion, the district court changed custody of the minor child from sole custody with Father to joint custody. The court of appeals held the district court erred when it changed the custody of the minor child, because neither party presented evidence of a material change in circumstances.

Matter of Marriage of Silliman, No. 117,373, 2017 WL 4455300 (Kan. App. Oct. 6, 2017) (unpublished opinion).

The district court did not err when it declined to impose sanctions on mother pursuant to Kansas Child Support Guidelines (KCSG) § V.B.2. Whether to assess a credit or adopt a sanction under § V.B.2. for a parent's failure to disclose a material change of circumstances is discretionary. The KCSG requires a parent to notify the other parent of any material change of financial circumstances, including a material change in the cost of work-related child care. KCSG § V.B.1. The KCSG does not impose a duty upon either parent to notify the court of a material change of financial circumstances.

Matter of Marriage of Ballinger, No. 116,904, 2017 WL 4455160 (Kan. App. Oct. 6, 2017) (unpublished opinion).

Husband appealed the district court's order of spousal maintenance, property valuation and division, and order regarding child support and private school expenses. The court of appeals reiterated the "need" of a party is one of many factors the district court should consider when determining an award of spousal maintenance.

It is not an abuse of discretion for a district court to take into account how the parties acquired the marital property when making an equitable distribution of property. In fact, "the time, source and manner of acquisition of property" is one of the factors expressly set forth in K.S.A. 2016 Supp. 23-2802(c) that a district court is to consider in dividing marital property.

Kansas courts have traditionally had the discretion to allocate the tuition of private or parochial education between parents in a divorce action as part of the authority granted by K.S.A. 2016 Supp. 23-3001(a) and (b). Although the Child Support Guidelines no longer include a provision for "extraordinary expenses," the lack of such a provision does not prohibit a district court's discretion to allocate the tuition of private or parochial education between the parents in a divorce action. District courts continue to have the authority to deviate from the Child Support Guidelines so long as they justify any deviation by way of written findings explaining how the deviation is in a child's best interest.

In the Matter of Marriage of Shaw, No. 116,037, 2017 WL 6542930 (Kan. App. Dec. 22, 2017) (unpublished opinion).

Former husband appealed the district court's division of marital property, claiming abuse of discretion with regard to the valuation of his business and in the division of a joint income tax return. On appeal, the court found that husband's request for "clarification" of the district court's ruling at trial, along with his motion for a new trial or amendment of judgment filed after the ruling, did not constitute an objection to the district court's findings. The district court's findings were supported by substantial competent evidence.

Davis v. Kansas Dep't for Children & Families, No. 117,346, 2018 WL 671166 (Kan. App. Feb. 2, 2018) (unpublished opinion).

The Kansas Department for Children and Families (DCF) determined that Davis was a perpetrator of sexual abuse based upon sexual contact he had with a minor. DCF (then SRS) mailed Davis notification of the substantiation of sexual abuse, listing him as the perpetrator. As a result of the determination, Davis' name was placed on an abuse and neglect central registry, which in turn prohibited him from working, volunteering, or residing at child care facilities. See K.S.A. 2016 Supp. 65-516(a)(3). Davis was later found guilty of two counts of aggravated indecent liberties with a child in a separate criminal proceeding.

Davis completed an administrative appeal, which was denied. He filed a petition for review with the district court, claiming that DCF's case against him was moot given that the original caseworker who made the initial determination no longer worked with DCF. He also argued the court should consider the fact that shortly after his arrest, the minor child had signed a sworn affidavit stating she had lied about him sexually abusing her. The district court affirmed the administrative decision of DCF. Davis appealed the district court's affirmation.

By failing to challenge the DCF presiding officer's actual reason for granting summary judgment on appeal, Davis abandoned any argument he may have had.

Further, the evidence used to convict him at his criminal trial was sufficient to establish he was a perpetrator of sexual abuse by clear and convincing evidence.

Kaster v. Riley, No. 117,008, 2018 WL 672106 (Kan. App. Feb. 2, 2018) (unpublished opinion).

