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## Family Law

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# FAMILY LAW

## Caroline A. Winnie

### INTRODUCTION

In 1979 the Montana Supreme Court continued to interpret the Uniform Marriage and Divorce Act<sup>1</sup> enacted in 1975. The most important interpretations involved the relationships between property disposition and maintenance. There were also important new developments in the area of child abuse and neglect. This survey examines cases in three categories: (1) property disposition; (2) maintenance; and (3) child custody and dependency.<sup>2</sup>

### I. PROPERTY DISPOSITION

#### A. *Proving the Value of the Marital Estate*

The Montana Supreme Court in 1979 continued to stress the need for district courts to expressly state their findings of fact in property disposition cases appealed to the supreme court. Without a statement of the court's findings of fact in the record, the supreme court will not affirm a contested property disposition. This requirement is illustrated by *Grenfell v. Grenfell*,<sup>3</sup> which was remanded for failure to find the net value of the marital estate before dividing the marital assets.

The fact-finding requirement may be satisfied, however, without a formal statement of findings of fact, at least in cases where the marital estate is small and not complex. In *Kuntz v. Kuntz*,<sup>4</sup> a court-ordered sale of marital assets was held to establish the net value of the estate, obviating the need for the district court to formally state the value.<sup>5</sup>

Findings of fact in the record enable the supreme court to determine on review whether the district court considered all the factors set out in MCA § 40-4-202 (1979).<sup>6</sup> Where findings of fact are

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1. MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 40-1-101 through 404 (1979).

2. *See Family Law Survey*, 40 MONT. L. REV. 75 (1979).

3. — Mont. —, 596 P.2d 205 (1979).

4. — Mont. —, 593 P.2d 41 (1979).

5. *Id.* at —, 593 P.2d at 42.

6. The factors to be considered are "duration of the marriage and prior marriage of either party; antenuptial agreement of the parties; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; custodial provisions; whether the apportionment is in lieu of or in addition to maintenance; and the opportunity of each for future acquisition of capital assets and income.

erroneous or contradictory, the supreme court will not accept a property disposition. For example, in *Robertson v. Robertson*,<sup>7</sup> the court vacated an award because the findings of fact were inconsistent and contradictory.<sup>8</sup> In *Kruse v. Kruse*,<sup>9</sup> the court remanded the case because the district court had used the wrong value in computing the marital estate. Instead of using current market values for appreciated assets, the district court had used purchase prices to establish net values. The supreme court held the failure to consider current market values an abuse of discretion.<sup>10</sup>

Since the UMDA vests broad discretion in the district court with respect to property distribution, the supreme court is not likely to overturn a decision unless "the record demonstrates the district court acted arbitrarily, without a reasonable basis resulting in substantial injustice."<sup>11</sup> A decision supported by specific findings of fact is not likely to be found arbitrary. The court reversed only one case where the findings of fact seemed adequate, holding that the division was inequitable.<sup>12</sup> Therefore, to avoid further litigation, the best approach is to produce consistent and accurate evidence of the current net worth of the estate.

### B. *Equitable Distribution*

In light of the broad discretion over property distribution vested in the district court by the UMDA,<sup>13</sup> the supreme court is unlikely to overturn a property division on grounds of inequitable division. If the supreme court finds the division grossly inequitable, however, it will reverse.<sup>14</sup> The fairness of a property division is determined in light of several factors, including duration of the marriage and the age, health, employability, and needs of both parties.<sup>15</sup> Findings are not required on these factors, but the more obvious it is that the district court considered these factors, the less likely will be reversal.<sup>16</sup>

Two cases illustrate the efficacy of specific reference in the record to the relevant factors of MCA § 40-4-202 (1979). Thus, the

7. — Mont. —, 590 P.2d 113 (1978).

8. *Id.* at —, 590 P.2d at 116.

9. — Mont. —, 586 P.2d 294 (1978).

