

517.18 MARRIAGE AMONG QUAKERS; BAHAT'S

HISTORY. RS 1851 c 65 s 16; PS 1858 c 52 s 16; GS 1866 c 61 s 16; GS 1878 c 61 s 16; GS 1894 s 4783; RL 1905 s 3567; GS 1913 s 7104; 1947 c 66 s 1.

517.19 ILLEGITIMATE CHILDREN

Legal settlement for poor relief of mother and illegitimate child was not retroactively affected by marriage to father of the child whose legal settlement was in another county. OAG Sept. 8, 1948 (339-D-3).

CHAPTER 518

DIVORCE

NOTE: Excepted from rules of civil procedure insofar as inconsistent or in conflict therewith.

518.01 WHAT MARRIAGES VOID

Res judicata; full faith and credit for foreign divorce decrees when both spouses are parties. 33 MLR 317.

Law and the disrupted marriage. 35 MLR 168.

Where a defendant in a divorce action, in which she had defaulted, made a showing that her default was induced by intimidation caused by threats and the service without a motion of false and defamatory affidavits, which affidavits charged her with perverted conduct, the trial court was within its sound discretion in vacating the decree entered upon her default, allowing her proposed answer to stand, and setting the case for trial. Under the facts of this case, the lapse of 15 months by defendant before taking action to vacate or modify the default decree did not constitute laches as a matter of law. *Berg v Berg*, 227 M 173, 34 NW(2d) 723.

After an appellate court has pronounced the judgment or decree in a cause, and has remitted it to the court below for enforcement, and such remittitur has been filed in the lower court, the jurisdiction of the appellate court is completely divested, and it has no authority to recall the remittitur unless there has been some irregularity or error in issuing it; as where it was issued contrary to the rules of the court, or where, by reason of a clerical mistake, it does not correctly express the judgment of the appellate court. *Kasal v Kasal*, 228 M 570, 37 NW(2d) 711.

The fact that the legislature in one section expressly declared certain prohibited marriages absolutely void leaves a necessary inference that all other prohibited marriages should be valid until set aside by a decree of a competent court. *Re Kinkead's Estate*, M, 57 NW(2d) 628.

It is as desirable to reconcile a broken marriage or to solve the problems of alimony in one judicial district as in another. The problem is not unique to one county but affects the whole state and its citizens regardless of location. The 1947 Illinois Domestic Relation's Act purporting to set up a divorce division in the circuit court of Cook county, Illinois, is invalid "as a special law." *Hunt v Cook County*, 76 NE(2d) 48.

Divorce actions are not specifically excepted from the provisions of section 540.06. Neither does any exception appear in the statute pertaining to divorce actions for annulment. In the absence of a court decision the safe course to pursue in annulment action under sections 518.01, 518.02 or 518.03 would be to have a guardian ad litem appointed for a minor. See 4 MLR 524. OAG June 9, 1948 (147-C).

The relationship of cousin to a daughter of a cousin is that of "first cousin once removed" and marriage between such persons is forbidden. OAG Feb. 26, 1953 (300-G).

MINNESOTA STATUTES 1953 ANNOTATIONS

1321

DIVORCE 518.06

518.02 WHAT MARRIAGES VOIDABLE

Power of the guardian of an incompetent person to bring a divorce action for the ward. 32 MLR 827.

518.03 ACTION TO ANNUL

A guardian ad litem should be appointed for an infant plaintiff in an action for annulment. OAG June 9, 1948 (147-C).

518.05 ANNULMENT, GROUNDS

Power of the guardian of an incompetent person to bring an action for divorce for the ward. 32 MLR 827.

Rights of the insane offender. 36 MLR 933.

518.06 GROUNDS

HISTORY. Amended, 1951 c 637 s 1.

Recrimination rejected as a defense in divorce proceedings. 31 MLR 744.

Power of the guardian of an incompetent to bring a divorce action for his ward. 32 MLR 827.

Convicts; civil death; marital status, statutes in pari materia. 33 MLR 319.

Marriage; quasi contract; remedy of putative wife. 33 MLR 321.

Jurisdiction of the court to award custody and maintenance of children in a case where a divorce is refused to the parents. 34 MLR 350.

Estoppel of the divorce plaintiff. 34 MLR 515.

Estoppel of the divorce respondent. 34 MLR 523.

Estoppel of third persons. 34 MLR 526.

Law and the disrupted marriage. 35 MLR 168.

Right of a divorced spouse to a notice of adoption proceedings by the re-married spouse and his or her spouse. 36 MLR 391.

Rights of the insane offender. 36 MLR 933.

A finding that the acts or misconduct of defendant who in cross-complaint also sought a divorce, "were not of such consequence or so serious as to constitute a systematic course of cruel and inhuman treatment—and some of the more serious acts of misconduct—were provoked by the misconduct of plaintiff" were insufficient as a finding of cruel and inhuman treatment to sustain a divorce on that ground and do not constitute a barrier to the award of a divorce to the party against whom such finding is made. *Johnson v Johnson*, 223 M 420, 27 NW(2d) 289.

Where issues were made two years before trial and plaintiff failed to make any action to compel defendant to make her answer and cross bill more specific and certain, an objection on appeal by plaintiff to the sufficiency of his adversary's pleading comes too late, since such matters are initially for the trial court. *Potter v Potter*, 224 M 29, 27 NW(2d) 784.

The showing necessary to set aside a previous default divorce judgment and to set the case for retrial is a question peculiarly within the province of the trial court who in the instant case found duress and fraud had been evident. *Berg v Berg*, 227 M 173, 24 NW(2d) 722.

Findings which reflected on husband's conduct toward wife did not preclude husband from obtaining a divorce on ground of cruel and inhuman treatment, in absence of finding that husband was guilty of cruel and inhuman treatment toward wife. *Gonzagowski v Gonzagowski*, 227 M 247, 35 NW(2d) 343.