Defendant was served one day before the June hearing on plaintiff's petition for protection from stalking. The day the hearing was scheduled, all parties and witnesses appeared. Defendant appeared with counsel who requested another continuance, as she was retained the night before. The district court denied defendant's request for a continuance, allowed counsel 10 minutes to confer with her client and proceeded with the hearing. During the hearing, the trial judge interrupted and interjected during the parties' testimony and counsel's argument numerous times. The court found plaintiff's allegations rose to the level of stalking and entered a final PFS order. Defendant filed a motion for new trial and a motion for recusal of the judge, both of which were denied.

The court of appeals was unable to resolve the due process issue as the available record was insufficient. Defendant's substantial rights were not prejudiced by the trial court's bias, despite the judge acting "aggressive, rigid, and intolerant in some respects." The panel noted it is every judge's obligation to insure that every party receive a fair hearing.

Bowen v. Cantrell, No. 118,099, 2018 WL 793326 (Kan. App. Feb. 9, 2018) (unpublished opinion).

In a post-judgment paternity case, Father (Bowen) moved for a temporary ex parte order for sole legal custody and residential custody of the minor child. Bowen's verified motion alleged Mother (Cantrell) was using or had used illegal drugs. Bowen asked the court to order Cantrell to submit to a hair follicle drug test and offered to submit to such a test himself. The district court held an ex parte hearing in accordance with K.S.A. 2016 Supp. 23-3219, granted Bowen's motion and set an evidentiary hearing, in accordance with the statute. At the evidentiary hearing, no evidence was presented. Instead, Cantrell asked for a continuance for an appointment of a guardian ad litem. The district court asked if Cantrell would voluntarily submit to drug testing, and she declined. Drawing an adverse inference against Cantrell, the district court ordered Cantrell to submit to a hair follicle test, and she refused to do so. The district court allowed the parties to retain joint legal custody but granted Cantrell only telephone contact and certain unsupervised contact with the minor child. The temporary orders issued by the district court at the ex parte hearing, which transferred residential placement to Bowen, remain in place.

Cantrell appealed, alleging her due process rights were violated by the ex parte procedure and that her privacy rights were violated by the district court's order to submit to a drug test. No evidentiary hearing was held, and no final order modifying the temporary custody or placement order was made. Based upon the language of K.S.A. 2016 Supp. 23-3219(b), an order made at an emergency ex parte hearing which temporarily changes child custody or residential placement may be modified at the review hearing and is thus not a final order for purposes of appeal.

Matter of Marriage of Rodrock, No. 115,078, 2017 WL 2494704 (Kan. App. June 9, 2017) (unpublished opinion). After a contested divorce trial in which the primary issue was the value of the husband's business and alleged dissipation of assets, the district court appointed a special master to oversee how the money from the marital estate was being spent in the months between the trial and the entry of the decree of divorce. Following the decree of divorce, special masters were appointed to oversee the disposition of assets. Husband appealed, alleging the district court violated the Kansas Code of Judicial Conduct at several points during and after the trial. The court of appeals focused on the appointment of special masters and concluded there was no showing of unethical conduct by the judge. Husband also argued the district court failed to account for the parties' debt in the divorce decree. Because the husband did not raise the issue with the district court by filing a motion to amend the divorce decree, the issue was not properly preserved for appeal.

In re Matter of Marriage of Santee, No. 117,222, 2018 WL 475477 (Kan. App. Jan. 19, 2018) (unpublished opinion).

The parties entered into a separation agreement (Agreement), which was adopted by the district court and incorporated in the decree of divorce. The Agreement required former husband to pay spousal maintenance to wife in the form of 120 monthly payments of $1,900. Maintenance would terminate upon wife's "cohabitation ... with a nonrelative person in a marriage-like relationship as set forth under Kansas law." The Agreement also authorized the district court to exercise jurisdiction to reduce maintenance downward pursuant to K.S.A. 23-2903. After husband's employment ended, he filed a motion to reduce maintenance. The trial court denied husband's motion. Husband filed a notice of appeal and a motion to set aside the judgment. Wife filed a motion to dismiss husband's appeal, due to a failure to timely docket. The trial court dismissed husband's appeal and denied his motion to set aside the journal entry. Following the dismissal of Husband's second motion to terminate spousal maintenance, Husband appealed. Notably, the Court discussed a material change of circumstance in the context of spousal maintenance and found the district court did not err in ruling the husband failed to prove that he experienced a material change in circumstances.