10. *Id.* at —, 586 P.2d at 294.

11. *Madsen v. Madsen*, — Mont. —, 590 P.2d 110, 112 (1978).

12. *Brown v. Brown*, — Mont. —, 587 P.2d 361 (1978) (also reversed for custody considerations).

13. UNIFORM MARRIAGE AND DIVORCE ACT [hereinafter cited as UMDA] § 307, 9A UNIFORM LAWS ANNOTATED [hereinafter cited as ULA] 148 (1979).

14. *Brown v. Brown*, — Mont. —, 587 P.2d 361 (1978).

15. MCA § 40-4-202 (1) (1979).

16. *Caprice v. Caprice*, — Mont. —, 585 P.2d 641 (1978).

court affirmed as equitable the disposition in *Jermunson v. Jermunson*,<sup>17</sup> where the couple married young, was married only four years, and the wife was awarded \$1,500 while the husband assumed the family debt of \$11,000. This award was based on the findings that he was five years older than she and was employed, while she had not completed high school and had no skills. Also affirmed was *Houtchens v. Houtchens*,<sup>18</sup> where the couple had acquired only \$1,500 in assets during the two years of their marriage. Here the wife was awarded \$8,000 since the husband had assets of about \$75,000. As these cases make clear, if sufficient evidence has been produced concerning the relevant factors in MCA § 40-4-202 (1979) and the disposition is not grossly inequitable, the court will not reverse on the grounds of inequity.

### C. Gifts and Inheritance

Montana is the only UMDA state to specifically include inheritance and gifts as marital property and to provide for their disposition.<sup>19</sup> The statute provides that when disposing of inherited or gifted property, the court shall consider those contributions of the other spouse to the marriage, including "(a) the nonmonetary contribution of the homemaker, (b) the extent to which such contributions have facilitated the maintenance of this property, and (c) whether or not the property disposition serves as an alternative to maintenance arrangements."<sup>20</sup> The supreme court has not, however, decided precisely how these three factors will affect the disposition.

In *Balsam v. Balsam*,<sup>21</sup> the disposition of assets gifted to the husband prior to marriage was at issue. The husband received a trust fund before marriage which he later used to reduce the construction price of the family home by one-half. The district court allowed only one-half of the home's present value to be included in the marital estate. The supreme court somewhat reluctantly affirmed. Deducting an inheritance, which has been invested in the home, from the value of the home before dividing the marital estate contravenes the rule laid down earlier in *Vivian v. Vivian*.<sup>22</sup> The court distinguished *Balsam* from *Vivian* "because in *Vivian*, no evidence was presented on the husband's expenditure for home

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17. — Mont. —, 592 P.2d 491 (1979).

18. — Mont. —, 592 P.2d 158 (1979).

19. UMDA § 307, 9A ULA 145 (1979).

20. MCA § 40-4-202 (1979).

21. — Mont. —, 589 P.2d 652 (1979).

22. — Mont. —, 583 P.2d 1072, 1074-75 (1978).

improvements and the inheritance was received during the marriage [while in *Balsam*] the gifted funds were received before marriage and evidence of the husband's expenditures was clearly presented at the trial."<sup>23</sup> Since the court has previously disapproved of deducting an inheritance invested in home improvements from the present value of the marital estate,<sup>24</sup> the first factor considered by the court, evidence of that investment, should be irrelevant. Furthermore, according to MCA § 40-4-202 (1979), the second factor considered by the court, when the gifts are acquired, is also irrelevant. Although the court frowned on the deduction of the appreciated investment,<sup>25</sup> it nevertheless allowed the deduction and, in doing so, gave importance to two formerly irrelevant factors: (1) evidence of the prior investment and (2) when the gifted investment was acquired.