MINNESOTA STATUTES 1953 ANNOTATIONS

518.07 DIVORCE

1322

Unjustifiable conduct on the part of either husband or wife which so grievously wounds the mental feelings of the other or so utterly destroys the peace of mind of the other as to seriously impair the bodily health or endanger the life of the other or utterly destroys the legitimate ends and objects of matrimony constitutes cruel and inhuman treatment under MSA, Section 518.06 although no physical or personal violence may be inflicted or even threatened. *Thompson v Thompson*, 227 M 256, 35 NW(2d) 289.

An habitual drunkard within the divorce statute is one who, by frequent, periodic indulgence in liquor to excess, has lost the power or desire to resist alcoholic opportunity, with the result that intoxication becomes habitual rather than occasional. *Melheim v Melheim*, 228 M 89, 36 NW(2d) 398.

No divorce may be granted except upon the grounds prescribed by statute. Divorce cannot be granted simply because there is no chance of reconciliation between husband and wife. The doctrine of comparative rectitude, under which, where each party to a divorce suit has been guilty of misconduct which is a ground for divorce, a divorce will be granted to the lesser offender, is not recognized in this jurisdiction. The supreme court has no authority to make or amend findings of fact in a case on appeal. A judgment or decree of absolute divorce shown by the face of the record not to be justified by a finding of fact constituting one of the valid statutory grounds for an absolute divorce will be reversed upon the court's own motion, although neither party has raised the question. *Kasal v Kasal*, 228 M 570, 35 NW (2d) 745.

In divorce proceedings recriminatory defenses are recognized but the doctrine of comparative rectitude is not followed. *Arp v Arp*, 229 M 6, 38 NW(2d) 67.

Cruel and inhuman treatment to constitute grounds for divorce must be something more than mere incompatibility; in the instant case the husband's constant and habitual neglect, contemptuous treatment, drunkenness, and physical attacks upon the wife constituted a clear case of cruel and inhuman treatment. *Wilson v Wilson*, 229 M 126, 38 NW(2d) 155.

Jurisdiction is purely statutory and the courts have only such powers as are delegated to them by statute. *State ex rel v Rensch*, 230 M 160, 40 NW(2d) 881.

Jurisdiction in divorce matters is statutory. *Papaik v Papaik*, 235 M 393, 51 NW(2d) 68.

Evidence that a person committed a similar but distinct crime, or civil wrong, on a different occasion, is inadmissible for the purpose of proving that he is possessed of a propensity or a state of mind that would naturally dispose him to commit the particular crime or civil wrong with which he is charged. *Luley v Luley*, 234 M 324, 48 NW(2d) 328.

In an action for divorce on the ground of cruel and inhuman treatment, evidence of relations of parties, their conduct and manner of life, and acts of cruelty not specially pleaded and antedating those specifically alleged in the complaint may be shown, not as ground for divorce, but as confirmatory and cumulative evidence in support of acts of cruelty specifically alleged. *Olson v Olson*, 236 M 363, 53 NW(2d) 29.

A husband may not sue his wife for an absolute divorce on the ground of cruel and inhuman treatment alleged to have occurred prior to the time the wife became mentally ill and more than ten years before the commencement of the divorce action, the action being barred by a statute fixing ten years limitation as to an action cognizable by the court of chancery on Feb. 28, 1857, and no other limitation having been prescribed. *Zlindra v Zlindra*, 252 Wis. 606, 32 NW(2d) 656.

518.07 RESIDENCE OF COMPLAINANT

A finding that the acts or misconduct of defendant who in cross-complaint also sought a divorce, "were not of such consequence or so serious as to constitute a systematic course of cruel and inhuman treatment—and some of the more serious acts of misconduct—were provoked by the misconduct of plaintiff" were insufficient as a finding of cruel and inhuman treatment to sustain a divorce on that ground and do

not constitute a barrier to the award of a divorce to the party against whom such finding is made. *Johnson v Johnson*, 223 M 420, 27 NW(2d) 289.

Where a wife sought to require her husband to provide for the support and maintenance of herself and minor child, delivery of one-half of the accumulated property or one-half the value thereof, for attorney's fees and for a restraining order against the third party, the action was not one for divorce requiring a one year's residence within the state but an equitable action for support and maintenance. The equitable action for separate maintenance was not abolished by Laws 1933, Chapter 165. *Donigan v Donigan*, 236 M 516, 53 NW(2d) 635.

Where an equitable action was brought by a wife for support of herself and minor child against a nonresident husband, jurisdiction could be acquired where the summons was served by publication on the husband and no order of court was made decreeing substituted service. *Donigan v Donigan*, 236 M 516, 53 NW(2d) 635.

An equitable action for support of the wife and minor child by the husband is a "transitory action" which can be brought by a nonresident of Minnesota by attaching property of a nonresident husband located within the state. In determining whether an action is "transitory" or "local" the test is that if the cause of action could have arisen in any place it is "transitory," while it is "local" if the transaction is necessarily local or one that could have happened only in one particular place. *Donigan v Donigan*, 236 M 516, 53 NW(2d) 635.

In determining the custody, the overriding and primary consideration is the welfare of the child, and to this welfare the rights of the parent must yield. The trial court is vested with broad powers in such a case; and, in the absence of a showing of arbitrary action in the award of custody, an appellate court will not interfere with the exercise of that discretion. *Polzin v Polzin*, 237 M 164, 54 NW(2d) 143.

518.08 DENIAL, THOUGH ADULTERY PROVED

Recrimination rejected as a defense. 31 MLR 744.

Effect of subsequent interpretation by the court of the parent state from which the divorce statute was copied. 31 MLR 617.

A continuance of marital relations does not necessarily constitute a condonation of preceding acts of cruel treatment. The law of condonation rests (1) upon the express or implied forgiveness by the injured party; and (2) the express or implied promise of proper treatment by the other. If the improper or cruel treatment continues, there is no condonation. *Olson v Olson*, 236 M 363, 53 NW(2d) 29.

