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# RETROACTIVE MODIFICATION OF ACCRUED CHILD SUPPORT PAYMENTS

Martha Sheehy

## I. INTRODUCTION

One express purpose of Montana's divorce law is to make reasonable provisions for the spouse and minor children.<sup>1</sup> In fulfilling this purpose, the court may order a parent to pay a reasonable amount of support.<sup>2</sup> The financial condition of the supporting parent, however, often changes. In recognition of this possibility, our laws allow the modification of support upon motion to the court under certain circumstances.<sup>3</sup>

Until 1986, the Montana Supreme Court refused to modify retroactively accrued child support payments. Statutory law and a long line of cases supported this position. In July of 1986, the court changed its course and allowed past-due child support payments to be modified, basing the decision on equitable considerations. This comment will trace the development of this new rule, compare it to the law in other states, and discuss the implications of the court's action.

## II. OTHER STATES: RETROACTIVE MODIFICATION ALLOWED

The Montana Legislature adopted the Uniform Marriage and Divorce Act in 1975. Part of this act, section 40-4-408(1), specifies that "[a] decree may be modified by a court as to maintenance or support only as to installments accruing subsequent to the motion for modification."<sup>4</sup> Therefore, maintenance and support in a decree are judgments which are not subject to retroactive change.<sup>5</sup> Once a payment comes due, section 40-4-208(1) precludes the court from modifying, cancelling, or changing it.

The Montana Legislature enacted section 40-4-208(1) as part of the Uniform Marriage and Divorce Act. Six other states—Arizona, Colorado, Illinois, Kentucky, Missouri, and Washington—have also adopted the Act. All of these states have confronted the issue of whether past due child support can be modi-

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1. MONT. CODE ANN. § 40-4-101(4) (1985).

2. MONT. CODE ANN. § 40-4-204 (1985).

3. MONT. CODE ANN. § 40-4-208 (1985).

4. MONT. CODE ANN. § 40-4-208(1) (1985).

5. See *In re Marriage of Cook*, \_\_\_\_ Mont. \_\_\_\_, \_\_\_\_, 725 P.2d 562, 566 (1986), holding: "The general rule is that when child support becomes due under a dissolution decree it becomes a judgment debt similar to any other judgment for money."

fied. While each state asserts that support provisions cannot be retroactively altered, all these states have carved out exceptions to this potentially harsh rule.

Among the states governed by the Uniform Act, Washington adheres most strictly to the provision that support provisions can be modified only as to installments accruing subsequent to the motion for modification. In Washington, courts are allowed to credit payments made directly to the children against past due installments.<sup>6</sup> Overpayments may be set off for equitable reasons against arrearages on a case-by-case basis.<sup>7</sup> Other than these limited concessions, the Washington courts hold that accrued installments are vested and cannot be retrospectively modified.<sup>8</sup>

The other states acknowledge equity as an ameliorating force. Illinois and Missouri recognize defenses to the automatic judgment against a parent behind in his payments. Equitable estoppel and waiver exist as defenses in Illinois,<sup>9</sup> while Missouri allows for compromise of settlement of the arrearage between the parties,<sup>10</sup> and recognizes waiver.<sup>11</sup> Arizona courts allow equitable relief in the form of waiver and defenses such as laches.<sup>12</sup> In Colorado, courts have the authority to dole out equitable relief as circumstances require.<sup>13</sup>

When enacting the Uniform Marriage and Divorce Act, the Kentucky Legislature omitted the phrase used in Montana's section 40-4-208(1), "only as to installments accruing subsequent to the motion for modification and."<sup>14</sup> As a result, Kentucky's courts are not bound by statute to enforce judgments against child sup-

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6. See *Martin v. Martin*, 59 Wash. 2d 468, 473, 368 P.2d 170, 172-73 (1962).

7. See *Mathews v. Mathews*, 1 Wash. App. 838, 843, 466 P.2d 208, 211 (1970), holding that if the obligated spouse can establish equitable considerations, justifying credit against unpaid installments without injury to child or custodial parent, the court may exercise its equitable powers. See generally *In re Marriage of Olsen*, 24 Wash. App. 292, 301, 600 P.2d 690, 696 (1979).

