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INTRODUCTION

The Montana Supreme Court heard more than fifty cases falling within the broad rubric of "family law" in 1982. This survey does not attempt to deal with all of these cases; rather, it focuses on the handful of cases which significantly changed, clarified, or complicated existing Montana law. Further, it should be noted that each of the cases discussed by this survey presented more than one issue to the supreme court on appeal. This survey does not purport to analyze every issue raised in each case cited. It concentrates instead on examining those key issues which resulted in a statement of consequence on the law of Montana.

I. PROPERTY DIVISION

A. *Retirement Plans*

In two cases, the Montana Supreme Court took steps to limit the effect of the United States Supreme Court's landmark decision in *McCarty v. McCarty*[1] on the practice of including the value of retirement plans in the marital assets of a divorcing couple and apportioning the same between the parties. In *Kis v. Kis*[2] and in *In Re Marriage of Laster*,[3] the Montana Supreme Court held that the *McCarty* decision which exempted military retirement benefits from inclusion in the marital estate for dissolution purposes, was based on principles of federal presumption and, therefore, had no effect on any other private or federal retirement plans.

The *Kis* case involved game warden retirement benefits stemming from the husband's service with the Montana Fish and Game Department. Although the district court had awarded these retirement benefits to the husband in their entirety, he appealed the property distribution to the Montana Supreme Court, contending that the benefits should not have been considered a marital asset for dissolution purposes. In support of his position, the husband relied on *McCarty* and Montana Code Annotated Section 19-8-805,

1. 453 U.S. 210 (1981). For a discussion of the immediate impact of the *McCarty* decision on Montana law, see *Montana Supreme Court Survey: Family Law*, 43 MONT. L. REV. 317, 317-19 (1982).

2. ___ Mont. ___, 639 P.2d 1151 (1982).

3. ___ Mont. ___, 643 P.2d 597 (1982).

which he claimed specifically excluded game warden retirement benefits from being considered a marital asset.[4]

The state supreme court rejected the argument that *McCarty* applied, stating that the *McCarty* decision had been based on a finding that California community property laws in this regard had been specifically preempted by federal statutes concerning military retirement benefits.[5] Further, the court refused to construe the exemption provided by section 19-8-805 as extending to determinations of marital estates in dissolution proceedings.[6] The court found the purpose of this provision to be simply the protection of a person's future retirement security.[7] The court also approved the district court's use of the cost of an annuity to establish the present value of the retirement benefits; however, it recognized that such value might be affected by the contingency of the retirement benefits failing to reach the anticipated levels.[8]

Laster concerned a federal rather than state retirement plan and involved not merely consideration but actual division of the pension. The husband worked for the federal government as an OSHA compliance officer and, at the time of the divorce, had interests in three retirement plans, two vested and one which was to vest in five years. The district court awarded the wife maintenance in the amount of $350 per month, but recognized that this would end when the husband retired. Therefore, the court awarded the wife a one-third interest in the husband's retirement plans as a substitute for maintenance at that time.

On appeal, the husband propounded a rather novel equal protection argument. He contended that *McCarty* and an earlier United States Supreme Court decision, *Hisquierdo v. Hisquierdo*,[9] had created a classification which discriminated in its application to divorce proceedings against persons whose pensions were covered by neither the Federal Railroad Retirement Act nor the military. The Montana Supreme Court found this argument without

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4. MONT. CODE ANN. § 19-8-805 (1981) provides:

> Any money received or to be paid as a member's annuity, state annuity, or return of deductions or the right of any of these shall be exempt from any state or municipal tax and from levy, sale, garnishment, attachment, or any other process whatsoever and shall be unassignable except as specifically provided in 19-8-806.

5. *Kis*, ___ Mont. ___, 639 P.2d at 1153.

6. *Id.*

7. *Id.*

8. *Id.* at ___, 639 P.2d at 1153-54.