518.09 ACTION; HOW AND WHERE BROUGHT, VENUE

Power of a guardian of an incompetent person to bring divorce action for the ward. 32 MLR 827.

The district court divorce jurisdiction is purely statutory. It does not extend beyond the powers delegated to the court. *Kienlen v Kienlen*, 227 M 137, 34 NW(2d) 351.

The findings of the trial court is on an appeal in a divorce action attested with every presumption of evidentiary support. *Loth v Loth*, 227 M 387, 35 NW(2d) 542.

In a divorce action the husband's motion to dismiss the wife's appeal was denied because a stipulation had been entered into agreeing that there should be no appeal and this so clearly that the intention of the parties to waive the right to appeal was unmistakable. *Arp v Arp*, 229 M 6, 38 NW(2d) 67.

Residence for the purpose of divorce may be commenced where the plaintiff resides and residence is the place where one actually lives. It need not be permanent and fixed for purposes of domicile and may be acquired in a short period of time. The trial court in its discretion may change the place of trial of a divorce when it appears, (1) that an impartial trial cannot be had in the county where the action is pending, or (2) the convenience of witness and the ends of justice would be promoted by the change. In the instant case the trial court did not abuse its discretion in refus-

ing to change the venue of plaintiff's action to the county of defendant's place of residence. *Buckheim v Buckheim*, 231 M 333, 43 NW(2d) 113.

Where parties to a divorce action stipulated for a property settlement and withdrew such issue from the court, a decree granting a divorce was not a bar to an action on the agreement providing for a property settlement. *Smith v Smith*, 235 M 412, 51 NW(2d) 276.

While a property division in a divorce decree based on a stipulation is in the nature of a consent decree, it does not constitute a consent to the divorce. Such consent or stipulation might prevent the divorce on grounds of collusion. The stipulation is to property, alimony or support money, or custody of children only. *Hafner v Hafner*, 237 M 424, 54 NW(2d) 854.

A foreign divorce decree of the Florida court cannot be collaterally attacked in Massachusetts when the spouse appeared in the Florida action and had an opportunity to litigate the jurisdictional fact. *Sherer v Sherer*, 68 SC 1087, 334 US 343; 33 MLR 317.

518.11 SERVICE, PUBLICATION

In the wife's divorce action the district court acquired jurisdiction of the res, the marriage status, by service of process upon defendant-husband without the state since that part of the action was in rem, and therefor the court had jurisdiction to grant a divorce to the plaintiff. *Allegrezza v Allegrezza*, 236 M 464, 53 NW(2d) 133.

In a default divorce action, the district court acquires jurisdiction of the res, the marriage status, by the service of process upon defendant without the state. Where there is no personal service of process upon the defendant within the state and no appearance by him the trial court is without jurisdiction to enter a personal judgment against him for the payment of alimony, attorney's fees, or court costs. The trial court does not acquire jurisdiction over any interest of the defendant in real property where there is no showing in the pleadings relative to ownership. In a default case the court cannot go beyond the pleading. That part of the judgment which constitutes a judgment in personam against the defendant is reversed. *Allegrezza v Allegrezza*, 236 M 464, 53 NW(2d) 133.

Where the wife brought an equitable action for the support of herself and minor child against a nonresident husband, jurisdiction was acquired where the summons was served by publication on the husband and no order of the court was made decreeing substituted service. *Donigan v Donigan*, 236 M 516, 53 NW(2d) 635.

In case of a divorce decree concededly void for want of service by summons, a party may be estopped from denying its validity where he has accepted the benefits and privileges of the divorce. *Watson v Watson*, M, 57 NW(2d) 691.

518.13 FAILURE TO ANSWER, REFERENCE

The court cannot go beyond the pleadings in a default divorce action. *Allegrezza v Allegrezza*, 236 M 464, 53 NW(2d) 133.

518.14 ALIMONY PENDING SUIT, COSTS

Where the wife's appeal from an adverse judgment in a divorce action involved improper issues and was taken in good faith, she was entitled to attorney's fees and costs and disbursements in the supreme court although her appeal was unsuccessful. *Johnson v Johnson*, 223 M 420, 27 NW(2d) 289.

Voluntary litigation in a divorce case by the parties of their respective rights confers jurisdiction upon the court to determine the question raised thereby regardless of whether otherwise the court would have had jurisdiction. In the instant case where the husband had property worth \$1,000,000, and an income of in excess of \$25,000 a year, and the wife had no means of her own, an allowance in a divorce case of \$750 a month for four months as temporary alimony is not excessive, nor is an allowance of \$750 as temporary attorney's fees excessive. *Hempel v Hempel*, 225 M 287, 30 NW(2d) 595.

MINNESOTA STATUTES 1953 ANNOTATIONS

1325

DIVORCE 518.16

Where the husband has property worth a million dollars and an income consisting of a salary of \$25,000 a year plus an income from stocks, and the wife has no means of her own, an allowance of \$750 per month as temporary alimony is not excessive nor is a temporary attorney fee of \$750 excessive. *Hempel v Hempel*, 225 M 287, 30 NW(2d) 594.

In a divorce case the court may issue a temporary injunction restraining the husband from disposing of his property and income during the pendency of the case, where it appears that a contemplated transfer thereof would defeat the wife's claim to alimony and other rights under the final judgment. *Hempel v Hempel*, 225 M 287, 30 NW(2d) 594.

The suggestion that there be a change in custody of minor children, which was not presented to the trial court, was not properly before the supreme court on appeal from an order modifying divorce decree by increasing award for support of minor children. *Toebe v Toebe*, 225 M 323, 30 NW(2d) 585.

The court may allow suitable attorney's fees and necessary disbursements in connection with appeals even though the judgment denied the appeal. *Ellingson v Ellingson*, 227 M 149, 34 NW(2d) 356.

