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HOUSING IN MONTANA: NOT FOR ADULTS ONLY

Jeffrey T. Even

I. INTRODUCTION

In recent years a nationwide controversy has emerged over discrimination in housing against tenants with children.[1] Many landlords have long refused to rent to people with children.[2] This practice has increasingly been challenged in both state and federal courts as unlawful discrimination. The Montana Human Rights Commission recently addressed this issue in terms of Montana law when it interpreted the housing section of the Montana Human Rights Act.[3] This question, controversial nationwide, will undoubtedly remain alive in Montana through at least the 1987 legislative session.

This comment analyzes the federal and state law regarding the denial of housing to people with children. It then discusses the procedure involved in bringing a fair housing case and includes a discussion of the available remedies. Finally, this comment closes with a recommendation to the 1987 Montana Legislature.

II. MONTANA LAW

The Montana Human Rights Act contains a section prohibiting housing discrimination based on age.[4] This act provides the basis of the claim that refusal to rent to tenants with children violates Montana law. The validity of this claim has not yet been

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1. The relevance of some of the material in this comment is more broad than age discrimination in housing. The section on procedure, in particular, is applicable to any case based on the Montana Human Rights Act, MONT. CODE ANN. tit. 49, ch. 2 (1985).

2. The refusal of landlords to rent to tenants with children has been a significant problem in Montana. Testimony before the Montana Human Rights Commission indicated that in Bozeman, for example, 75 percent of the apartments that rent to university students do not allow children. Anecdotal testimony pointed out similar problems in Missoula and Butte. *Ruling on Housing Discrimination is Pending*, The Missoulian, May 11, 1985, at 15, col. 1. *See also*, *Bozeman Mother Protests 'For Rent, No Kids' Practice*, The Missoulian, November 26, 1985, at 18, col. 1.

3. MONT. CODE ANN. tit. 49, ch. 2 (1985). This comment chiefly concerns the housing provision, MONT. CODE ANN. § 49-2-305 (1985). The provision reads in pertinent part:

> Discrimination in housing. (1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, or other person having the right to sell, lease, or rent a housing accommodation or improved or unimproved property:
>
> (a) to refuse to sell, lease, or rent the housing accommodation or property to a person because of . . . age . . . .

4. *Id.*

tested before any court in Montana. Similar claims have been considered by courts of other states, however, and by the Montana Human Rights Commission.

In September 1985 the Commission adopted an administrative rule interpreting the age provision of the statute. The rule prohibits discrimination based on the presence of children in the household.[5] Subsection (1) of the rule provides:

> *24.9.1107 REAL PROPERTY TRANSACTIONS; AGE DISCRIMINATION.* (1) Section 49-2-305 (1), MCA, which prohibits discrimination in housing on the basis of age, shall cover refusal to sell, rent or lease a housing accommodation or improved or unimproved property because of the age of a person residing with the buyer, lessee, or renter.[6]

Subsection (2) of the rule exempts federal housing from the provisions of subsection (1).[7] Subsection (3) provides an exception for senior citizen housing.[8]

The issue of housing discrimination based on the presence of children involves the balancing of conflicting interests. The interest of the landlord in controlling the use of private property must be weighed against the need of families and single parents to find suitable housing. Opponents of the rule argued to the Human Rights Commission that landlords should be allowed to prohibit children, "because children are noisier and cause more damage than other tenants."[9] Further, denial of a landlord's right to exclude children may constitute both overregulation and interference with private property rights. This would discourage investment in rental property.[10]

The Human Rights Commission rejected these arguments, finding the rule, "consistent with the language and intent of the statute."[11] The Commission also found the argument that children are noisier and more destructive than other tenants to be simply a "stereotypical assumption."[12] The Commission noted that the Act prohibits discrimination based on similar assumptions regarding

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5. The rule is not yet included in the Administrative Rules of Montana, but will be included at MONT. ADMIN. R. 24.9.1107. Also found at MONT. ADMIN. REG. 1399 (1985).

6. *Id.*

7. *Id.*

8. *Id.* A petition for declaratory ruling that senior citizen housing does not violate MONT. CODE ANN. § 49-2-305 (1985) is currently pending before the Human Rights Commission. MONT. ADMIN. REG. 1205 (1985).

9. *Id.* at 1399.

10. *Id.* at 1399-1400.

11. *Id.* at 1400.

12. *Id.*

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race, sex, or handicap.[13] The Commission's holding implicitly allows discrimination based only on specific characteristics of individuals, rather than on loosely reasoned assumptions about entire classes.[14]

The Commission's rule will not become effective until July 1, 1987.[15] Postponing the effective date allows the legislature to examine the issue of adults-only housing before a prohibition takes effect. It also ensures, however, that age-based housing discrimination will remain a controversial issue in Montana.