8. See *Koon v. Koon*, 50 Wash. 2d 577, 579, 313 P.2d 369, 371 (1957). The court held that "[t]he settled jurisprudence of Washington is that accrued installments of support money are vested and may not be retrospectively."

9. See *Hoos v. Hoos*, 86 Ill. App. 3d 817, —, 408 N.E.2d 752, 755 (1980). See generally *Ruster v. Ruster*, 91 Ill. App. 3d 355, 414 N.E.2d 927 (1980).

10. See *Penney v. White*, 594 S.W.2d 632, 635 (Mo. Ct. App. 1980). See also *Kennedy v. Kennedy*, 575 S.W.2d 833, 835 (Mo. Ct. App. 1978).

11. See *State ex rel. Div. of Family Serv. v. Willig*, 613 S.W.2d 705, 706 (Mo. Ct. App. 1981).

12. See *Cordova v. Lucero*, 129 Ariz. 184, 629 P.2d 1020 (1981); *Corbett v. Corbett*, 116 Ariz. 350, 569 P.2d 292 (1977).

13. See generally *Griffith v. Griffith*, 152 Colo. 292, 381 P.2d 455 (1963); *Carey v. Carey*, 486 P.2d 38 (Colo. Ct. App. 1971); *Partridge v. Partridge*, 601 P.2d 662 (Colo. Ct. App. 1979); *In re Franklin*, 634 P.2d 1032 (Colo. Ct. App. 1981).

14. KY. REV. STAT. § 403.250 (1986).

port debtors. Although Kentucky's statutory law does not preclude modification of past due child support installments, Kentucky's case law parallels that of the other states governed by the Uniform Act: while accrued payments are considered vested, equitable relief is allowed under compelling circumstances.<sup>15</sup>

These states have applied equitable principles to soften the harsh results of strict adherence to the modification of decree provisions. Recent decisions have brought Montana law in line with that of the other jurisdictions governed by the Uniform Marriage and Divorce Act.

### III. THE OLD RULE: STRICT ADHERENCE TO STATUTORY LANGUAGE

In enacting the Uniform Marriage and Divorce Act, the Montana Legislature enacted section 40-4-208(1), allowing modification of support only as to installments accruing subsequent to the motion for modification. Even before the adoption of the Act, the Montana Supreme Court refused to modify a divorce decree so as to cancel past due installments. In *Kelly v. Kelly*,<sup>16</sup> the divorce decree gave custody of two children to the mother, and ordered the father to pay \$25 per month in support. The mother placed the children in the care of her aunt and uncle. The father never paid support because the children were not in the custody of their mother.<sup>17</sup> The court refused to cancel the support arrearages, stating, "The decree is not subject to modification as to installments past due and unpaid."<sup>18</sup>

Until recently, the court consistently reaffirmed this holding. In *Fitzgerald v. Fitzgerald*,<sup>19</sup> the district court held that it would be unconscionable to require the father to pay support arrearages since visitation between the father and the child had never been established.<sup>20</sup> The Montana Supreme Court reversed this ruling, holding that decree provisions concerning visitation have no bearing upon the legal and moral obligations to support a child; a divorce decree cannot condition the support obligation on the exercise of visitation.<sup>21</sup>

The court addressed the issue again in *Williams v. Budke*.<sup>22</sup> In

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15. See generally *Dalton v. Dalton*, 367 S.W.2d 840 (Ky. 1963).

16. 117 Mont. 239, 157 P.2d 780 (1945).

17. *Id.* at 242, 157 P.2d at 781.

18. *Id.* at 244, 157 P.2d at 783.

19. \_\_\_ Mont. \_\_\_, 618 P.2d 867 (1980).

20. *Id.* at \_\_\_, 618 P.2d at 868.