On appeal relating to a judgment denying divorce the evidence must be viewed in the light most favorable to the prevailing party, and findings of the trial court will not be disturbed unless manifestly and palpably contrary to the evidence. *Ellingson v Ellingson*, 227 M 149, 34 NW(2d) 356.

In a divorce proceeding, there is no statutory restriction or public policy which prohibits attorneys from entering into an agreement covering the value of their services over and above any sum which the court may require the husband to pay under section 518.14.

In divorce proceedings, an attorney's lien may be established, and judgment therefor impressing the same upon a lump-sum settlement may be entered, in proceedings summary or ancillary to the main action. *McDonald v Johnson*, 229 M 119, 38 NW(2d) 197.

The supreme court may allow suitable attorney's fees and necessary disbursements to the wife in connection with her appeal in a divorce action and in addition to the \$75 allowed to the plaintiff by the trial court, an allowance of \$250 to cover attorney's fees and expenses in connection with the appeal. *Wilson v Wilson*, 229 M 126, 38 NW(2d) 155.

Where on appeal the husband secured a modification of a child support order he was the prevailing party within the provisions of section 607.01 relating to the right to costs. *Krusemark v Krusemark*, 232 M 416, 46 NW(2d) 647.

Voluntary litigation in a divorce case of the right to possession of realty in proceedings relative to temporary alimony, confers jurisdiction on the court to determine such issue. *Carlson v Carlson*, 234 M 258, 48 NW(2d) 58.

In the wife's divorce action where there was no personal service of process upon the defendant within the state and no appearance by him, the trial court had no jurisdiction to enter a personal judgment against the defendant for alimony, attorney's fees, or court costs. *Allegrezza v Allegrezza*, 236 M 464, 53 NW(2d) 133.

In a proceeding by the wife for an amendment of the divorce judgment to award the custody of children to her, where it appeared that the husband had a very modest income and a large encumbrance on his home and was supporting himself and two of the four children, the request by the wife, who was unsuccessful in her proceeding that she be granted fees, costs, and disbursements, was properly denied. *Polzin v Polzin*, 237 M 164, 54 NW(2d) 143.

518.16 CUSTODY OF CHILDREN DURING PENDENCY

The problem of children in divorce procedure. 32 MLR 766.

In action for divorce acceptance by plaintiff wife of an award to her of the custody of the children and of provisions which are made primarily for their care,

support and benefit is not such an acceptance of benefits of a judgment as will preclude plaintiff personally from attacking it on appeal; an acceptance of attorney's fees awarded for payment of plaintiff's counsel is not such an acceptance of the benefits as will estop plaintiff from taking an appeal from the judgment. The court after denying a divorce retains jurisdiction in the same action under its general equitable powers to make provisions for the care and custody of the minor children where the parents are in fact living apart from each other. *Atwood v Atwood*, 229 M 333, 39 NW(2d) 103.

The shifting of a child back and forth between divorced parents is usually not in the best interest of a child, but each case must be determined on its own facts and conditions in the homes, age and sex of the child, attitude of the parents and their treatment of the child. The supreme court will not reverse an order of the trial court relating to a divided and shifting custody of a child unless there has been an abuse of judicial discretion. *Mansfield v Mansfield*, 230 M 574, 42 NW(2d) 315.

Voluntary litigation of the right to possession of certain real property in proceedings relative to temporary alimony in a divorce action confers jurisdiction upon the court to determine the issue. Where property possessed by the wife is not sufficient for her support while the action is pending, or where it is not readily available for her immediate needs, the court in its discretion may make an order requiring the husband to pay temporary support money pendente lite. The court may order the husband, a party to the divorce action, to remove himself from the homestead of the parties when his presence there might endanger the health or security of the wife. *Carlson v Carlson*, 234 M 258, 48 NW(2d) 58.

The primary consideration in determining custody is the welfare of the child and to this welfare the selfish and unselfish desires of the parents must be subordinated, without regard to which parent is to blame in making a divorce necessary. *French v French*, 236 M 439-444, 53 NW(2d) 215.

518.17 CUSTODY OF CHILDREN ON JUDGMENT

The problem of children in divorce procedure. 32 MLR 766.

Denial of a divorce, custody and maintenance of children. 34 MLR 347.

Husband and wife; confidential relationship pending divorce. 37 MLR 489.

Where the wife's appeal from an adverse judgment in a divorce action involved improper issues and was taken in good faith, she was entitled to attorney's fees and costs and disbursements in the supreme court although her appeal was unsuccessful. *Johnson v Johnson*, 223 M 420, 27 NW(2d) 289.

The statute confers upon the district court power to revise its orders concerning the care and custody of minor children of divorced parents and make such new orders as the circumstances of the parents and of the children require. *In re Jaren*, 223 M 561, 27 NW(2d) 656.

Natural parents have the first right to the care and custody of their child except where the best interest of the child requires that it be placed with some one else. *State ex rel v Eldred*, 225 M 72, 29 NW(2d) 479.

In the instant case, the father of a 7-year-old girl was entitled to recover the custody of the child from the stepfather where the child's mother, who had married the stepfather after a divorce decree awarded her custody of the child, was dead, and the child's father had remarried. The natural parents have the first right to care and custody of their child unless the best interests of the child require that it be given into the hands of someone else. *State ex rel v Eldred*, 225 M 72, 29 NW(2d) 479.

It is the husband's primary obligation to support minor children even though the divorced wife has custody of the children and is gainfully employed. *Toebe v Toebe*, 225 M 323, 30 NW(2d) 585; *State v Sax*, 231 M 1, 42 NW(2d) 680.

The suggestion that there be a change in custody of minor children, which was not presented to the trial court, was not properly before the supreme court on

MINNESOTA STATUTES 1953 ANNOTATIONS

1327

DIVORCE 518.17

appeal from an order modifying divorce decree by increasing award for support of minor children. *Toebe v Toebe*, 225 M 323, 30 NW(2d) 585.