III. Developments in Other States

An analysis of recent developments in several other states illuminates the issue facing Montana. The courts of many other states, particularly California, have explored the issue of adults-only housing. These decisions provide a significant body of law regarding both lease provisions in rental housing and restrictive covenants in fee simple housing.

With a few exceptions,[16] the courts of most states have until recently allowed such discrimination. In 1946, the Ohio Supreme Court found that a landlord may contract for a lease provision barring children and discerned no statutory or constitutional limitation on this right.[17] Similarly, a 1967 Georgia Supreme Court opinion upheld the eviction of a woman who had given birth to an illegitimate child.[18] This comment will examine the trend in both federal and state courts, and demonstrate that courts have recognized the right of tenants with children to have access to the housing market. California has led the way.

A. *Arbitrary vs. Reasonable Discrimination: The California Cases*

1. *Background*

Attempts by California claimants to invalidate age-based dis-

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13. *Id.*

14. For a fuller explanation of this argument, see Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 738, 640 P.2d 115, 125, 180 Cal. Rptr. 496, 507 (1982).

15. This will be included at Mont. Admin. R. 24.9.1107(4). Also found at Mont. Admin. Reg. 1399 (1985).

16. In 1946, the Illinois Supreme Court rejected a landlord's argument that renting to people with children "just wouldn't work out." People v. Metcoff, 392 Ill. 418, 64 N.E.2d 867 (1946). In Gilman v. City of Newark, 73 N.J. Super. 562, 180 A.2d 365 (1962), the court invalidated sections of a city ordinance prohibiting minors from living in rooming houses as conflicting with state law.

17. Lamont Bldg. Co. v. Court, 147 Ohio St. 183, 70 N.E.2d 447 (1946).

18. Williams v. Housing Authority of Atlanta, 223 Ga. 407, 155 S.E.2d 923 (1967).

crimination rely on that state's Unruh Civil Rights Act.[19] This act differs significantly from Montana's Human Rights Act in that the California act does not specifically prohibit discrimination based on age.[20]

The California Supreme Court has ruled, however, that protection under the Unruh Act embraces more than the enumerated categories. The court, in *In Re Cox*,[21] found the categories listed in the statute to be illustrative rather than restrictive. The court ruled that the act prohibited all arbitrary discrimination.[22] The question, therefore, is whether refusal to allow occupancy by children is arbitrary.

The California courts until recently held such discrimination to be reasonable. For example, in *Flowers v. John Burnham and Co*,[23] the landlord prohibited families with male children over age five. The court found that "regulating tenants' ages and sex to that extent is not unreasonable or arbitrary."[24]

2. *Marina Point, Ltd. v. Wolfson*

The 1982 landmark decision of the California Supreme Court in *Marina Point, Ltd. v. Wolfson*[25] altered the earlier application of the Unruh Act. This case presents an excellent study in the issues involved in a challenge of housing restrictions which discriminate against tenants with children.

In *Marina Point*, the landlord, plaintiff Marina Point, Ltd, sought to evict defendants Stephen and Lois Wolfson. The Wolfsons moved into Marina Point in January, 1974 and signed a lease which prohibited children.[26] The couple's first child was born the

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19. CAL. CIV. CODE § 51 (West 1982). The full text of the act is as follows:

§ 51. Unruh Civil Rights Act; equal rights; business establishments

This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin.

20. *Id.*

21. 3 Cal. 3d 205, 216, 474 P.2d 992, 999, 90 Cal. Rptr. 24, 31 (1970).

22. *Id.*

23. 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1971).

24. *Id.* at 703, 98 Cal. Rptr. at 645. A few years later, the California Court of Appeals held valid a by-law of a condominium association refusing residence to minors. Ritchey v. Villa Nueva Condominium Assoc., 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978).

25. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).

26. *Id.* at 726, 640 P.2d at 117, 180 Cal. Rptr. at 499.

following September.[27] Marina Point refused to renew the lease because of the child.[28] When the Wolfsons did not leave the apartment complex, Marina Point brought an unlawful detainer action against them.[29] The Wolfsons contended that Marina Point's adults-only policy violated California law.[30]

The California Supreme Court held for the Wolfsons, relying upon its previous decision in *In Re Cox*.[31] The court concluded, as it had in *Cox*, that the Unruh Act prohibits all arbitrary discrimination.[32]

The court's decision turned on whether the discrimination was arbitrary or reasonable. Marina Point argued that the exclusion of children was entirely reasonable, referring to "past instances in which young tenants had engaged in annoying or potentially dangerous activities, ranging from acts of arson to roller skating and batting practice in the hallways to the attempted solicitation of snacks from the landlord's office staff."[33] In addition, two expert witnesses from the real estate business testified on behalf of Marina Point that children frequently cause more wear and tear on property than adults. They further testifed that because of this, landlords who rent to families with children experience higher maintenance costs than landlords who exclude children.[34]

