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Paschen v. Paschen: When a Gift Is Not Just a Gift

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Casenote; *Paschen v. Paschen*: When a Gift Is Not Just a Gift

Constance Van Kley

The guiding principle of child support is "to meet the needs of the child according to the financial ability of the parents."[1] In *Paschen v. Paschen*,[2] the Montana Supreme Court reviewed a divorce proceeding that presented a novel child support question: Should gifts factor into determination of maintenance and child support payments? Undermining the guiding principle of child support, a five-justice panel unanimously held gifts should not be a factor.

I. Factual and Procedural Background

Herb Paschen ("Herb") and Anne Kemsley ("Anne"), married in 1996 and had three children together before separating in 2011 and filing for divorce in 2012.[3] During the marriage and subsequent separation, Anne stayed home with their children, earning little to no outside income.[4] She knew little about the family's finances; in fact, the record suggests that Herb hid the source and amount of a substantial amount of money.[5] For example, Anne testified that she believed the family had brought in only $75,000 annually from 2007 to 2010, all of which had been gifted by Herb's mother.[6] In fact, Herb spent over $1.7 million during that time. At trial, he apparently could not remember the source of the money or where it went.[7]

In 2015, the district court issued a final order dissolving the marriage, distributing marital assets and allocating marital debt.[8] The court allocated approximately $16,000 in debt to Anne and over $5.5 million to Herb.[9] Acknowledging the "grossly disproportionate allocation," the court determined that the assignment was appropriate because Herb planned to file for bankruptcy and would not remain liable for the debt.[10]

The court also considered the parenting plan and set Herb's child support and maintenance payments to Anne.[11] The court determined that Herb earned $175,000 annually, including $100,000 in self-reported employment income and $75,000 in gifts given to Herb by his mother,

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[1] Mont. Admin. R. 37.62.101(2) (2012).
[2] No. DA 15–0292, ___ P.3d ___, 2015 WL 9484544 (Mont. Dec. 29, 2015).
[3] *Id.* ¶¶ 2–7.
[4] *Id.* ¶¶ 2.
[5] *Id.*¶ 4.
[6] *Id.*
[7] *Id.*
[8] *Id.* ¶ 1.
[9] *Id.* ¶ 10.
[10] *Id.*
[11] *Id.* ¶ 11.

Leslie Douglass ("Bunny").[12] Bunny gave the family $75,000 each year for several years, but when the couple separated, she decreased her annual gift to $30,000, which she gave directly to Herb.[13]

Herb appealed, raising two issues: (1) that the district court erroneously calculated his income to set child support and maintenance payments; and (2) that the district court erred and/or abused its discretion in apportioning marital assets and debts.[14] Through counsel, Bunny filed an amicus brief supporting Herb's argument that her annual gifts to him should not be considered income for purposes of child support or maintenance payments.[15]

II. HOLDINGS

A. Calculation of Income

The Court devoted the majority of its analysis to Herb's argument that the district court erred in calculating his income to set child support and maintenance payments.[16] Herb argued that the court erred twice: first, in imputing to him an annual earning capacity of $100,000; and second, in imputing $75,000 in income based on Bunny's gifts to him and the family.[17]

The Court held that the district court properly estimated Herb's earning capacity to be $100,000.[18] At trial, Anne argued that Herb earned or could earn greater than $400,000, and Herb claimed that he could earn less than $60,000 annually.[19] Applying Montana statutes and administrative rules,[20] the Court determined that the district court properly considered not only Herb's actual employment income but his earning ability, affirming the court's imputation of $100,000 in earning capacity.[21]

The Court next considered an issue of first impression: should gifts be included within income for the purpose of setting child support