21. *Id.*

22. 186 Mont. 71, 606 P.2d 515 (1980).

that case the father moved for modification of his child support obligation. His financial situation had changed drastically as a result of an inability to work after open-heart surgery. In addition to reducing the father's future child support payments, the district court granted him credit against accrued payments for \$970 which he spent directly on the children, and established a deferred payment schedule for the remaining arrearages.<sup>23</sup> The supreme court held that the district court erred in granting a credit for voluntary expenditures. Granting such credit allows the father to substitute his own judgment for that of the custodial parent, and this violates the spirit of the divorce decree.<sup>24</sup>

The *Williams* court also held that the district court retroactively modified the judgment for accrued child support payments in the establishment of a deferred payment schedule.<sup>25</sup> The deferral of payments deprived the wife of her right to levy execution for the arrearage if property could be found in the possession of the father which could be applied to the accrued payments.<sup>26</sup> The court felt compelled to uphold the strict wording of section 40-4-208(1), but recognized the district court's good intentions:

We appreciate the effort of the District Court to take cognizance of the financial condition of husband in establishing the deferred schedule. However, the result, as the court ordered it, is to modify the judgment previously entered in the District Court as to the accrued child support payments. This action of the District Court is oppugnant to a controlling statute.<sup>27</sup>

The court fought off further oppugnancies in other cases. The district court in *Dahl v. Dahl*<sup>28</sup> cancelled delinquent support payments, reasoning that the divorced wife's use of the house offset any arrearages in support payments.<sup>29</sup> The supreme court again stated that a divorce decree cannot be modified to cancel past due and unpaid child support.<sup>30</sup> In another case, *State Department of Revenue v. Dawson*,<sup>31</sup> the court set aside a district order restraining the state from levying on a father's bank account to enforce a child support decree.<sup>32</sup> The court held that the practical

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23. *Id.* at 75, 606 P.2d at 516-17.

24. *Id.* at 75, 606 P.2d at 517.

25. *Id.*

26. *Id.* at 77, 606 P.2d at 518.

27. *Id.* at 75, 606 P.2d at 517.

28. 176 Mont. 307, 577 P.2d 1230 (1978).

29. *Id.* at 310, 577 P.2d at 1232.

30. *Id.*

31. \_\_\_ Mont. \_\_\_, 674 P.2d 1091 (1984).

32. *Id.* at \_\_\_, 674 P.2d at 1093.

effect of the district court's order was to defer the mother's right to levy execution on accrued child support payments, and that this constituted retroactive modification of the support award.<sup>33</sup>

The foregoing cases illustrate the attitude towards retroactive modification of accrued child support which existed until 1986. The Montana Supreme Court upheld section 40-4-208(1) at all costs, disregarding equitable considerations and possible defenses.

#### IV. THE EVOLVING RULE: RETROACTIVE MODIFICATION ALLOWED IN CERTAIN CASES

In 1986, the Montana Supreme Court abandoned its steadfast adherence to the language of section 40-4-208(1). After decades of refusing to modify past due child support installments, the court suddenly changed its course. In *State ex rel. Blakeslee v. Horton*,<sup>34</sup> the collection of child support arrearages was barred, based on equitable principles.

The Hortons divorced in 1970. The divorce decree provided that the father pay \$50 per month in support of the child. However, the mother and father agreed orally that if the father stayed away from the mother and the child, they, in turn, would stay out of his life. Both parties lived according to this agreement until 1984, when the mother brought action against the father to collect \$8850 in past due child support. The father never saw the child or knew of its whereabouts.<sup>35</sup>

The district court recognized that under section 40-4-208(1), unpaid child support installments cannot be retroactively modified by a court.<sup>36</sup> The court also noted that "child support and child visitation are separate incidence, neither being dependent or conditioned upon the other."<sup>37</sup> However, the circumstances of the case compelled the court to consider the inequity which could be wrought by these legal principles:

[The mother] can turn the clock backwards on the understanding which was entered into and became consummated by mutual observance over the years, and create a financial windfall situation—one that can be pursued through County prosecuting offices by filling out and signing forms in a local office without any personal expense to her.