The landlord, however, made no allegations specifically regarding the Wolfsons' child.[35] Two of the Wolfsons' neighbors testified that the child did not disturb them.[36] Expert testimony on behalf of the Wolfsons contradicted plaintiff's contention that landlords who rented to families with children faced higher maintenance costs.[37] The Wolfsons also introduced studies showing the extent to which exclusionary policies limited the availability of housing to people with children. The Supreme Court agreed and noted that "in many of the major metropolitan areas of the state, families with children are excluded from 60 to 80 percent of the available rental housing."[38]

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27. *Id.* at 727, 640 P.2d at 118, 180 Cal. Rptr. at 499.
28. *Id.*
29. *Id.* at 727, 640 P.2d at 118, 180 Cal. Rptr. at 500.
30. *Id.*
31. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).
32. Marina Point, Ltd., 30 Cal. 3d at 732, 640 P.2d at 122, 180 Cal. Rptr. at 503.
33. *Id.* at 728, 640 P.2d at 118, 180 Cal. Rptr. at 500.
34. *Id.* at 728, 640 P.2d at 119, 180 Cal. Rptr. at 500.
35. *Id.* at 728, 640 P.2d at 118, 180 Cal. Rptr. at 500.
36. *Id.* at 728, 640 P.2d at 119, 180 Cal. Rptr. at 500.
37. *Id.*
38. *Id.* at 728-729, 640 P.2d at 119, 180 Cal. Rptr. at 501. This has caused at least one writer to fear "child ghettos" in which families dependent on the rental market would be

The court found the blanket exclusion of all children to be illegal, arbitrary discrimination.[39] An entire class of people may not be excluded simply on the basis of statistical inference; rather, the landlord must base the exclusion on the characteristics of the particular individual.[40]

B. *Restriction to Designated Buildings*

The Michigan Supreme Court, in *Department of Civil Rights v. Beznos Corp.*,[41] addressed a slightly different issue than that raised in the California cases. In *Beznos*, the landlord allowed children in certain buildings in its complex and excluded them from others.[42]

The court held that the restriction of families with children to certain buildings did not violate the Michigan Civil Rights Act[43] but refrained from holding "that such designation could never be violative of the act."[44] The court held only that the restriction of children to certain buildings is permissible only when the landlord acted "in the interest of the comfort and safety of all of the tenants."[45]

The *Beznos* decision was accompanied by a vigorous dissent which argued that the majority opinion decided nothing. The dissenting justice pointed out that the majority provided no real guidelines for determining when a landlord may or may not restrict children to certain buildings.[46]

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relegated to the worst neighborhoods with inferior educational opportunities. Note, *Housing Discrimination Against Families With Children: A National Concern*, 20 WASHBURN L.J. 307, 310 (1980).

39. Marina Point, Ltd., 30 Cal. 3d at 739, 640 P.2d at 124, 180 Cal. Rptr. at 507.

40. The court explained:

> As we recognized in *Cox*, of course, an individual may forfeit his statutory right of access to the services of a business enterprise if he conducts himself improperly or disrupts the operations of the enterprise. But, contrary to the contention of Marina Point and the suggestion of the *Flowers* case, the Unruh Act does not permit a business enterprise to exclude an *entire class* of individuals on the basis of a generalized prediction that the class "as a whole" is more likely to commit misconduct than some other class of the public.

Marina Point, Ltd., 30 Cal. 3d at 738, 640 P.2d at 125, 180 Cal. Rptr. at 507 (emphasis in original).

41. 421 Mich. 110, 365 N.W.2d 82 (1984).

42. *Id.* at ____, 365 N.W.2d at 85.

43. *Id.*

44. *Id.*

45. *Id.* The court distinguished age from all other prohibited categories. The court claimed, astonishingly, that to do otherwise would "require landlords to rent apartments to minor children." *Id.* at ____, 365 N.W.2d at 87.

46. *Id.* at ____, 365 N.W.2d at 88-89 (Ryan, J. dissenting).

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C. *Restrictive Covenants*

This comment has focused to this point on the validity of leases prohibiting occupancy by children. Children may also be excluded from housing through a restrictive covenant in a deed.[47] Cases dealing with the validity of covenants that prohibit children frequently involve condominium developments. Because covenants may appear in deeds to any real property, the following discussion of age-restrictive covenants can be applied beyond the condominium context.