[12] *Id.*
[13] *Id.* ¶¶ 3, 6.
[14] *Id.* ¶¶ 12–15.
[15] *Id.* ¶ 12.
[16] *Id.* ¶¶ 18–42.
[17] *Id.* ¶¶ 19–20.
[18] *Id.* ¶ 26.
[19] *Id.* ¶ 23.
[20] *Id.* ¶¶ 21–22. Separate statutes and rules govern calculation of maintenance and child support payments. Regarding maintenance, Montana Code Annotated § 40–4–203(2) provides that a court should consider the "*ability* of the spouse from whom maintenance is sought." (2015) (emphasis added). Section 40–4–204 similarly requires the court to consider any and all relevant factors in setting child support. For the purposes of determining child support, the Administrative Rules of Montana expressly obligate the court to consider imputed as well as actual income, authorizing the imputation of income when a parent is not employed to her fullest capacity. Mont. Admin. R. 37.62.105, 37.62.106.
[21] *Paschen*, ¶ 26.

and/or maintenance payments?[22] Reversing the district court on this issue, it held that they should not. The Court's analysis closely tracked Bunny's amicus brief, which offered two lines of reasoning.[23] First, the Court examined the history of the child support guidelines to conclude the governing administrative bodies[24] intentionally excluded gifts from the definition of income.[25] Second, the Court considered the reasoning of other states that have refused to include gifts in calculating income.[26]

Historically, Montana expressly included "gifts and prizes" within income,[27] but as the regulations evolved between 1992 and 2012, gifts were no longer included in the regulations' non-exhaustive list of income sources.[28] Following the rules of statutory interpretation, which prevent the court from "insert[ing] what has been omitted,"[29] the Court "decline[d] to re-insert 'gifts'" into the statutes and regulations governing child support.[30]

The Court found support for its holding in other jurisdictions.[31] Where statutory or regulatory law does not expressly authorize inclusion,[32] courts are divided.[33] Because a donor has "no legal obligation to continue" gifts, the Court determined that including gifts in income for purposes of setting child support would be "fundamentally unfair."[34] The Court similarly held that gifts could not be included in income to set maintenance payments because "there is no guarantee that [a spouse] will continue to receive substantial gifts . . . into the foreseeable future."[35] The Court held that the district court erred by including $75,000 in annual gifts in Herb's income.[36]

B. Apportionment of the Marital Estate

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[22] *Id.* ¶ 27.
[23] Leslie Douglass's Amicus Curiae Brief, *Paschen v. Paschen*, 2015 WL 5547374 (Mont. Dec. 29, 2015) (No. DA–15–0292).
[24] The Montana Department of Social and Rehabilitation Services governed the child support guidelines until 1995, when the Montana Department of Public Health and Human Services assumed control.
[25] *Paschen*, ¶¶ 28–33.
[26] *Id.* ¶¶ 34–37.
[27] *Id.* ¶ 28 (citing Mont. Admin. R. 46.30.1513(1)(a), (b) (1990).
[28] *Id.* ¶ 28–30 (citing Mont. Admin. R. 46.30.1508, 46.30.1513 (1992); Mont. Admin. R. (1998); Mont. Admin. R. 37.62.105, 37.62.106 (2012)).
[29] Mont. Code Ann. § 1–2–101.
[30] *Paschen*, ¶ 33.
[31] *Id.*¶ 34–37.
[32] For examples of schemes including gifts within income, see Ga. Code Ann. § 19–6–15(f)(1)(A)(xviii) (2014); Tenn. Comp. R. & Regs. 1240–2–4–.04(3)(a)(1)(xviii) (2008), https://perma.cc/CLG8-DUWT; Ind. Child Support R. & Guidelines 3(A)(1) (2016), https://perma.cc/35DR-8CWL; Va. Code Ann. § 20–108.2.C (2015).
[33] *Paschen* ¶¶ 34–36 (contrasting California and Missouri, which broadly interpret income to include gifts, with Alaska and Maine, which have refused to do so). *See In re* Marriage of Alter, 89 Cal. Rptr. 3d 849 (2009); Petersen v. Petersen, 22 S.W.3d 760 (Mo. Ct. App. 2000); Nass v. Seaton, 904 P.2d 412 (Alaska 1995); True v. True, 615 A.2d 252 (Me. 1992).
[34] *Paschen*, ¶ 37.
[35] *Id.* ¶ 38.
[36] *Id.* ¶¶ 37–38.