Where a divorce judgment provides for monthly payments until the further order of the court of a certain sum to the wife as alimony for the wife and as support money for their minor children, whose custody was awarded to the wife during their minority, but without specifying how much thereof shall be alimony for the wife and how much shall be support money for the children, and declared the payments a lien on real estate which the wife was adjudged to convey to the husband, prior to all encumbrances thereof of record, the court has the power after the death of the husband to modify and amend the provisions of the judgment concerning alimony and support money. *Garber v Robitshek*, 226 M 398, 33 NW(2d) 30.

Where the affidavit submitted by the defendant in support of his motion for modification of a divorce decree relative to payments due for support of a minor child did not show any material change in the defendant's financial condition from that at time of the original decree, the trial court did not abuse its discretion in denying the defendant's motion. *Williams v Williams*, 226 M 365, 32 NW(2d) 862.

Obligation to pay for support of a child or to pay alimony under a divorce decree is not a "debt" within the constitutional provision prohibiting punishment for debt. *Wojahn v Halter*, 229 M 374, 39 NW(2d) 545.

All things being equal, the natural parents have the paramount right to the care and custody of a child, but such right is not absolute and must yield to the child's welfare. The burden is upon those who claim the contrary to overcome that presumption by satisfactory proof. Under certain conditions the child's wishes may be taken into consideration. Where a father had ignored the child for more than ten years and offered no excuse for his conduct, he had to all intents and purposes abandoned the child and the child's best interest required that she be permitted to remain with her aunt. *State ex rel v Vorlicek*, 229 M 497, 40 NW(2d) 350.

The right of a parent to custody is not absolute but must yield where it would best serve the welfare of the minor to grant custody to some one other than the parent. The right of a statutory guardian is no more absolute than the right of a parent. The appointment of a guardian over the person of a minor child does not divest the district court of jurisdiction over custody of such child; and upon death of one of the parties divorced by a judicial decree the divorce proceedings follow so far as concerned any further right to custody of the child. *State v Rensch*, 230 M 160, 40 NW(2d) 881.

In a suit upon a Wisconsin decree of divorce in which plaintiff, after her children attained their majority, sought contempt proceedings to enforce the collection of support money that had accrued by the terms of the Wisconsin decree during the minority of her children, the purpose of section 518.17 and its enforcement by contempt proceedings is to insure support for the children during their minority. When they reach majority, the purpose and justification for the extraordinary remedy having expired, the district court does not have jurisdiction to enforce by contempt the payment of unpaid support money accruing prior to attainment of majority. *Lieder v Straub*, 230 M 460, 42 NW(2d) 12.

Where a divorce decree provided for divided custody on weekends of a boy of seven years of age and the father and the mother resided only eight miles apart and there was evidence to show that the boy was cared for with affection by the father and the father's parents, a decree shifting custody of the boy between the parents was not an abuse of discretion. *Mansfield v Mansfield*, 230 M 574, 42 NW(2d) 315.

The trial court is vested with broad discretion in awarding custody of the child of divorced parents and in the absence of the showing of arbitrary action, an appellate court will not interfere with the exercise of that discretion. The primary consideration is the welfare of the child. The custodial preference for the mother ceases to be a factor in determining the custody of the child where there are controlling reasons why the custody should be given to someone other than the mother. The wishes of a nine-year-old child and the income of the husband and

MINNESOTA STATUTES 1953 ANNOTATIONS

518.18 DIVORCE

1328

wife are not controlling factors but may be taken into consideration. *Aske v Aske*, 233 M 540, 47 NW(2d) 417.

In matters involving the custody of children the cardinal principle is to regard the welfare of the children and not the special claim of either parent. The natural parents have the first right to the care and custody of their children, unless the best interests of the child requires that the custody be given to someone else. Where the past records of the parents did not indicate them to be fit or proper persons to have the custody of their children, provisions already made for the children through the guardianship proceedings will not be changed. *Maloney's Guardianship*, 234 M 1, 48 NW(2d) 313.

The determination that the husband who was awarded a divorce be required to pay \$27 weekly for the support of four minor children of the parties, ranging from the age of three to the age of ten, was not erroneous in view of present-day prices. *French v French*, 236 M 439, 53 NW(2d) 215.

In determining the custody of a child of divorced parents, the overriding and primary consideration is the welfare of the child, and to this welfare the rights of the parent must yield. *Polzin v Polzin*, 237 M 164, 54 NW(2d) 143; *Wicklem v Wicklem*, 229 M 478, 40 NW(2d) 69; *Atwood v Atwood*, 229 M 333, 39 NW(2d) 103.

518.18 REVISION OF ORDER

Where the wife's appeal from an adverse judgment in a divorce action involved improper issues and was taken in good faith, she was entitled to attorney's fees and costs and disbursements in the supreme court although her appeal was unsuccessful. *Johnson v Johnson*, 223 M 420, 27 NW(2d) 289.

Natural parents have the first right to the care and custody of their child except where the best interest of the child requires that it be placed with some one else. *State ex rel v Eldred*, 225 M 72, 29 NW(2d) 479.

In the instant case, the father of a seven-year-old girl was entitled to recover the custody of the child from the stepfather where the child's mother, who had married the stepfather after a divorce decree awarded her custody of the child, was dead, and the child's father had remarried. The natural parents have the first right to care and custody of their child unless the best interests of the child require that it be given into the hands of some one else. *State ex rel v Eldred*, 225 M 72, 29 NW(2d) 479.

The suggestion that there be a change in custody of minor children, which was not presented to the trial court, was not properly before the supreme court on appeal from an order modifying divorce decree by increasing award for support of minor children. *Toebe v Toebe*, 225 M 323, 30 NW(2d) 585.