In 1974, an Arizona court ruled that an age-restrictive covenant remained in force even though the state had enacted a law which expressly banned discrimination against tenants with children.[48] That court found that the covenant bore a "rational relationship to a permissible state objective."[49]

The Florida Supreme Court has arrived at substantially the same conclusion. In *White Egret Condominium, Inc. v. Franklin*,[50] a child-restrictive covenant survived a challenge.[51] The court found age restrictions to be a "reasonable means to accomplish the lawful purpose of providing appropriate facilities for the differing housing needs and desires of the varying age groups."[52] Florida courts have maintained this interpretation.[53]

Until recently this was the rule in California as well. In 1978, the California Court of Appeals held valid a condominium development restriction against families with children.[54]

In 1983, the California Supreme Court considered age-restrictive covenants in light of the *Marina Point* decision regarding rental restrictions. In *O'Connor v. Village Green Owners Association*,[55] the court invalidated an age-restrictive covenant in a condominium development. The court concluded that just as the Unruh Civil Rights Act[56] prohibits lease provisions banning children, it

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47. Montana statutes governing servitudes and covenants are contained in MONT. CODE ANN., tit. 70, ch. 17 (1985).

48. Riley v. Stoves, 22 Ariz. App. 223, 228, 526 P.2d 747, 751 (1974).

49. *Id.*

50. 379 So.2d 346 (Fla. 1979).

51. *Id.* at 352.

52. *Id.* at 351.

53. In Star Lake N. Commodore Ass'n v. Parker, 423 So.2d 509, 511 (Fla. 1982), the court explained that *White Egret* only invalidated age restrictions where applied selectively or arbitrarily. *See also*, Everglades Plaza Condominium Ass'n v. Buckner, 462 So.2d 835 (Fla. 1984).

54. Ritchey v. Villa Nueva Condominium Ass'n, 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978).

55. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).

56. CAL. CIV. CODE § 51 (West 1982).

also bans provisions contained in restrictive covenants.[57]

The *O'Connor* holding, later endorsed by the California Legislature,[58] makes eminent good sense for any jurisdiction that has banned age-restrictive lease provisions. It makes no sense to prevent a property owner from prohibiting occupancy by children through a lease provision, while allowing them to attain the same goal through a real covenant. Such a distinction would allow age restrictions even in rental property. A landlord could simply convey the rental property to a straw and take it back again by a deed containing an age-restrictive covenant. This would make a mockery of any fair housing act.

IV. Federal Actions

Challenges to housing discrimination against children have also been brought in federal court. In *Halet v. Wend Investment Co.*[59] the Ninth Circuit Court of Appeals addressed the issue under the fourteenth amendment,[60] the federal Civil Rights Act,[61] and the federal Fair Housing Act.[62]

A. *The Fourteenth Amendment and the Federal Civil Rights Act*

A claim based on either the federal Civil Rights Act or the fourteenth amendment must prove "state action" to prevail.[63] Generally, state action is difficult to demonstrate in a case of housing discrimination. In most cases, the discrimination results solely from the actions of the landlord.

The intricacies of the state action doctrine are too complex to explore here.[64] State action notwithstanding, an exclusion from housing based on the presence of a child in the family probably violates the fourteenth amendment and the federal Civil Rights

57. O'Connor, 33 Cal. 3d at 792, 662 P.2d at 428, 191 Cal. Rptr. at 321.
58. Cal. Civ. Code § 51.2 (West Supp. 1984).
59. 672 F.2d 1305 (9th Cir. 1982).
60. U.S. Const. amend. XIV, § 1.
61. 42 U.S.C. §§ 1981, 1982, and 1983 (1982).
62. 42 U.S.C. § 3604 (1982).
63. Halet, 672 F.2d at 1309. The U.S. Supreme Court, in Shelley v. Kraemer, 334 U.S. 1 (1948) stated, "[t]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such actions as may fairly be said to be that of the States." *Id.* at 13.
64. *See* Shelley v. Kraemer, 334 U.S. 1 (1948); *Halet*, 672 F.2d at 1309-10; Note, *Familial Discrimination in Rental Housing: The Halet Decision*, 28 St. Louis U.L.J. 1085, 1097-98 (1984) [hereinafter cited as Note, *Familial Discrimination*]; Note, *The Enforceability of Age Restrictive Covenants in Condominium Developments*, 54 S. Cal. L. Rev. 1397, 1409-19 (1981).

Act. The *Halet* court found that "[f]amily life, in particular the right of family members to live together, is part of the fundamental right of privacy."[65]

B. *The Federal Fair Housing Act*

A plaintiff may also have a claim of age discrimination based on the federal Fair Housing Act.[66] Unlike the Montana act, the federal act does not list age as a prohibited motive for discrimination.[67] Because of this, tenants have to be creative in bringing the exclusion of children within the prohibitions of the act. One possibility is to argue that the prohibition of children constitutes discrimination based on race.[68] This is based on a statistical showing that minorities tend to have more children. A similar claim could be made alleging sex discrimination, based on the disproportionate numbers of single parent families headed by women.