The father and the child, on the other hand, cannot turn the

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33. *Id.*

34. \_\_\_ Mont. \_\_\_, 722 P.2d 1148 (1986).

35. *Id.* at \_\_\_, 722 P.2d at 1149-50.

36. *Id.* at \_\_\_, 722 P.2d at 1150.

37. *Id.*

clock backwards to recapture the association which they should have had and could have had, except for the agreement which was made and has been followed.<sup>38</sup>

The supreme court adopted the memorandum and order of the district court, and thereby barred the collection of past due child support.<sup>39</sup> The court carefully narrowed the holding, noting that previous case law stands; each installment under an order for child support is still non-modifiable when it falls due. *Blakeslee* simply upholds the right of a district court to exercise discretion and to apply the accepted principles of equity.<sup>40</sup>

The supreme court again faced the issue of modification of past due support payments in *In re Marriage of Cook*.<sup>41</sup> The parties divorced in January of 1980. The divorce decree awarded custody of the two children to Dieta, the mother, and required James, the father, to pay \$250 per month per child for support. The court recognized "the mutual desire of the parties to have the children pursue a parochial education" in setting that amount. The decree also required Dieta to obtain permission of the court before moving out of Montana with the children.<sup>42</sup>

In May of 1980 Dieta moved with the children to Utah. The children no longer attended parochial schools.<sup>43</sup> In June, the parties agreed to reduce the support to \$200 per month per child for the months August through June, and to \$100 per child for July. In the years following, the parties acted according to this agreement.<sup>44</sup> In July of 1983, James filed a motion to modify custody, which the court granted on January 23, 1985. In February, James moved the court to determine the nature and extent of his support obligation. The district court held that Dieta was estopped from enforcing the support provisions of the decree from and after the oral agreement of June 1980.<sup>45</sup> Dieta appealed this finding based on section 40-4-208(1).

The district court's decision was upheld by the Montana Supreme Court.<sup>46</sup> The Cooks' oral agreement modifying support payments estopped Dieta from enforcing the provisions in the divorce decree. The court declared that "the provision of 40-4-208, MCA,

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38. *Id.*

39. *Id.* at \_\_\_\_, 722 P.2d at 1149.

40. *Id.* at \_\_\_\_, 722 P.2d at 1151.

41. \_\_\_\_, Mont. \_\_\_\_, 725 P.2d 562 (1986).

42. *Id.* at \_\_\_\_, 725 P.2d at 563.

43. *Id.* at \_\_\_\_, 725 P.2d at 565.

44. *Id.*

45. *Id.* at \_\_\_\_, 725 P.2d at 564.

46. *Id.* at \_\_\_\_, 725 P.2d at 566.

providing that a decree may be modified by a court as to maintenance or support only as to installments accruing subsequent to the motion for modification, is subject to the doctrine of equitable estoppel . . . .”<sup>47</sup> However, this doctrine may only be applied where the trial court finds “clear and compelling evidence” of a need to override the provisions of the statute.<sup>48</sup>

Justice Weber, joined by Justices Turnage and Gulbrandson, dissented in *Cook*.<sup>49</sup> He found reason to uphold the strict language of section 40-4-208(1). The statute is part of the Uniform Marriage and Divorce Act. The Act itself states that its general purpose is to make the law uniform among those states which enact it.<sup>50</sup> In addition, Justice Weber asserted that the majority disregarded section 40-4-208, which contains the legislative view of the power of the courts to modify support payments.<sup>51</sup> The legislature limited the district court’s power, allowing modification only as to installments accruing subsequent to the motion to modify. Justice Weber believed that the legislature, not the court, should authorize modification on equitable theories.<sup>52</sup>

Despite these objections, Justice Weber joined the court in reaffirming the application of equitable principles to the modification of support in *In re Marriage of Jensen*.<sup>53</sup> In June of 1981 Steve and Shirley Jensen orally agreed that during strikes and layoffs, or when he had custody of the children, Steve could reduce his support payments. Steve’s financial situation changed, and he petitioned the court for a permanent modification of support payments. The district court modified the amount due in the future, and found Steve responsible only for past due installments accruing prior to the oral agreement.<sup>54</sup> The supreme court affirmed the district court’s decision.<sup>55</sup>

The *Jensen* court approved the application of equitable principles in *Blakeslee* and *Cook*.<sup>56</sup> These two cases authorized in *Jensen* the enforcement of an oral agreement between the parties which modified support payments. The court defined the rules regarding such enforcement, holding that a decree for support may

47. *Id.*

48. *Id.*

49. \_\_\_ Mont. at \_\_\_, 725 P.2d at 566 (Weber, J., dissenting).