The Court held the district court did not err in apportioning marital debts and assets.[37] Because the parties presented the district court with conflicting evidence, and the district court, as finder of fact, determined that Herb was not a credible witness, the lower court enjoys substantial deference.[38]

III. ANALYSIS

The Court's holding that gifts are not includable in income is problematic.[39] The lower court likely erred in imputing significantly more income in annual gifts to Herb than the evidence supported.[40] But instead of correcting the district court's calculation, the Court categorically ruled that gifts may never be included in income for the purposes of child support and maintenance payments. The Court's opinion conflicts with statutory and regulatory authority, the policies guiding calculation of child support, and the common-law majority rule.

A. Statutes and Regulations

1. Child Support

In setting child support, Montana statute requires that courts "consider all relevant factors, including: the financial resources of the parents [and] the standard of living that the child would have enjoyed had the marriage not been dissolved."[41] The child support regulations are more concrete, providing that "[i]ncome for child support includes actual income, imputed income . . . , or any combination thereof which fairly reflects a parent's resources available for child support."[42] Actual income is defined as "economic benefit from whatever source derived, except as excluded" elsewhere within the same regulation.[43] Gifts are not an enumerated exception within the child support guidelines.[44]

The Court appropriately considered the rules of construction, citing Montana Code Annotated § 1–2–101: "In the construction of a statute, the office of the judge is simply to ascertain and declare what is

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[37] *Id.* ¶¶ 41–42.
[38] *Id.*
[39] Analysis is limited to the single issue of whether gifts should be included in income for determining child support and maintenance payments. The Court did not devote considerable analysis to Herb's imputed income or to the apportionment of marital debts and assets, and its determination of these issues is consistent with well-settled law.
[40] The Court imputed $75,000 in income to Herb based on Bunny's annual gifts between 2007 and 2010. Bunny gave to Herb $30,000 annually following the couple's separation. *Paschen*, ¶¶ 3, 6.
[41] Mont. Code Ann. § 40–4–204(2)(b), (c).
[42] Mont. Admin. R. 37.62.105(1).
[43] Mont. Admin. R. 37.62.105(2)(a).
[44] Mont. Admin. R. 37.62.105(3).

in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."[45] Although the Court determined that it should not "reinsert 'gifts'" under this rule,[46] the same rule of construction supports the opposing argument. Income is defined broadly within the regulations, mirroring the definition of gross income within the federal tax code.[47] The tax code's gift exemptions,[48] however, suggest gifts would otherwise fit within broad definition of income. If the Court should not insert gifts into the definition of income, it also should not insert them into the exclusions. The definition of actual income within the regulations is expansive. Because gifts are an "economic benefit," and because the source of the economic benefit is by definition irrelevant, the plain meaning of the child support guidelines support inclusion.

Another rule of statutory construction lends support to this argument. "The maxim *expression unius est exclusion alterius* (the expression of one thing is the exclusion of another) is routinely cited in Montana case law."[49] Although the guidelines do not expressly foreclose the possibility of other exceptions to income, they also do not invite expansion. In contrast, where income is defined, the same regulation provides that income "includes but is not limited to" certain enumerated examples.[50] By setting forth specific, limited exceptions to income, the regulation implies that gifts should be included in income.[51]

The Court looked beyond the plain meaning of the regulations and into their history. In 1990, the Administrative Rules of Montana expressly included gifts within gross income.[52] When the Montana Department of Social and Rehabilitation Services amended the rules in 1992, it removed gifts as a source of income, reasoning that "one-time gifts and inheritances, except for income derived from their investment, are not income. To include . . . one-time sources of funds would result in a skewed application of the guidelines."[53] Later amendments to the regulations did not revert to the earlier regulatory scheme.[54]