9. 439 U.S. 572 (1979) (value of a railroad pension under the Federal Railroad Retirement Act, 26 U.S.C. §§ 3201 through 3233, is not includible for purposes of a marital property valuation in a divorce proceeding).

merit for two reasons.[10] First, the equal protection argument had not been raised at the trial and there was no "plain error" in the distribution of the retirement benefits. Second, and more significant, the court found no discriminatory classification, stating: "These cases were merely construing federal statutes and discerning the intent of Congress in enacting those specific retirement plans. These cases had *no effect* on any private or other federal retirement plans. The husband is arguing apples and oranges."[11]

In both *Kis* and *Laster* the Montana Supreme Court declared that including retirement benefits among the marital assets in dissolution proceedings was mandated by Montana Code Annotated section 40-4-202(1).[12] Specifically, the court focused on the language of section 40-4-202(1) requiring a district court to consider "the opportunity of each [spouse] for the acquisition of capital assets and income."[13]

Kis and *Laster* make it clear that all private, state, and federal retirement plans may continue to be included in the marital assets for the purposes of marital property distributions in Montana. The only exceptions are the exemptions of military and railroad pensions recognized by *McCarty* and *Hisquierdo*. Further exemptions for federal pensions will probably not be recognized in Montana until specifically ruled on by the United States Supreme Court.

B. *Future Interests*

In *In re Marriage of Hill*,[14] the Montana Supreme Court held that vested future interests in real property are properly includible in a marital estate for property distribution purposes. The court reasoned that although the right to possession of a vested future interest is postponed,[15] it is still a property interest that can be distributed in accordance with the requirements of Montana Code Annotated section 40-4-202(1).[16]

In reaching this decision the supreme court relied extensively

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10. *Laster*, ___ Mont. ___, 643 P.2d at 603.
11. *Id.* (emphasis in original).
12. *Kis*, ___ Mont. ___, 639 P.2d at 1153; *Laster*, ___ Mont. ___, 643 P.2d at 603.
13. *Laster*, ___ Mont. ___, 643 P.2d at 603.
14. ___ Mont. ___, 643 P.2d 582 (1982).
15. MONT. CODE ANN. § 70-1-317 (1981).
16. *Hill*, ___ Mont. ___, 643 P.2d at 587; MONT. CODE ANN. § 40-4-202(1) (1981) provides in pertinent part:

> In a proceeding for dissolution of a marriage. . . the court. . . shall. . . finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both.

on a Kansas case, *McCain v. McCain*.[17] In *McCain*, the Supreme Court of Kansas held that a vested future interest could be included in making a marital property division because such interests may be sold or otherwise alienated, transferred, or mortgaged; such interests, therefore, had a present value.[18] The Montana Supreme Court expressly adopted this rationale.[19] The court recognized that Kansas had not, like Montana, adopted the Uniform Marriage and Divorce Act (UMDA), but noted that the Kansas statute[20] on the division of marital property was substantially similar to section 40-4-202(1).[21]

C. *Postponement of Distribution Hearings*

In *In re Marriage of Krause*,[22] the Montana Supreme Court considered the scope of the district court's power to postpone disposition of marital property under Montana Code Annotated section 40-4-104.[23] While encouraging that all matters be concluded upon the entry of a decree of dissolution, the supreme court held that in those unusual situations where the district court is not able to make the property disposition at the time of dissolution it must make written findings that a postponement of such proceeding is in the best interests of the parties. The district court must then set a specific later hearing date or a time period within which the final disposition must be completed.[24]

In *Krause*, the hearing on the property distribution was not held until thirty-four months after the entry of the divorce decree. During this thirty-four month period, the husband had control over certain oil and gas properties acquired during marriage. These properties consisted of working interests in twenty oil and gas wells. The properties generated income which the husband used to purchase working interests in twenty additional oil and gas wells.

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17. 219 Kan. 780, 549 P.2d 896 (1976).

18. *Id.* at 783-84, 549 P.2d at 900.

19. *Hill*, ___ Mont. ___, 643 P.2d at 587.

20. KAN. STAT. ANN. § 60-1610(d) (Vernon Supp. 1981).

21. The only UMDA state with any precedent for including vested remainder interests in making marital property distributions is Kentucky. *See* Rompf v. Rompf, 433 S.W.2d 879 (1968). In that case, the district court took into consideration the wife's remainder interests in two estates when dividing the marital assets. The Kentucky Court of Appeals affirmed the resulting lump sum settlement without comment on this point.

22. ___ Mont. ___, 654 P.2d 963 (1982).

23. MONT. CODE ANN. § 40-4-104 (1981) provides in pertinent part: "(1) The district shall enter a decree of dissolution of marriage if: (d) . . . the court has considered, approved, or made provision for . . . the disposition of property or provided for a separate, later hearing to complete these matters."

24. *Krause*, ___ Mont. ___, 654 P.2d at 968.