A plaintiff need not belong to the minority against which discrimination was allegedly directed to have standing to sue under the federal Fair Housing Act.[69] Nor is it necessary to show discriminatory intent.[70] For a claim to succeed, a court need only find discriminatory effect,[71] but this is unlikely in adults-only housing cases. The discrimination in an adults-only housing case is based on the presence of children. While this may impact more severely on racial minorities or women, it is difficult to call this racial or sexual discrimination. The discrimination is based on something other than race or sex. The federal Fair Housing Act, for this reason, is not likely to provide relief for the tenant with children.

C. *Additional Federal Remedy*

Federal law provides an additional, although strictly limited, remedy for age discrimination. If the landlord has received federal mortgage insurance for rental housing, he may not discriminate against families with children.[72]

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65. *Halet*, 672 F.2d at 1311.

66. 42 U.S.C. § 3604 (1982).

67. The federal Fair Housing Act prohibits housing discrimination based on "race, color, religion, sex, or national origin." 42 U.S.C. §3604 (1982).

68. *See* Note, *Familial Discrimination, supra* note 64, at 1101 (1984).

69. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979), granting standing for a white person to challenge discrimination against blacks.

70. United States v. City of Black Jack, 508 F.2d at 1184-85.

71. *Id.*

72. 12 U.S.C. § 1713(b) (1982).

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D. *Attorney Fees*

A successful party under section 1983 of the Civil Rights Act is entitled, at the discretion of the court, to attorney fees.[73] Attorney fees are also allowed under the federal Fair Housing Act, but only for the plaintiff, and only if the plaintiff cannot pay his own fees.[74]

V. MONTANA PRACTICE

A challenge to age discrimination in Montana would be best pursued through state remedies. Because Montana law does not contain a state action requirement and does list age as an enumerated category, the most difficult aspects of a federal case can be averted. The new rule adopted by the Montana Human Rights Commission, once in effect, will provide a strong basis for striking down adults-only housing policies. The rule has yet to withstand judicial scrutiny.

A. *Validity of the New Rule*

To be valid, administrative rules must meet the requirements of Montana law.[75] As discussed earlier, the Montana Human Rights Commission has adopted an administrative rule interpreting the housing provision of the Montana Human Rights Act as prohibiting adults-only housing policies. While there is room for debate, this rule probably meets the requirements for validity.

Montana law establishes two requirements for the validity of an administrative rule.[76] The Montana Supreme Court has held that "administrative regulations are 'out of harmony' with legislative guidelines if they: (1) 'engraft additional and contradictory requirements on the statute'; or (2) if they engraft additional, non-contradictory requirements on the statute which were not envisioned by the legislature."[77]

The new rule banning adults-only housing does not conflict with any express provision of the Montana Human Rights Act and

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73. 42 U.S.C. § 1988 (1982). This section is discretionary. In the Ninth Circuit, at least, fees may be denied to the plaintiff if there is a contingency fee agreement. *See, e.g.*, Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979).

74. 42 U.S.C. § 3612(c) (1982). This means that a poor tenant can bring a case without risk of being held liable for the landlord's legal fees.

75. MONT. CODE ANN. § 2-4-305(6) (1985).

76. *Id.*

77. Bell v. Dep't of Licensing, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979). While this wording differs from that in the statute, the court has held that the two tests are identical. Board of Barbers v. Big Sky College, ___ Mont. ___, ___, 626 P.2d 1269, 1271 (1981).

so meets the first requirement. It could be argued, however, that by prohibiting adults-only housing policies the rule adds an additional requirement to the law, thus violating the second part of the test. On closer inspection, however, the rule does not add any new requirement to those already present in the statute, but merely interprets an ambiguous term. The Montana Supreme Court has invalidated an administrative rule only in cases in which the rule added a requirement that was clearly additional to anything found in the statute.[78] The rule adopted by the Human Rights Commission, however, merely explains the meaning of the word age in the statute.

The interpretation itself is reasonable. The Commission's rule is consistent with the statutory definition of age. Montana statute defines age as the "number of years since birth. It does not mean level of maturity or ability to handle responsibility. These latter criteria may represent legitimate considerations as reasonable grounds for discrimination without reference to age."[79] Clearly the legislature intended that characteristics of individuals be relevant only on an individual basis. The legislature did not intend to allow discrimination based on statistical inferences that people of a certain age may be more noisy or destructive than other classes of people. The new administrative rule effects the legislature's intent.