## II. MAINTENANCE

The property disposition and maintenance statutes<sup>26</sup> encourage courts to provide for the financial needs of divorced spouses by property disposition rather than by an award of maintenance.<sup>27</sup> In 1979 several cases contested maintenance awards; most were decided following existing rules. *Madsen v. Madsen*<sup>28</sup> and *Cromwell v. Cromwell*,<sup>29</sup> however, raised new issues concerning the relationship between property disposition and maintenance. *Madsen* discussed whether MCA § 40-4-203 (1979) (providing for maintenance) (1) requires that property distributed to a spouse seeking maintenance be converted into income-producing property and (2) whether the spouse needing maintenance must seek job training before maintenance can be awarded. Finding no controlling authority in Montana, the supreme court looked to other UMDA jurisdictions that have construed language similar to section 40-4-203. The Montana court held that "whether the spouse seeking maintenance lacks sufficient property and is unable to support herself through appropriate employment [is relative] to the standard of living established during marriage."<sup>30</sup> Even in an affluent marriage, then, a spouse

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23. *Balsam*, — Mont. —, 589 P.2d at 655.

24. *Vivian*, — Mont. —, 583 P.2d 1072, 1074-75 (1978).

25. *Id.* at —, 589 P.2d at 655.

26. MCA §§ 40-4-202, -203 (1979).

27. Commission Comments, UMDA § 308, 9A ULA 161 (1979). The district court may award maintenance only if the property disposition inadequately meets the spouse's needs. MCA § 40-4-203 (1) (1979).

28. — Mont. —, 590 P.2d 110 (1979).

29. — Mont. —, 588 P.2d 1010 (1979).

30. *Madsen*, — Mont. —, 590 P.2d at 112.

receiving substantial amounts of property may still be awarded maintenance.

In *Cromwell v. Cromwell*,<sup>31</sup> the wife received more than half the marital estate, but she was unable to support herself through employment. The supreme court examined all the statutory considerations including the husband's ability to pay maintenance and his substantial retirement fund. Since the wife lacked retirement income, the court ruled that she should receive maintenance "to help her meet not only her present needs, but also to help prepare her for retirement."<sup>32</sup> Thus, in both *Madsen* and *Cromwell*, the supreme court approved maintenance awards despite large property settlements.

### III. CHILD CUSTODY AND DEPENDENCY

The most significant issues raised in the cases involving children were in the area of child abuse and neglect and the termination of parental rights. Child custody determinations following dissolution of marriage generally followed existing rules, although changes occurred concerning the tender years presumption and off-record interviews with children.

#### A. Child Custody: Dissolution of Marriage

##### 1. Tender Years Presumption

The determination of custody under the UMDA<sup>33</sup> was "designed to codify existing laws"<sup>34</sup> and, although the tender years and other presumptions are not mentioned, the Commissioner's Notes state that "the language of the section is consistent with preserving such rules of thumb."<sup>35</sup> For example, the presumption that the mother should be given custody of young children is no longer statutory, yet the Montana Supreme Court has stated that it still exists.<sup>36</sup> In 1977, the court held<sup>37</sup> that once the presumption was overcome the district court should apply the "best interest" test.<sup>38</sup> In *Jensen v. Jensen*,<sup>39</sup> however, the court held that the presumption exists but the district court must determine custody following the

31. — Mont. —, 588 P.2d 1010 (1979).

32. *Id.* at —, 588 P.2d at 1013.

33. MCA § 40-4-212 (1979).

34. Commission Comments, UMDA § 402, 9A ULA 198 (1979).

35. *Id.* at 198.

36. *Tweeten v. Tweeten*, — Mont. —, 563 P.2d 1141 (1977).

37. *Isler v. Isler*, — Mont. —, 566 P.2d 55 (1977).

38. MCA § 40-4-212 (1979).

39. — Mont. —, 597 P.2d 733 (1979).

statutory guidelines for "best interest" determinations. The presumption will be overcome if the district court determines that in the best interest of the child, the father should be given custody.<sup>40</sup> This means custody will be decided solely according to the best interest of the child. No burden must be overcome before applying the "best interest" test and the only possible application of the tender years presumption is when the court finds that both parents are equally suitable. Thus, parties seeking custody should produce as much evidence as possible conforming to MCA § 40-4-212 (1979) and not rely on the tender years presumption.