Bradfield v. Urias, No. 116,8435, 2018 WL 560406 (Kan. App. Jan. 26, 2018) (unpublished opinion).

This is the second appeal by Father, challenging the subject matter jurisdiction of a Kansas district court to enter child custody orders concerning his child, N.U. See *In re N.U.*, 52 Kan. App. 2d 561, 369 P.3d 984 (2016). In the prior appeal, the court of appeals found Kansas lacked authority to extend its temporary emergency jurisdiction in a child in need of care (CINC) case because Nebraska previously issued custody orders regarding the minor child and had not ceded jurisdiction to Kansas.

In the present case, soon after the initial dismissal of the CINC case, Mother filed a pro se petition for child custody and support. During the course of the proceedings, the Nebraska court determined a Kansas court would be a more convenient forum. See K.S.A. 2016 Supp. 23-37,207. The requirements for modification jurisdiction under K.S.A. 2016 Supp. 23-37,203 were met—Kansas was N.U.'s home state in 2016 under K.S.A. 2016 Supp. 23-37,201(a)(1), and Nebraska, the "court of the other state" determined "that a court of this state would be a more convenient forum." See K.S.A. 2016 Supp. 23-37,207; K.S.A. 2016 Supp. 23-37,203.

In the Matter of the Marriage of Ziebart, No. 117,293, 2018 WL 1545786 (Kan. App. Mar. 30, 2018) (unpublished opinion).

In a post-decree custody dispute, the district court ordered the minor child be placed in the "joint custody of her parents," but designated Father as the residential custodian. Father was directed "…to seek agreements with [Mother] as to what is best for their child and that they need to continue to consult with each other in regard to all of the [the minor child's] care and activities. However, if there is a disagreement, [Father] will have the authority to make the decision as to what is best for [the minor child]." Mother filed a Motion to Alter or Amend with the district court, which was denied. Mother appealed.

Reversing the district court, the court of appeals found the district court erred in its characterization of joint legal custody. Pursuant to joint legal custody, both parents retain the decision-making authority for the major issues in rearing a child—education, medical care, activities.

Matter of Marriage of Smith, No. 117,664, 2018 WL 1247164 (Kan. App. Mar. 9, 2018) (unpublished opinion).

Former husband filed several *pro se* post-divorce motions, including a motion for modification of child custody and for modification of child support. During the course of the litigation, husband sent his former wife requests for production of documents and interrogatories. Wife hired an attorney to respond to the motions and discovery

requests, and she incurred substantial attorney's fees. Prior to an evidentiary hearing on husband's motion to modify custody, the court warned him that, should he be unsuccessful at trial, he could be assessed attorneys' fees. Husband did not prevail and was ordered to pay $1,500 of wife's attorney fees. The husband appealed. The district court had the authority and discretion to order the husband to pay attorney fees under K.S.A. 2017 Supp. 23-2715 and did not abuse its discretion in so doing.

Marriage of Gustafson, No. 117,381, 2018 WL 1353380 (Kan. App. Mar. 16, 2018) (unpublished opinion).

In a post-divorce child support dispute, Mother was found in contempt of court for failure to pay child support. She also failed to appear at the sentencing hearing for the contempt and was sanctioned by a suspension of her parenting time until the contempt was resolved. More than seven years later, Mother became current on her child support obligation and filed a motion to reinstate parenting time; however, Father and the minor child had moved to Texas more than five years prior. The district court found Mother had purged herself of the contempt; however, it declined to exercise jurisdiction over the child custody matter pursuant to the Unified Child Custody Jurisdiction and Enforcement Act (UCCJEA), relying on K.S.A. 2017 Supp. 23-37,202(a)(1). There was no significant connection with Kansas. The court of appeals upheld the rulings of the district court, but noted that "…the suspension of parenting time to punish or coerce a party to perform certain acts in a domestic relations case is not a proper sanction for contempt."