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[45] *Paschen*, ¶ 33.
[46] *Id.* ¶ 33.
[47] 26 U.S.C. § 61(a) (2012).
[48] 26 U.S.C. § 102(a).
[49] Carbon Cnty. v. Union Reserve Coal Co., 898 P.2d 680, 684 (Mont. 1995).
[50] Mont. Admin. R. 37.62.105(2)(a).
[51] Where *expression unius est exclusion alterius* applies, the Court applies the maxim to infer that the legislative body intended a rule's omissions, as well as its inclusions. *See* Dukes v. City of Missoula, 119 P.3d 61, 64–65 (Mont. 2005) (holding that the Scaffolding Act, which creates liability for contractors, subcontractors, and builders, does not lead to liability to other entities, including counties, cities, towns, or villages).
[52] Mont. Admin. R. 46.30.1513(1)(a), (b) (1990).
[53] 5 Mont. Admin. Reg. 408 (Mar. 12, 1992).
[54] Mont. Admin. R. 37.62.106 (1998); 37.63.105 (2012).

Although this history suggests that the governing bodies[55] wished to limit the inclusion of gifts, it does not support the Court's holding that gifts are never includable. Rather, it indicates that a court should determine whether a gift is a single, isolated event before determining child support. Additionally, it shows that the regulators had the opportunity to exclude all gifts from income and chose not to do so. Where, as in *Paschen*, the gifts are regular and continuous, inclusion reflects the actual finances of the parent and does not "result in a skewed application of the guidelines."[56]

2. Maintenance

Analysis of the relevant authority on maintenance payments leads to a similar result. Where maintenance is appropriate, the court should "consider[] all relevant factors, including: the financial resources of the party seeking maintenance . . . ; the standard of living established during the marriage . . . ; and the ability of the spouse from whom maintenance is sought to meet the spouse's own needs while meeting those of the spouse seeking maintenance."[57] The statute requires the court to fully consider the parties' resources. Because regular gifts may substantially alter those resources, gifts should be considered in setting maintenance payments.

B. Equity and the Policies Guiding Child Support

Divorce actions are governed by equity, and a court's determination of income must serve that end.[58] "A court sitting in equity causes is empowered to . . . render justice between the parties[.]"[59] A court should have the power to look into a party's actual financial situation and beyond the simple question of whether the money was given as a gift. It is easy to imagine a case even more compelling than *Paschen*. For example, a parent from a wealthy family might choose not to work, living exclusively off of gifts from her own parents. Additionally, a parent receiving substantial gifts could be in a markedly better financial situation than his former spouse but still be entitled to payments. The court determining child support and maintenance must be

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[55] The Montana Department of Social and Rehabilitation Services governed the child support guidelines until 1995, when the Montana Department of Public Health and Human Services assumed control.
[56] 5 Mont. Admin. Reg. 408 (Mar. 12, 1992).
[57] Mont. Code Ann. § 40–4–203(2)(a), (c), (f).
[58] *In re* Marriage of Parrish, 763 P.2d 658, 661 (Mont. 1988); *In re* Marriage of Stevens, 253 P.3d 877, 880 (Mont. 2011).
[59] Rase v. Castle Mountain Ranch, Inc., 631 P.2d 680, 687 (Mont. 1981);

able to look into the substance rather than the form of a party's resources in order to reach an equitable end for children and former spouses.[60]

Not only is the exclusion of gifts potentially inequitable, it conflicts with the policy of child support clearly expressed in the regulations. Montana's child support guidelines "are based on the principle that it is the first priority of parents to meet the needs of the child according to the financial ability of the parents. . . . [A] child's standard of living should not, to the degree possible, be adversely affected because a child's parents are not living in the same household."[61] If a parent receives regular annual gifts, a court cannot accurately determine that parent's financial ability to provide for her child without considering those gifts. By excluding regular gifts from income, courts will fail to equitably distribute marital resources and meet the best interests of the child.