## 2. Court Interviews with Child

The statutes providing for interviews, investigations, reports, and hearings in custody disputes,<sup>41</sup> were "designed to permit the district court to decide custody issues as informally and non-contentiously as possible based on as much relevant information as can be secured while preserving a fair hearing for all interested parties."<sup>42</sup>

The supreme court addressed the issue of mandatory records of in-chambers child interviews in three cases. In *Brown v. Brown*, the court reversed because there was no finding of the children's wishes and no record was made of the interview.<sup>43</sup> The court reiterated its earlier holding<sup>44</sup> that compliance with MCA § 40-4-212 (1979) does not require the interview but if one is conducted the district court must make a record of it.<sup>45</sup>

In a later case,<sup>46</sup> the court held that the requirement of a record is a right of the parties and can be waived only by them.<sup>47</sup> In *Wilson v. Wilson*,<sup>48</sup> the judge conducted an off-record interview with the children, who were accompanied by a guidance counselor. Because the counselor later testified at a hearing concerning what occurred during the interview, the lack of a verbatim record was not grounds for remand.<sup>49</sup> Thus, if the district court affirms the wishes of the children and their parents have waived the right to a

40. *Id.* at \_\_\_, 597 P.2d at 735.

41. MCA §§ 40-4-214 through - 216 (1979).

42. Commission Comments, UMDA § 404, 9A ULA 203 (1979).

43. \_\_\_ Mont. \_\_\_, 587 P.2d 361 (1978).

44. *E.g.*, Schiele v. Sager, \_\_\_ Mont. \_\_\_, 571 P.2d 1142 (1977).

45. *Brown*, \_\_\_ Mont. \_\_\_, 587 P.2d at 366.

46. *Counts v. Chapman*, \_\_\_ Mont. \_\_\_, 589 P.2d 151 (1979).

47. *Id.* at \_\_\_, 589 P.2d at 154. Had the district court not affirmed the children's wishes, it might have been necessary to remand and have an attorney appointed to represent the children and a verbatim record made of their interviews. *Id.*

48. \_\_\_ Mont. \_\_\_, 590 P.2d 1136 (1979).

49. *Id.* at \_\_\_, 590 P.2d at 1140.

record, or if there is another means of conveying the content of the interview, lack of an in-chambers record will not be fatal.

### B. Guardianship

It is well-settled in Montana that the "best interest" test cannot be used to terminate a parent's rights.<sup>50</sup> Termination may occur on a finding of abuse, neglect, dependency, or parental unfitness.<sup>51</sup> Once any of these factors exists the "best interest" test is then used to determine custody. The court reiterated these rules in *In re Aschenbrenner*<sup>52</sup> where a guardianship proceeding purported to terminate a natural parent's rights. The supreme court reversed the district court's granting of letters of guardianship and custody of the children to the grandparents since the mother's rights had never been terminated.

In another recent case,<sup>53</sup> the court held, under MCA § 72-5-222 (1) (1979),<sup>54</sup> that the term "parental rights" includes the rights of the Department of Social and Rehabilitation Services when it has legal custody of a child and that the Department's rights are not terminated by placing the child in foster care.<sup>55</sup>

### C. Youth In Need of Care

Each of four cases concerning youths in need of care involved far-reaching issues and decisions. The statutory definitions of abuse and neglect<sup>56</sup> were challenged on the grounds of unconstititutional vagueness in *In re JLB*.<sup>57</sup> The mother argued that because the statute "fails to state any specific harms to a child which might justify termination of parental rights, it is subject to overly-broad interpretation and arbitrary application."<sup>58</sup> The court upheld the statute's constitutionality after examining various sets of standards which have been proposed for termination of parental rights.<sup>59</sup> The court appeared to adopt a standard which focuses on the needs of the child instead of parental fault, yet leaves "emotional depriva-

50. *In re Fish*, \_\_\_ Mont. \_\_\_, 569 P.2d 924, 927 (1977).