B. *Investigation*

A fair housing case must be properly investigated. The more aware the landlord may be of the requirements of fair housing law the more creative thought this investigation will require. Collecting evidence may be extremely easy in Montana at present. Landlords frequently advertise that the residence is open only to adults. This advertising itself violates Montana law.[80] Of course, if the landlord is aware of the illegality of age restrictions, any discrimination will

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78. The court has invalidated a rule requiring that instructors at a barber college must first pass an examination. Since the statute did not mention an examination, the requirement was clearly in addition to anything in the statute. Bell v. Dep't of Licensing, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979). Similarly the court struck down a rule requiring that barbers serve their apprenticeship in a commercial barbershop, while the statute had required only the supervision of a licensed barber. Board of Barbers v. Big Sky College, ___ Mont. ___, ___, 626 P.2d 1269, 1271 (1981). The court has also invalidated a rule adding a requirement to those in the statute regarding the licensing of a psychologist. McPhail v. Montana Bd. of Psychologists, ___ Mont. ___, ___, 640 P.2d 906, 908 (1983).

79. MONT. CODE ANN. § 49-2-101 (1985).

80. MONT. CODE ANN. § 49-2-305(3) (1985). It is also worth noting that MONT. CODE ANN. § 49-2-305(1)(c) makes it illegal "to make written or oral inquiry or record of" the fact that a person seeking housing falls into one of the categories against which discrimination is prohibited.

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probably be hidden.

The use of a "tester" presents one accepted[81] method of investigation in a fair housing case.[82] A tester is an investigator who poses as an apartment seeker and attempts to isolate the landlord's true motives in rejecting the plaintiff. If a client suspects discrimination, the attorney may send an investigator to attempt to rent the apartment. The investigator should not be a member of whatever suspect class to which the client may belong. If the investigator is offered the housing while the client was not, it may indicate the landlord's true motives. This is one way of proving that discrimination has taken place.

Investigation should also be aimed at discovering how many members of the suspect category, if any, are currently renting from the target landlord. If there are few or no members of that class, it will help establish a case of discrimination.[83]

C. *Mootness*

In *Halet v. Wend Investment Co.*,[84] the Ninth Circuit Court of Appeals addressed the issue of mootness in a fair housing claim. Between the filing of the complaint and the trial, the landlord, Wend, voluntarily ceased its adults-only policy. Wend maintained that its action rendered Halet's claim moot.[85] The court rejected this argument, ruling that the court "cannot rely on Wend's statement alone. Wend could revert to an adults-only policy in the future, and Wend has not demonstrated that there is no reasonable expectation of such an occurrence."[86] A fair housing case does not become moot merely because the landlord voluntarily changes policy.

D. *Procedure*

1. *Exhaustion of Administrative Remedies*

The pursuit of a fair housing claim begins with the filing of a

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81. *See, e.g.*, United States v. Yuritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973), affirmed as modified, 509 F.2d 623 (9th Cir. 1975). *See also*, United States v. Wisconsin, 395 F. Supp. 732 (W.D. Wis. 1975) (invalidating a state law that banned testing).

82. Leadership Council for Metropolitan Open Communities, *Guide To Practice Open Housing Law*, 5, (1980). This is an invaluable work for any attorney practicing open housing law. While this comment only sketches the practical issues involved in a fair housing case, this guide provides a more detailed study. Leadership Council For Metropolitan Open Communities, 407 S. Dearborn St., Chicago, IL 60605.

83. *See, e.g.*, Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979).

84. 672 F.2d 1305 (9th Cir. 1982).

85. *Id.* at 1307.

86. *Id.* at 1308.

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complaint with the Montana Human Rights Commission.[87] A plaintiff must exhaust this administrative remedy before action can be taken in district court.[88] The statute governing the filing of a complaint before the Commission is phrased permissively.[89] Section two of that statute, however, states, "A complaint under this chapter must be filed with the commission within 180 days . . . ."[90] In addition, another statute outlines the procedure for filing a complaint in district court.[91] A prerequisite is receiving the permission of the Human Rights Commission. This permission is only granted in cases where the Commission has failed to deal with the case.[92] It therefore appears that a case must begin before the Human Rights Commission. A federal district court, applying Montana law, has reached the same conclusion.[93]

2. *Complaint and Temporary Relief*

The Commission may file a complaint in district court seeking temporary relief against the landlord's discriminatory practices.[94] This is important, because the ultimate objective of the plaintiff is to secure the housing. This objective will be defeated if the landlord can rent the property to someone else before the case is settled. The plaintiff should be allowed to seek this relief directly, without having to wait for the Commission to act. It should also be noted that the statute limits temporary relief to 14 days, "except by consent of the respondent or upon a finding by the court that there is reasonable cause to believe that the respondent has en-

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87. MONT. CODE ANN. § 49-2-501 (1985). This statute reads:

Filing complaints. (1) A complaint may be filed by or on the behalf of any person claiming to be aggrieved by any discriminatory practice prohibited by this chapter. The complaint must be in the form of a written, verified complaint stating the name and address of the person, educational institution, financial institution, or governmental entity or agency alleged to have engaged in the discriminatory practice and the particulars of the alleged discriminatory practice. The commission staff may file a complaint in like manner when a discriminatory practice comes to its attention.