When the district court finally made the property distribution, it awarded the wife only a thirty-five percent interest in the original twenty wells (which had been valued near the time of the divorce decree).[25] The wife appealed, alleging error in the district court's failure to value the disputed marital assets at the time of the dispositional hearing and contending that she was entitled to share in the income realized from both the original and newly acquired wells.

The Montana Supreme Court agreed. The court reviewed its decisions in a number of earlier cases[26] and distilled three principles which a district court must consider when making property valuations: (1) proper valuation is not tied to a specific event; (2) there may be more than one valuation point, depending upon the kind of property involved; and (3) preferably, fair market values at the time of distribution should be used.[27] Although recognizing that the district court still has broad discretion in applying these principles to property distributions, the supreme court found an abuse of discretion in *Krause* because of the wide fluctuations in the value of the assets between the valuation dates and the time of the dispositional hearing.[28] Additionally, the court found that the wife was entitled to share in the additional oil and gas wells because she had never been divested of her interest in the marital property that generated the income for their acquisition.[29] The court remanded the case to the district court with directions to accept evidence of the current value of the marital assets and determine the wife's interest in the newly acquired oil and gas properties.[30]

The complications which arose in the valuation of the marital property in *Krause* were a direct result of the thirty-four month delay between the entry of the dissolution decree and the property distribution hearing. To avoid a recurrence of this problem in the future, the court took pains to delineate the scope of the district court's power to postpone a property distribution under section 40-

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25. *Id.* at ____, 654 Mont. at 965.

26. Lippert v. Lippert, ____ Mont. ____, 627 P.2d 1206 (1981); Hamilton v. Hamilton, ____ Mont. ____, 607 P.2d 102 (1980); Herring v. Herring, ____ Mont. ____, 602 P.2d 1006 (1979); Vivian v. Vivian, 178 Mont. 341, 583 P.2d 1072 (1978); In re Marriage of Kramer, 177 Mont. 61, 580 P.2d 439 (1978); Downs v. Downs, 170 Mont. 150, 551 P.2d 1025 (1976).

27. *Krause*, ____ Mont. ____, 654 P.2d at 968.

28. *Id.* at ____, 654 P.2d at 969. Specifically, the court noted that testimony indicated that the parties' 2000 shares of Energy Resources stock, which had been valued at $18,000 as of May 17, 1978, were worth $31,000 at the time of the dispositional hearing. The court stated: "Failure to recognize these kinds of value fluctuation is error." *Id.*

29. *Id.*

30. *Id.*

4-104. That statute allows postponement of property distribution where a separate, later hearing has been provided for. To "provide for," said the supreme court, means to make arrangements for, and to make arrangements entails the setting of a date or time period agreeable to the parties.[31] Additionally, the court cautioned that postponements should be made only when necessary and not as a matter of course.[32]

The supreme court approved the "balanced approach" (found in Colorado law)[33] of requiring the district court to make specific findings of fact to show that delay is necessary.[34] Despite laying down this new procedure, the supreme court indicated that the setting of precise time limits was still within the discretion of the district court and made it clear that, absent facts such as those in *Krause*, an unwarranted delay would not necessarily result in a faulty judgment.[35]

II. CHILD SUPPORT

A. *Duration of Obligation to Support*

In *Torma v. Torma*,[36] a case of first impression in Montana, the supreme court held that a divorced father who was obligated to pay $125 per month for the support of his two minor children could not unilaterally reduce his payments by half when his son joined the Navy five months before his eighteenth birthday. The supreme court adopted the rule of a Colorado case, *Taylor v. Taylor*.[37] In *Taylor*, the Supreme Court of Colorado held that, when a divorce decree directs the periodic payment of a specified amount for the benefit of more than one minor child, the emancipation of one of the children does not affect the liability of the father to pay the full amount. Instead, the burden is upon the father to make a showing that he is entitled to relief from all or part of the obligation.[38] In support of this rule, the Montana Supreme Court approved the two-part rationale set forth by the Maryland Court of Special Appeals in *Becker v. Becker*:[39]

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31. *Id.* at ___, 654 P.2d at 967.
32. *Id.* The court noted that the Commissioners' Note to § 40-4-104 stated that postponement was authorized only "if necessary." *See* MONT. CODE ANN. § 40-4-104 (1981) commissioners' note.
33. *Krause*, ___ Mont. ___, 654 P.2d at 967.
34. COLO. REV. STAT. § 14-10-106 (1973).
35. *Krause*, ___ Mont. ___, 654 P.2d at 968.
36. ___ Mont. ___, 645 P.2d 375 (1982).
37. 147 Colo. 140, 362 P.2d 1027 (1961).
38. *Id.* at 145, 362 P.2d at 1029.
39. 39 Md. App. 630, 387 A.2d 317 (1978).