51. *Id.* at \_\_\_, 569 P.2d at 927.

52. \_\_\_ Mont. \_\_\_, 597 P.2d 1156 (1979).

53. *Guardianship of PJD*, \_\_\_ Mont. \_\_\_, 600 P.2d 1170 (1979).

54. MCA § 72-5-222(1) (1979) provides that "[t]he court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order."

55. *PJD*, \_\_\_ Mont. \_\_\_, 600 P.2d at 1173.

56. MCA § 41-3-102(2) (1979).

57. \_\_\_ Mont. \_\_\_, 594 P.2d 1127 (1979).

58. *Id.* at \_\_\_, 594 P.2d at 1132.

59. *Id.* at \_\_\_, 594 P.2d at 1133-35.



tion" undefined. The court also adopted a new standard of proof required for termination of parental rights: "The State must show by clear and convincing evidence that the child is neglected or abused before parental rights may be terminated."<sup>60</sup> This standard is higher than Montana's previous standard of "substantial credible evidence."<sup>61</sup> The thrust of this holding is that there must be a body of evidence which clearly and convincingly proves the child neglected, although the court declines to say what specific evidence is required to prove a child emotionally or physically neglected. This is not unreasonable given the lack of consensus among child care experts as to what symptoms indicate neglect<sup>62</sup> and the innumerable ways in which children can be neglected.

*In re TYK and DAWR*<sup>63</sup> also raised the issue of what constitutes abuse. The district court's findings of abuse and neglect of both children in the home were based on the facts that one was abused and both children's weight improved after foster placement. In affirming termination of the parents' rights in respect to both children, the court stated that the definition of abuse and neglect "allow[ed] the court to look at the 'totality of the circumstances' surrounding the child's home environment before making a determination."<sup>64</sup> The court held that the statute<sup>65</sup> "grants to the district court the ability to make a determination of neglect and abuse as to all children in a family based on the policy that abuse of one child has a detrimental effect on the other child's development."<sup>66</sup>

*In re TER*<sup>67</sup> raised the procedural issue of allowing an abused child to testify outside the presence of her abusers. The court held that in abuse-and-neglect cases children may testify outside the presence of their parents "subject to cross-examination by the parents' attorney, when the presiding judge determines that it is the most likely method of discovering the whole truth as to the alleged abuse and neglect."<sup>68</sup> Here the youth court terminated the rights of TER's mother and step-father. The supreme court affirmed the termination of the step-father's rights noting that all of the evidence concerned only the step-father's abuse. The court determined that the youth court had ignored the mother's rights and vacated the order regarding the mother. Clearly, before terminating

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60. *Id.* at \_\_\_, 594 P.2d at 1136.

61. *Id.* at \_\_\_, 594 P.2d at 1137.

62. *Id.* at \_\_\_, 594 P.2d at 1134.

63. \_\_\_ Mont. \_\_\_, 598 P.2d 593 (1979).

64. *Id.* at \_\_\_, 598 P.2d at 595.

65. MCA § 41-3-102 (1979).

66. TYK, \_\_\_ Mont. \_\_\_, 598 P.2d at 596.

67. \_\_\_ Mont. \_\_\_, 590 P.2d 1117 (1979).

68. *Id.* at \_\_\_, 590 P.2d at 1120.

a parents' rights there must be a finding of abuse and neglect by that parent. Evidence that a parent knew of child abuse yet did not prevent it would permit termination of the non-abusing parent's rights under MCA § 41-3-102 (1979). Where the innocent parent is unaware of the abuse, the courts will be faced with the difficult task of terminating one parent's rights while preserving the rights of the other parent.