Where the affidavit submitted by the defendant in support of his motion for modification of a divorce decree relative to payments due for support of a minor child did not show any material change in the defendant's financial condition from that at time of the original decree, the trial court did not abuse its discretion in denying the defendant's motion. *Williams v Williams*, 226 M 365, 32 NW(2d) 862.

Where a divorce judgment provides for monthly payments until the further order of the court of a certain sum to the wife as alimony for the wife and as support money for their minor children, whose custody was awarded to the wife during their minority, but without specifying how much thereof shall be alimony for the wife and how much shall be support money for the children, and declared the payments a lien on real estate which the wife was adjudged to convey to the husband, prior to all encumbrances thereof of record, the court has the power after the death of the husband to modify and amend the provisions of the judgment concerning alimony and support money. *Garber v Robitshek*, 226 M 398, 33 NW(2d) 30.

The divorce jurisdiction of the district court is purely statutory and does not extend beyond the powers actually delegated by statute; and the court may revise an order concerning the care, custody, and maintenance of a minor child only on the petition of either parent. *Kienlen v Kienlen*, 227 M 137, 34 NW(2d) 351.

Upon the death of the parent who had custody of a minor child under a divorce decree, the right to custody automatically inures to the surviving parent unless he is shown to be unfit. The best interests of the child is paramount. *Kienlen v Kienlen*, 227 M 137, 34 NW(2d) 351.

"Prohibition" is not a writ of right but is issued under the discretionary power of the court for the purpose of preventing an inferior tribunal from proceeding with the jurisdiction or in excess of its legitimate authority; and the father of a minor child, where the custody of the child had been awarded to the mother by divorce decree, is entitled to a writ of prohibition against further action in district court of an order issued on the application of the child's maternal grandparents, relating to the custody of the child. *Kienlen v Kienlen*, 227 M 137, 34 NW(2d) 351.

After an appellate court has pronounced the judgment or decree in a cause, and has remitted it to the court below for enforcement, and such remittitur has been filed in the lower court, the jurisdiction of the appellate court is completely divested, and it has no authority to recall the remittitur unless there has been some irregularity or error in issuing it; as where it was issued contrary to the rules of the court, or where, by reason of a clerical mistake, it does not correctly express the judgment of the appellate court. *Kasal v Kasal*, 228 M 570, 37 NW(2d) 711.

In action for divorce acceptance by plaintiff wife of an award to her of the custody of the children and of provisions which are made primarily for their care, support and benefit is not such an acceptance of benefits of a judgment as will preclude plaintiff personally from attacking it on appeal; an acceptance of attorney's fees awarded for payment of plaintiff's counsel is not such an acceptance of the benefits as will stop plaintiff from taking an appeal from the judgment. The court after denying a divorce retains jurisdiction in the same action under its general equitable powers to make provisions for the care and custody of the minor children where the parents are in fact living apart from each other. *Atwood v Atwood*, 229 M 333, 39 NW(2d) 103.

The primary object of determining custody of children of divorced parents is the welfare of the children. Ordinarily the custody of a young child of divorced parents should be awarded to the mother except where the child has not received attention from the mother. Whether the welfare of a child is best served by awarding custody to the mother or father is a question of fact. *Wicklem v Wicklem*, 229 M 478, 40 NW(2d) 69.

After rendition of the divorce decree, the court retains jurisdiction for the purpose of determining which parent shall continue to have custody of a minor child and to modify and amend the judgment concerning alimony and support money. *Wicklem v Wicklem*, 229 M 478, 40 NW(2d) 69; *Garber v Robitshek*, 226 M 398, 33 NW(2d) 30.

The statute providing that the court may afford a divorce decree from time to time on petition of either parent revise such order concerning care, custody and maintenance of the children and make such new order concerning them as circumstances require leaves to the trial court's discretion determination as to which parent shall be given custody of children of divorced parents. *Wicklem v Wicklem*, 229 M 478, 40 NW(2d) 69.

Where the original divorce decree awarded the custody of the child to the plaintiff wife giving the defendant the right of reasonable visitation, the decree might be amended by the trial court to permit the plaintiff to place the child to live with her in a sister state and to require the defendant to pay for the support of the child, provided the defendant was given the privilege to have the child with him one month each summer under specified terms and conditions. *Hasse v Hasse*, 232 M 234, 45 NW(2d) 383.

Where during marriage a wife had received \$900 of her husband's money as bailee, and, by stipulation adopted in the findings of the court subsequently divorcing the parties, the wife agreed to accept \$5,000 as financial settlement and to relinquish all her right, title, or interest in her husband's property of any kind or nature, the wife is required to return the \$900 to her husband. *Holmberg v Holmberg*, 235 M 424, 51 NW(2d) 598.

MINNESOTA STATUTES 1953 ANNOTATIONS

518.19-518.23 DIVORCE

1330

On an application for alteration of a divorce decree so as to change the custody of minor children the parties are entitled, as a matter of right, to a hearing in which witnesses may be cross-examined in the absence of a waiver of such hearing. To constitute waiver there must be a written stipulation or it must very clearly be made to appear from the record. *Thompson v Thompson*, M, 55 NW(2d) 329.

Questions of fact are not tried de novo on appeal. The determination of questions of fact in a hearing on a motion will not be reversed on appeal where there is substantial evidence to support the trial court's findings. Where an appeal from an order denying a former wife's motion to amend a divorce decree so as to give her custody of minor children and additional property presented only questions of fact and the trial court's findings were supported by well-nigh conclusive evidence, the former husband would not be compelled to pay attorney's fees conducting such appeal, and where minor children whose mother had voluntarily surrendered their custody to the father in procuring the divorce decree, had made adjustment necessitated by divorce and remarriage of the father, it would not serve the welfare of the children to thereafter change their custody. *Watson v Watson*, M, 57 NW(2d) 691.

The divorced husband, irrespective of any increase in wealth income is only bound to maintain his former wife in the station in life to which he had accustomed her at the time of the divorce and prior thereto. *Arnold v Arnold*, Ill, 76 NE(2d) 335.