50. MONT. CODE ANN. § 40-4-102 (1985), states: “This chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law.”

51. *Cook*, \_\_\_ Mont. at \_\_\_, 725 P.2d at 566 (Weber, J., dissenting).

52. *Id.* at \_\_\_, 725 P.2d at 568.

53. \_\_\_ Mont. \_\_\_, 727 P.2d 512 (1986).

54. *Id.* at \_\_\_, 727 P.2d at 514.

55. *Id.* at \_\_\_, 727 P.2d at 517.

56. *Id.* at \_\_\_, 727 P.2d at 516.

be modified on equitable grounds based upon clear and convincing evidence of an oral agreement of modification.<sup>57</sup> In addition, the court may only modify support payments made subsequent to the oral agreement of the parties.<sup>58</sup> The terms of an agreement between the parties will only be enforced if the parties acted in good faith and if their agreement does not impair the rights of any assignee of support payments based upon public assistance paid to a party.<sup>59</sup>

The new rule allowing retroactive modification of support payments has developed quickly. The *Blakeslee* decision, based squarely in equity, set down the general principle: accrued support payments may be retroactively modified based on equitable considerations.<sup>60</sup> *Cook* reaffirmed this position and clearly announced that section 40-4-208 is subject to the doctrine of equitable estoppel.<sup>61</sup> *Jensen* regulated the use of this doctrine by defining its parameters.<sup>62</sup> While this evolving rule will be subject to further development, it is clear that in compelling circumstances, the court will apply equitable principles to bar the collection of unpaid child support. Rather than allow the law, specifically section 40-4-208(1), to bring about injustice, the court has found a remedy in equity.

## V. IMPLICATIONS

While recent decisions conform with the development of law in other states governed by the Uniform Marriage and Divorce Act, they signify a departure from Montana law. This state's highest court, which heretofore staunchly upheld the language of section 40-4-208(1), now allows equitable considerations to soften the statute's requirements. Such a change in the court's position creates uncertainty; exactly where does the law stand? While the court's opinions do not address all the questions raised by its decision, many questions regarding the state of the law can be answered.

### A. *Compatibility of the Old and New Rules*

The old and new rules concerning the modification of accrued child support payments seem incompatible. Under the old rule, the Montana Supreme Court refused to modify, cancel, or change child support arrearages retroactively. In *Blakeslee*, under the new rule,

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57. *Id.* at \_\_\_\_, 727 P.2d at 515-16.

58. *Id.* at \_\_\_\_, 727 P.2d at 516.

59. *Id.*

60. \_\_\_\_, Mont. \_\_\_\_, \_\_\_\_, 722 P.2d 1148, 1151 (1986).

61. \_\_\_\_, Mont. \_\_\_\_, \_\_\_\_, 725 P.2d 562, 566 (1986).

62. \_\_\_\_, Mont. \_\_\_\_, \_\_\_\_, 727 P.2d 512, 516 (1986).

the court allowed fourteen years of arrearages to be completely cancelled, citing equitable considerations as justification.<sup>63</sup> In arriving at its decision, no prior cases enunciating the old rule were overturned. *Cook* and *Jensen* reaffirmed the new rule without addressing contrary precedent.