(2) A complaint under this chapter must be filed with the commission within 180 days after the alleged unlawful discriminatory practice occurred or was discovered. Any complaint not filed within the time set forth herein may not be considered by the commission.

88. Walker v. Anaconda Co., 520 F. Supp. 1143 (D. Mont. 1981).

89. MONT. CODE ANN. § 49-2-501 (1985).

90. *Id.*

91. MONT. CODE ANN. § 49-2-509 (1985).

92. *Id.*

93. In *Walker*, 520 F. Supp. at 1144, Judge Russell Smith concluded that when the legislature creates a remedy, that remedy is exclusive.

94. MONT. CODE ANN. § 49-2-503 (1985).

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gaged in discriminatory practices."[95]

3. *Administrative Hearing*

After the complaint has been filed, the commission staff attempts to settle the case informally.[96] If this proves impossible, there will be a contested case hearing to determine the merits of the case.[97] Following this hearing, the Commission will either issue an order requiring that the discriminatory practice be ceased[98] or dismiss the complaint.[99] The Commission or a party may also seek an injunction from a district court should the order go unheeded.[100]

The importance of the administrative hearing should not be overlooked, even though the results are appealable to district court.[101] When reviewing a decision of the Human Rights Commission, a district court cannot redetermine the credibility of witnesses and the weight given evidence by the Commission. The court may only determine whether substantial evidence existed to support the Commission's decision.[102]

E. *Remedies*

The statutory remedies[103] provided on a fair housing claim in-

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95. *Id.*
96. MONT. CODE ANN. § 49-2-504 (1985).
97. MONT. CODE ANN. § 49-2-505 (1985).
98. MONT. CODE ANN. § 49-2-506 (1985).
99. MONT. CODE ANN. § 49-2-507 (1985).
100. MONT. CODE ANN. § 49-2-508 (1985).
101. MONT. CODE ANN. § 2-4-702 (1985) and MONT. CONST. art. VII, § 4(2).
102. Martinez v. Yellowstone Cnty. Welfare Dep't, ____ Mont. ____, ____, 626 P.2d 242, 247 (1981).
103. MONT. CODE ANN. § 49-2-506 (1985) provides:

Procedure upon a finding of discrimination. (1) If the commission finds that a person, institution, entity, or agency against whom a complaint was filed has engaged in the discriminatory practice alleged in the complaint, the commission shall order him or it to refrain from engaging in the discriminatory conduct. The order may:

(a) prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found;

(b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against;

(c) require a report on the manner of compliance.

(2) The order may not require payment of any punitive damages.

(3) Whenever a commission order or conciliation agreement requires inspection by the commission staff for a period of time to determine if the respondent is complying with that order or agreement, the period of time may not be more than 3 years.

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clude (1) injunctive relief,[104] (2) compensatory damages,[105] and (3) attorney fees.[106] Punitive damages are expressly prohibited.[107]

1. *Injunctive Relief*

The most important remedies for a claimant in a fair housing action are to obtain the housing and end the discriminatory practice. The Human Rights Commission may order such relief.[108] If a litigant appeals the matter to a district court, that court may provide the same remedies.[109] This relief may include an order prohibiting future discrimination[110] and may require future inspection by the Commission staff.[111] If the landlord fails to comply with an order of the Human Rights Commission, the Commission staff or a party may move the district court for an appropriate order.[112]

2. *Compensatory Damages*

Montana statute provides that the remedies for a housing discrimination claim may include measures to correct any harm to the claimant.[113] This may include monetary damages,[114] but punitive damages are expressly prohibited.[115]

3. *Attorney Fees*

Montana law allows attorney fees to the prevailing party.[116] In the case of actions before the Human Rights Commission, the prevailing party may petition the district court for attorney fees.[117] If the case goes to district court, that court may award attorney fees.[118] In both cases, attorney fees are at the discretion of the district court. A losing tenant may therefore avoid paying the landlord's legal fees if the court finds such avoidance to be equitable.