518.19-518.23 Repealed, 1951 c 551 s 15.

518.24 SECURITY; SEQUESTRATION; CONTEMPT

Right of child to sue the enticer of a parent. 34 MLR 63.

Effect of the wife's refusal to permit the husband to visit the child upon the husband's duty to pay support money for the child. 35 MLR 492.

Where pendente lite order directed the husband in a divorce action to remain away from and not interfere with his wife pending further order of the court, and was not extended by the divorce decree, the order terminated with the entry of the divorce decree and thereafter the husband could not be held in contempt thereof. The court's refusal to permit the defendant to testify in his own behalf was reversible error. *Krmpotich v Krmpotich*, 227 M 567, 35 NW(2d) 810.

Since the order adjudging the defendant in contempt for failure to make support payments includes matters not responsive to order to show cause, and there was no appearance by defendant or his counsel, it is erroneous. *French v French*, 236 M 439, 53 NW(2d) 218.

518.27 EFFECT OF DIVORCE, NAME OF WIFE

Where an order or judgment is to be in effect until further order of the court, there is in effect a reservation of jurisdiction to enter a further and final order or judgment and reserved jurisdiction does not abate and is not defeated in a divorce matter by the death of the husband. *Garber v Robitshek*, 226 M 398, 33 NW(2d) 30.

Where a Massachusetts citizen appeared and contested a divorce suit instituted in Florida by his wife, due process does not demand that he be afforded a second opportunity to litigate the existence of jurisdictional facts. Full faith and credit must be given to divorce decrees rendered in contested cases by courts in sister states no less than any other decrees. *Sherer v Sherer*, 68 SC 1087.

518.28 CORROBORATING TESTIMONY REQUIRED

HISTORY. GS 1866 c 73 s 96; GS 1878 c 73 s 106; GS 1894 s 5769; RL 1905 s 4746; GS 1913 s 8465.

The purpose of the statute requiring corroboration of the parties to a divorce action is to prevent collusion, and when a divorce is vigorously contested the rule is

MINNESOTA STATUTES 1953 ANNOTATIONS

1331

DIVORCE 518.47

greatly relaxed; and where the parties had not been living together for more than 16 years, the requirements of the statute requiring corroboration of testimony was in the instant case adequately met. *Potter v Potter*, 224 M 29, 27 NW(2d) 784.

In divorce actions recriminatory defenses are recognized but the doctrine of comparative rectitude is not followed; and in the husband's action for divorce on the ground of cruelty, adultery of the husband is not a bar to the action. *Arp v Arp*, 229 M 6, 38 NW(2d) 67.

The requirement that a divorce will not be granted upon the corroboration of testimony of the parties simply requires the testimony of other witnesses be introduced which would lead an impartial and reasonable mind to believe that such testimony as a whole is true. *Wilson v Wilson*, 229 M 126, 38 NW(2d) 154.

SUPPORT; DUTIES, RECIPROCAL ENFORCEMENT

518.41 PURPOSE

HISTORY. 1951 c 122 s 1.

NOTE: As of May, 1952, all of the states including Puerto Rico, Hawaii, and the Virgin Islands have adopted the Reciprocal Enforcement of Support Act except Arizona, Florida, Louisiana, Michigan, Mississippi, Nevada, New Mexico, Vermont, West Virginia, and the District of Columbia.

The proceeding had in the district court as a court of the responding state will be had under the petition or complaint of the initiating state. The case will be docketed by the clerk, the county attorney notified, and on his application a time and place will be had for hearing and the court of the responding state will take such action as is necessary to obtain jurisdiction of the obligor. This is generally done by an order to show cause. OAG May 8, 1952 (193-A-3).

518.42 DEFINITIONS

HISTORY. 1951 c 122 s 2.

518.43 REMEDIES ADDITIONAL

HISTORY. 1951 c 122 s 3.

518.44 LAW OF STATE

HISTORY. 1951 c 122 s 4.

In the enforcement of sections 518.41 to 518.53, public officers, who are charged with the expenditure of public funds for relief and support of the poor, have implied powers to expend public money in payment of clerk's fees for filing the petition to enforce such obligations against a person outside of the state, and in proceedings initiated in another state, the clerk of the district court must demand and receive fees, and in case of a dependent child, money should come from the appropriation made by the county board under section 256.80. OAG Sept. 20, 1951 (144-B-7).

518.45 PROCEEDINGS FOR SUPPORT

HISTORY. 1951 c 122 s 5.

518.46 OBLIGOR NOT PRESENT

HISTORY. 1951 c 122 s 6.

518.47 DUTIES OF COURT OF INITIATING STATE

HISTORY. 1951 c 122 s 7.

518.48 JURISDICTION OF COURT

HISTORY. 1951 c 122 s 8.

518.49 COUNTY ATTORNEY, DUTIES

HISTORY. 1951 c 122 s 9.

518.50 LAWS ATTACHING PRIVILEGE NOT TO APPLY

HISTORY. 1951 c 122 s 10.

518.51 GOVERNOR, DUTIES, EXTRADITION

HISTORY. 1951 c 122 s 11.

Husband and wife; confidential relationship pending divorce. 37 MLR 489.

518.52 SECTION 480.051 NOT LIMITED

HISTORY. 1951 c 122 s 12.

518.53 Unnecessary.

ALIMONY, SUPPORT, PROPERTY

518.54 DEFINITIONS

HISTORY. 1951 c 551 s 1.

518.55 ALIMONY OR SUPPORT MONEY

HISTORY. 1951 c 551 s 2.

Tax treatment of alimony payments. 37 MLR 413.

Tax treatment of support payments. 37 MLR 419.

Tax treatment of life insurance premiums and proceeds. 37 MLR 420.

Tax treatment of alimony, trusts, and annuities. 37 MLR 422.

Transfer of property with an appreciated value. 37 MLR 424.