Can these two rules co-exist? The court believes they can. In *Blakeslee*, rather than reverse prior rulings or distinguish previous cases, the court simply stated:

[W]e note that the instant case does not reverse or modify our previous case law which holds that each installment under an order for periodic child support is final and non-modifiable when it falls due. We only hold that Judge Luedke's memorandum and order constitutes a sound exercise of the District Court's discretion and also is a correct application of accepted principles of equity in this state.<sup>64</sup>

This statement indicates that although the old rule is still valid, it is not always valid. The statute still reads "[a] decree may be modified by a court as to maintenance or support only as to installments accruing subsequent to the motion for modification."<sup>65</sup> The court, however, seems to read the statute "a decree may be modified by a court as to maintenance or support for the most part only as to installments accruing subsequent to the motion for modification."

In *Jensen*, the court sought to bridge the gap between the two rules by setting standards for the new rule which parallel the statutory standards of the old rule. The court required clear and convincing evidence of an oral agreement and limited modification to payments accruing after the oral agreement.<sup>66</sup> The court stated:

These conclusions are consistent with section 40-4-208, MCA, which limits modifications to installments subsequently accruing, and which also limits the power of the district court to modify, except upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable where there is no written consent of the parties.<sup>67</sup>

While the court's conclusions may comport with the policies underlying section 40-4-208, the conclusions are not consistent with the statute itself. Section 40-4-208(1) limits modification of sup-

63. \_\_\_ Mont. at \_\_\_, 722 P.2d at 1151.

64. *Id.* at \_\_\_, 722 P.2d at 1150-51 (emphasis in original opinion).

65. MONT. CODE ANN. § 40-4-208(1) (1986).

66. *In re Marriage of Jensen*, \_\_\_ Mont. \_\_\_, \_\_\_, 727 P.2d 512, 515-16 (1986).

67. *Id.* at \_\_\_, 727 P.2d at 516.

port to "installments accruing subsequent to the motion for modification," not subsequent to an oral agreement between the parties. The new rule is not consistent with the statute's requirements; it allows exceptions to those requirements.

In trying to bind the new rule allowing retroactive modification of accrued support to the precedent requiring strict adherence to the language of section 40-4-208(1), the court ignored the relationship between the two rules. The rules are compatible in the sense that the new rule modifies, but does not abolish the old rule. Generally, the old rule is still good law; generally, accrued child support payments cannot be retroactively modified. However, exceptions to the rule will be recognized when equity so demands.<sup>68</sup> In seeking to compare the rule and the exception, the court created unnecessary confusion. The recognition of equitable exceptions is not rare, since equitable principles are often used to soften the effects of a harsh rule.<sup>69</sup> The rule and the equitable exception co-exist. Such is the case here.

### B. *Effect of the Evolving Rule*

The rule that accrued support payments cannot be retroactively modified is still good law, but now exceptions are recognized. The making of exceptions is left to the district court, which is allowed to use sound discretion and to apply accepted principles of equity.<sup>70</sup> This discretion, however, is not completely unfettered. The court must consider the best interest of the child,<sup>71</sup> act within its discretion,<sup>72</sup> and comply with the standards set down in *Jensen*.<sup>73</sup> These considerations limit the effect of the new rule allowing retroactive modification of child support payments.

In matters relating to child support, the interests of the children control.<sup>74</sup> Equitable relief which adversely affects the child will not be granted; the court is bound to protect the children's interests. The movement away from strict adherence to section 40-

68. *State ex rel. Blakeslee v. Horton*, \_\_\_ Mont. \_\_\_, \_\_\_, \_\_\_ P.2d \_\_\_, \_\_\_, 43 St. Rptr. 1321, 1325 (1986).

69. *In re Marriage of Cook*, \_\_\_ Mont. \_\_\_, \_\_\_, 725 P.2d 562, 566 (1986).

70. *Blakeslee*, \_\_\_ Mont. at \_\_\_, 722 P.2d at 1151. The court held that Judge Luedke's order cancelling past due child support constituted "a sound exercise of the District Court's discretion and also is a correct application of accepted principles of equity in this state."

71. *In re Marriage of Carlson*, \_\_\_ Mont. \_\_\_, \_\_\_, 693 P.2d 496, 499 (1984).

72. *Blakeslee*, \_\_\_ Mont. at \_\_\_, 722 P.2d at 1151.