> First, a child support order is not based solely on the needs of the minor children but takes into account what the parent can afford to pay. . . . Consequently, a child support order may not accurately reflect what the children actually require but only what the parent can reasonably be expected to pay. . . . Second, to regard an undivided child support order as equally divisible among the children is to ignore the fact that the requirements of the individual children may vary widely, depending on the circumstances.[40]

B. *Crediting Home Equity Against Support Payments*

In *Vinner v. Vinner*,[41] the district court awarded the husband an equity of $9,576.40 in the family home and ordered the same to be credited against his child support obligation at the rate of $200 per month until the equity had been satisfied. The Montana Supreme Court found this to be arbitrary and to exceed the bounds of reason.[42] The court held that, although the district court could properly make such an order, it must also credit the husband's ongoing principal with interest computed at a reasonable rate.[43] In reaching its decision in *Vinner*, the court distinguished *Crabtree v. Crabtree*,[44] which it had decided three months earlier.

In *Crabtree*, the supreme court held that marital assets could be applied to retroactive support payments due and owing at the time of the decree of distribution.[45] In that case, the wife moved out of the family home and filed for divorce, leaving her husband—unemployed and in poor health after suffering a stroke—to care for two fourteen-year-old children. In an amended decree of dissolution dated September 30, 1981,[46] the district court determined that the wife should be responsible for child support in the amount of $250 per month ($125 per child). However, upon a further finding that the wife's monthly income exceeded her monthly expenses by $50, the court ordered the support to be deducted from her share of the marital assets. The award covered the period from the separation of the parties to the date when each child reached eighteen or graduated from high school. Both children had reached the age

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40. *Id.* at 633-34, 387 A.2d at 320 (citing Delevett v. Delevett, 156 Conn. 1, 4, 238 A.2d 402, 404 (1968)).

41. ___ Mont. ___, 654 P.2d 526 (1982).

42. *Id.* at ___, 654 P.2d at 529.

43. *Id.*

44. ___ Mont. ___, 651 P.2d 29 (1982).

45. *Id.* at ___, 651 P.2d at 31-32.

46. The wife had originally obtained a decree of dissolution on March 13, 1981, but, alleging changed circumstances, filed a motion to amend and a motion for a new trial on April 13, 1981. *Crabtree*, ___ Mont. ___, 651 P.2d at 30.

of eighteen by the time this decree was filed. The supreme court correctly recognized this to be an entirely different situation from that in *Vinner*.[47]

III. CHILD CUSTODY

A. *Jurisdiction*

In *Pierce v. Pierce*,[48] the father filed a petition in Montana for modification of a Kentucky divorce decree that awarded custody of the parties' six-year-old son to the mother, alleging jurisdiction under subsections (1)(a), (1)(b), and (1)(c) of Montana Code Annotated section 40-4-211.[49] The mother filed an initial response and counter-petition alleging that the Montana court must decline jurisdiction because her ex-husband had improperly retained her son in this state after she requested his return to her custody. In an amended response and counter-petition, she further alleged continuing jurisdiction in Kentucky.

The Montana district court received a telephone call from the judge of the Kentucky court alleged to have continuing jurisdiction. The judge informed the Montana court that he felt the custody matter should be determined in Montana since that was

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47. *Vinner*, ___ Mont. ___, 654 P.2d at 529.

48. ___ Mont. ___, 640 P.2d 399 (1982).

49. MONT. CODE ANN. § 40-4-211 (1981) provides in pertinent part:

(1) A court of this state competent to decide child custody matters has jurisdiction to make a child custody decree by initial or modification decree if:

(a) this state:

(i) is the home state of the child at the time of commencement of the proceedings; or

(ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reason and a parent or person acting as parent continues to live in this state; or

(b) it is in the best interest of the child that a court of this state assume jurisdiction because:

(i) the child and his parents or the child and at least one contestant have a significant connection with this state; and

(ii) there is available in this state substantial evidence concerning the child's parent or future case, protection, training, and personal relationships; or

. . .