C. The Law of Other States

The Court supported its reasoning by looking to the law of other states. The highest courts of Alaska and Maine have declined to include gifts despite a broad definition of income, reasoning that to do so would lead to administrative burden and a potentially inequitable result.[62] Alaska and Maine are in the minority, however.[63] Even though most state guidelines do not address whether income includes gifts,[64] the majority rule includes gifts so long as they are "regularly received from a dependable source."[65] Other courts have held that, although gifts are not

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[60] Mont. Code Ann. § 1–3–219 ("The law respects form less than substance."). *See also* Pomeroy v. Sallaz, 498 P.2d 1211 (Mont. 1972) ("[I]n equity, substance, not form, controls.").
[61] Mont. Admin. R. 37.62.101.
[62] *Nass*, 904 P.2d at 416 ("We are persuaded that any [approach other than excluding gifts and inheritances] blurs the easily administered and well-established historical distinction between gifts and earned income."); *True*, 615 A.2d at 253 (holding that gifts should not be included in the income of the spouse seeking maintenance because "there is no legal obligation on the part of the [donor] to pay the money.").
[63] LAURA W. MORGAN, CHILD SUPPORT GUIDELINES INTERPRETATION & APPLICATION § 4.07(O) (2015) ("Most states have held that where gifts are continuous and predictable, they may be considered income.").
[64] Steven K. Berenson, *Economic Windfalls and Child Support: How Should Gifts, Inheritances, and Prizes be Treated?*, 47 SUFFOLK U. L. REV. 701, 704 (2014).
[65] *In re* Marriage of Nimmo, 891 P.2d 1002, 1007 (Colo. 1995) (en banc) (quoting Barnier v. Wells, 476 N.W.2d 795, 797 (Minn. Ct. App. 1991). *See also* MORGAN, *supra* note 63 § 4.07(O); Cummings v. Cummings, 897 P.2d 685 (Ariz. Ct. App. 1994); Ford v. Ford, 65 S.W.3d 432 (Ark. 2002); *In re* Marriage of Williamson, 172 Cal. Rptr. 3d 699 (2014); Zahringer v. Zahringer, 815 A.2d 75 (Conn. 2003); Ordini v. Ordini, 701 So. 2d 663 (Fla. Dist. Ct. App. 1997); *In re* Marriage of Rogers, 802 N.E.2d 1247 (Ill. 2003); Sells v. Sells, 669 N.W.2d 260 (Iowa App. 2003); Penner v. Penner, 411 S.W.3d 775 (Ky. Ct. App 2013); Petrini v. Petrini, 648 A.2d 1016 (Md. 1994); Andrews v. Andrews, 289 S.W.3d 7171 (Mo. Ct. App. 2009); Mellen v. Mellen, 688 N.Y.S.2d 674 (N.Y. App. Div. 1999); State v. Williams, 635 S.E.2d 496 (N.C. Ct. App. 2006); Kiehborth v. Kiehborth, 862 N.E.2d 863 (2006); Schinner v. Schinner, 420 N.W.2d 382 (Wis. Ct. App. 1988).

income, they may be a reason to deviate from the regulations or statutes to reach an equitable result.[66]

Although the Court is free to adopt a minority position, there is a clear reason why the majority of states have held otherwise: equity demands a full and complete inquiry into each party's available resources. Because regularly given gifts materially enhance a parent's ability to support her child financially, their categorical exclusion from income interferes with the guiding principles of child support.

IV. CONCLUSION

The Court's holding may lead to significant abuse of the system by parents who seek child support and maintenance payments as well as those who seek to avoid paying. Although the district court likely erred in its calculation of income, the Court's holding does far more than correct an error; it opens a loophole. As it looked deeply into the history of the child support guidelines, the Court missed what is clear at first glance. An incomplete view of a parent's finances will result in an inequitable result—a result that conflicts with the principles of child support and maintenance.

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[66] Styka v. Styka, 972 P.2d 16 (N.M. Ct. App. 1998); Suzanne D. v. Stephen W., 65 A.3d 965 (Pa. 2013).