73. \_\_\_ Mont. \_\_\_, \_\_\_, 727 P.2d 512, 515-16 (1986).

74. *Carlson*, \_\_\_ Mont. at \_\_\_, 693 P.2d at 499. The "best interests of the child" doctrine is also reflected in Montana's statutes. MONT. CODE ANN. § 40-4-212 (1985) provides: "The court shall determine custody in accordance with the best interest of the child."

4-208(1) may better enable the court to do so. Under a rigid interpretation of the statute, a court has little flexibility. In *Williams*, where severe medical problems greatly changed a father's ability to keep up with his child support payments, the judge was not even allowed to establish a deferred payment schedule for arrearages.<sup>75</sup> Today, a court may be able to apply equitable principles to reach a solution which will not adversely affect the child, but will help the troubled supporter. The *Williams* court "appreciate[d] the efforts of the District Court to take cognizance of the financial condition of the husband in establishing the deferred schedule."<sup>76</sup> The *Blakeslee* court allows such efforts.

In addition to protecting the child, the district court's action must be within its discretion in applying equitable principles. Equity comes into play in "circumstances where a litigant may be remediless unless equity could afford him relief."<sup>77</sup> While such circumstances occur, they are not so common as to leave all matters to the discretion of the judge.

The court's discretion is further limited by the standards set down in *Jensen*. In that case, the supreme court required clear and convincing evidence of an oral agreement between the parties and allowed support to be modified only as to payments accruing subsequent to the oral agreement.<sup>78</sup> In addition, the agreement must be made in good faith and it may not impair the rights of any assignee of support payments.<sup>79</sup>

Clearly these requirements must be met before a decree of support may be equitably modified based on an oral agreement. Language within *Jensen* suggests that equitable relief will only be allowed on the basis of an oral agreement: "We therefore hold that in Montana a decree for support may be modified on equitable grounds by a court where there is clear and convincing evidence of the terms of an oral agreement of modification."<sup>80</sup> The court noted that in both *Blakeslee* and *Cook* oral agreements were enforced. Whether the *Jensen* court limited retroactive modification to situations involving agreements between the parties or simply defined the rules that apply to retroactive modification in the event of an oral agreement is an open question. At the very least, the court has recognized one common set of circumstances which requires the

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75. *Williams v. Budke*, 186 Mont. 71, 75, 606 P.2d 515, 517 (1980).

76. *Id.*

77. *Blakeslee*, \_\_\_ Mont. at \_\_\_, 722 P.2d at 1151.

78. *Jensen*, \_\_\_ Mont. at \_\_\_, 727 P.2d at 512.

79. *Id.* at \_\_\_, 727 P.2d at 516.

80. *Id.* at \_\_\_, 727 P.2d at 515-16.

application of equitable principles.

Under the evolving rule, judges have greater flexibility in determining matters involving child support. The supreme court, in abandoning the strict interpretation of section 40-4-208(1), increased the amount of discretion available for the use of the district court judge. This discretion, however, is limited; the controlling interest of the child and the nature of equity itself check the judge's discretionary powers. In addition, the rules set down in *Jensen* limit the court's action in cases concerning oral agreements between the parties.

## VI. CONCLUSION

The Montana Supreme Court set down a new precedent in *Blakeslee*: accrued support payments may, in some cases, be retroactively modified. *Cook* and *Jensen* affirmed this precedent. These cases represent a substantial departure from the court's previous views. Despite the uncertainty that such a change creates, the decisions enhance Montana law. Strict adherence to the language of section 40-4-208(1) produces the potential for harsh results. When the situation requires it, relief should be available, provided that neither the child nor the custodial parent will be adversely affected. It is safe to presume, in light of *Jensen*, that the Montana Supreme Court will allow such relief in the future based on agreements between the parties. It is unclear whether equitable relief from strict adherence to section 40-4-208(1) is only available if such an agreement has been made. However, at least when the parties have agreed to modify support payments, and perhaps in other compelling circumstances, the court will apply equitable principles to bar collection of unpaid child support.