(d) (i) no other state has jurisdiction under prerequisities substantially in accordance with subsections (1)(a), (1)(b), or (1)(c) of this section or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine custody of the child; and

(ii) it is in his best interest that the court assume jurisdiction.

where the child was living. However, less than one week later, the Montana court received a second phone call from Kentucky. This time, the Domestic Relation Commissioner of the Kentucky court expressed his opinion that proper jurisdiction over the custody determination lay in Kentucky under the Uniform Child Custody Jurisdiction Act (UCCJA).[50] Thereafter, the Montana district court held a hearing on the matter. At the hearing, counsel for both sides argued the jurisdiction issue but neither side presented any testimony through witnesses. At the close of argument, the court ruled as a matter of law that it had no jurisdiction over the case.[51]

On appeal, the Montana Supreme Court reversed and remanded the case for a full evidentiary hearing to settle the jurisdictional matter. The district court was directed to make specific findings of fact as to the jurisdictional basis—based on evidence in the record and not mere allegations—using the decisional mode of *Wenn v. Schwartze*.[52]

In *Wenn*, the supreme court set out a two-step process for determining whether Montana has jurisdiction to modify another state's decree under the UCCJA. That process first requires a determination of whether Montana has jurisdiction under any of the bases of section 40-4-211.[53] If Montana does have jurisdiction, step two requires a determination of whether the original decree state also has jurisdiction under statutory provisions substantially similar to Montana's UCCJA requirements. If the other state can be found to have jurisdiction, Montana cannot modify the decree. If the other state does not have jurisdiction, Montana is free to act.[54] Only after Montana has been determined to have jurisdiction under this test can the district court consider whether jurisdiction must be declined on some other statutory ground.[55]

The Montana Supreme Court's insistence on detailed findings of fact after a full evidentiary hearing in modification of out-of-state decree proceedings under the UCCJA is consistent with its stand requiring findings of fact in other aspects of family law. Jus-

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50. Both Montana and Kentucky are UCCJA states. *See* MONT. CODE. ANN. §§ 40-7-101 to -125 (1981) and KY. REV. STAT. ANN. §§ 403.400 to .630 (Baldwin 1980).

51. *Pierce*, ___ Mont. ___, 640 P.2d at 902.

52. ___ Mont. ___, 598 P.2d 1086 (1979).

53. This section is incorporated by reference into Montana's UCCJA. *See* MONT. CODE ANN. § 40-7-104.

54. *Wenn*, ___ Mont. ___, 640 P.2d at 1092-95.

55. The court referred specifically to MONT. CODE ANN. § 40-7-109(2), which provides that, unless in the best interests of the child, a court may not exercise its jurisdiction to modify a decree of another state if the petitioner has improperly removed the child from the person entitled to custody or improperly retained the child after a visit or other temporary relinquishment of custody.

tice Shea's admonition in *Tomaskie v. Tomaskie*,[56] a marriage dissolution case, is no doubt equally relevant here: "It is a wise practice for the trial court to prepare and file its own findings and conclusions. Only in that fashion can the parties know the trial court has carefully considered all the relevant facts and issues involved."[57]

B. *Termination of Parental Rights*

In *Matter of M. F., J. F., and A. W.*, [58] the Montana Supreme Court held that it was not reversible error for the Department of Social and Rehabilitation Services (SRS) to submit a social worker's report with its petition for permanent custody in a termination of parental rights proceeding. The court noted that the author of the report had testified to essentially the same facts as contained therein at trial and had been subject to cross-examination. Further, the court stated that the appellant mother had presented no evidence to rebut the presumption that the trial court had disregarded all inadmissible material in making its decision.[59]

The court's decision effectively allows the SRS to avoid a bifurcated procedure under Montana Code Annotated section 41-3-401 (dealing with abuse, neglect, and dependency petitions) by submitting damaging evidence against the defendant simultaneously with filing its custody petition. When the authors of the welfare department reports appear at the hearing, the harmful evidence is merely reemphasized, to the continued detriment of the defendant.

56. ___ Mont. ___, 625 P.2d 536 (1981).
57. *Id.* at ___, 625 P.2d at 538.
58. ___ Mont. ___, 653 P.2d 1205 (1982).
59. *Id.* at ___, 653 P.2d at 1210.