Tax treatment of attorney's fees. 37 MLR 425.

Divorce and federal income taxes. 37 MLR 413.

Where the trial court denies a motion for a new trial on the ground that the verdict is not justified by the evidence, the order will be reversed on appeal only if there is no evidence reasonably tending to sustain the verdict, or if it is manifestly and palpably against the weight of the evidence. A motion on the ground of newly discovered evidence is addressed to the sound discretion of the trial court. *Austin v Rosecke*, M, 61 NW(2d) 240.

518.56 PERSONAL ESTATE OF WIFE

HISTORY. 1951 c 551 s 3.

A divorce decree providing for a division of property based on a stipulation of the parties is in the nature of a consent decree as to that part providing for the division of the property, and such part of the decree may be modified on proof of fraud or mistake. A motion is proper procedure to institute proceedings for the vacation of a consent decree. *Hafner v Hafner*, 237 M 424, 54 NW(2d) 855.

Whether the giving of consent to a stipulation for the division of property in a divorce proceeding was due to a mistake of fact is a question of fact for the trial court; and, in the instant case it is sufficient evidence in the record to sustain such a finding by the trial court. *Hafner v Hafner*, 237 M 424, 54 NW(2d) 855.

518.57 MINOR CHILDREN, MAINTENANCE

HISTORY. 1951 c 551 s 4.

518.58 DISPOSITION OF PROPERTY ACQUIRED DURING COVETURE

HISTORY. 1951 c 551 s 5.

Where a husband as part of a property settlement agreement entered into after commencement of a divorce action by the wife agreed to pay the wife \$10,000 after sale of the business, such agreement, though oral, was enforceable. In the instant case the evidence failed to show waiver by plaintiff of any rights under the agreement. A "waiver" is a voluntary relinquishment of a known right. *Smith v Smith*, 235 M 412, 51 NW(2d) 276.

Where parties to a divorce action stipulated for a property settlement and withdrew such issue from the court, a decree granting a divorce was not a bar to an action on the agreement providing for a property settlement. The decree granting a divorce did not establish an estoppel by verdict barring action on the agreement. *Smith v Smith*, 235 M 412, NW(2d) 276.

Where during marriage a wife had received \$900 of her husband's money as bailee, and, by stipulation adopted in the findings of the court subsequently divorcing the parties, the wife agreed to accept \$5,000 as financial settlement and to relinquish all her right, title, or interest in her husband's property of any kind or nature, the wife is required to return the \$900 to her husband. *Holmberg v Holmberg*, 235 M 424, 51 NW(2d) 598.

Where in 1930, in a divorce action then pending, a stipulation was entered into between the parties containing the statement: "It is agreed that the respective parties have a joint tenancy interest in certain real estate known as (describing property)," and where the husband thereafter was granted a divorce, but no mention of the stipulation or its terms was incorporated in the findings and decree, that the court erred when, on motion by the wife, it amended the divorce judgment and decree on April 21, 1951, and as of that date, by adding thereto the following: "That the respective parties have a joint tenancy interest in certain real estate known as (describing the property)." *Russell v Russell*, 236 M 28, 51 NW(2d) 665.

Where the homestead of the parties was held in joint tenancy and consideration therefor was furnished almost exclusively by the defendant husband, who was granted a divorce on his cross complaint, the court did not err in permitting the wife to retain her interest in the property. *French v French*, 236 M 439, 53 NW(2d) 215.

518.59 HOUSEHOLD GOODS AND FURNITURE

HISTORY. 1951 c 551 s 6.

518.60 ALIMONY, LIMITATION

HISTORY. 1951 c 551 s 7.

518.61 TRUSTEES

HISTORY. 1951 c 551 s 8.

518.62 TEMPORARY ALIMONY

HISTORY. 1951 c 551 s 9.

518.63 HOMESTEAD, OCCUPANCY

HISTORY. 1951 c 551 s 10.

518.64 ALTERATION OF ORDERS OR DECREES

HISTORY. 1951 c 551 s 11.

Jurisdiction of the district court to revise divorce decrees to change the amount of support money requires a petition in writing and notice thereof properly served on the party affected by the relief sought. In the instant case there was substantial compliance to this requirement and the court had jurisdiction. From the few facts found in the record the trial court's order is not sustained by the evidence, and the court's conclusion and order abating arrears of support money and vacating an order for future support was an abuse of the discretion vested in the court. *Papaik v Papaik*, 235 M 393, 51 NW(2d) 68.

518.65 PROPERTY; SALE, PARTITION

HISTORY. 1951 c 551 s 12.

518.66 POWERS OF COURT NOT LIMITED

HISTORY. 1951 c 551 s 13.

518.67 APPLICATION

HISTORY. 1951 c 551 s 14.

Where, in a divorce case, the findings of fact and conclusions of law were dated March 27, 1951, but judgment was not entered until April 20, 1951, the date when Laws 1951, Chapter 551, was approved, the provision that the property acquired during coverture shall be disposed of as shall appear just and equitable, is applicable to the divorce case. *French v French*, 236 M 439, 53 NW(2d) 215.

CHAPTER 519

MARRIED WOMEN; RIGHTS, PRIVILEGES

519.01 SEPARATE LEGAL EXISTENCE

Extent to which the common law concept of the unity of husband and wife and its consequences have been abrogated in Minnesota by the Married Women's Act and related statutes. 32 MLR 262.

Separate legal existence at common law under the Minnesota statutes. 32 MLR 263.

Capacity of a married woman to sue and be sued. 32 MLR 265.

Right to contract; at common law; under Minnesota statute. 32 MLR 275.

Contracts inter se; antenuptial contracts; postnuptial contracts. 32 MLR 278.

Action for loss of consortium caused by negligent injury to spouse. 35 MLR 318.

Marital deduction; estate tax. 36 MLR 50.

Rights of husband and wife to limit evidentiary disclosures in court by their spouses. 36 MLR 251.