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104. MONT. CODE ANN. § 49-2-506(1)(a) (1985).
105. MONT. CODE ANN. § 49-2-506(1)(b) (1985).
106. MONT. CODE ANN. § 49-2-505(4) (1985). *See also*, MONT. CODE ANN. § 49-2-509(3) (1985).
107. MONT. CODE ANN. § 49-2-506(2) (1985).
108. MONT. CODE ANN. § 49-2-506(1) (1985).
109. MONT. CODE ANN. § 49-2-509(3) (1985).
110. MONT. CODE ANN. § 49-2-506(1)(a) (1985).
111. MONT. CODE ANN. § 49-2-506(3) (1985).
112. MONT. CODE ANN. § 49-2-508 (1985).
113. MONT. CODE ANN. § 49-2-506(1)(b) (1985).
114. *Id.*
115. MONT. CODE ANN. § 49-2-506(2) (1985).
116. MONT. CODE ANN. § 49-2-505(4) (1985).
117. *Id.*
118. MONT. CODE ANN. § 49-2-509(3) (1985).

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F. *Criminal Penalties*

Violation of the Montana Human Rights Act carries criminal as well as civil liability. Montana statute provides a penalty of a $500 fine or 6 months imprisonment, or both, for violation of the Act or for resisting an order of the Human Rights Commission.[119] This suggests not only an additional inducement for a landlord to cease the discrimination, but also an additional way for an indigent plaintiff to seek redress. Rather than filing a civil action, the person denied housing due to discrimination may file a criminal complaint with the county attorney. In addition, the Human Rights Commission may file a criminal complaint if a case of housing discrimination comes to its attention.[120]

It should be remembered that violations of the act include not only the actual discrimination, but also advertising a discriminatory intent[121] and inquiring into whether a tenant belongs to any of the categories against which discrimination is prohibited.[122]

VI. Recommendations for Legislative Action

The 1987 Montana Legislature should clarify its stance regarding the issue of age discrimination in housing. This matter involves the competing interests of several different sectors of society. The needs of landlords, families, single parents, senior citizens, and childless adults should be balanced to arrive at a sound public policy. By delaying until 1987 the imposition of its rule interpreting the housing provision of the Human Rights Act, the Human Rights Commission has invited legislative determination of age discrimination issues.

A. *The Interests to be Considered*

The Legislature should balance the interests of four distinct segments of society relating to child-exclusionary housing. First, the legislature should consider the needs of families with children, including single parent families, to attain suitable housing. Children should not be excluded from large portions of the housing market. They should not be relegated to the worst neighborhoods with the worst educational opportunities. Our culture should focus on the nurturing of children and promote the hope that they might grow up in the best environment possible.

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119. Mont. Code Ann. § 49-2-601 (1985).
120. Mont. Code Ann. § 49-2-501 (1985).
121. Mont. Code Ann. § 49-2-305(3) (1985).
122. Mont. Code Ann. § 49-2-305(1)(c) (1985).

Second, the interests of landlords in determining the use of their own property should be considered. The Legislature should consider whether the law should allow a landlord to exclude large portions of the population from housing based on assumptions about an entire class.

Third, the Legislature should consider the needs of senior citizens. Many older citizens require special housing accommodations. An exception to any ban on age-restrictive housing should be made for their benefit.

Finally, the Legislature should evaluate the needs of childless adults who may desire a child-free environment. On this question, the words of the court in *Schmidt v. Superior Court*[123] are particularly appropriate. The *Schmidt* court pointed out that, absent the special needs of senior citizens, "the right of an adult to enjoy such relative tranquility is decidedly outweighed by society's vital and compelling interest in providing housing which fosters wholesome development of its children."[124]

A thoughtful weighing of these competing interests will undoubtedly show the balance to tilt heavily in favor of the children. This determination should not be seen as another attempt of government to interfere with and regulate the lives of citizens. Rather, it should be viewed as an effort to protect the family and to promote the proper nurturing of the next generation.

B. *Restrictive Covenants*

If Montana adopts a clear prohibition of child-restrictive lease provisons, the current language of the Montana Human Rights Act should be read as invalidating age-restrictive covenants as well. The act currently prohibits discrimination "relating to the use, sale, lease, or rental of the housing accommodation or property."[125]

Logic requires that if a property owner may not use a lease provision to prohibit occupancy by children, the same goal should not be accomplished by a restrictive covenant. Both methods are simply unilateral discriminatory actions.

C. *Montana and "Mrs. Murphy"*

The housing provision of the Montana Human Rights Act[126]

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123. ___ Cal. App. 3d ___, 215 Cal. Rptr. 840 (1985).

124. *Id.* at ___, 215 Cal. Rptr. at 848.

125. MONT. CODE ANN. § 49-2-305(1)(b) (1985).

126. Mont. Code Ann. § 49-2-305 (1985). While the Act does allow an exemption for "a private residence designed for single-family occupancy in which sleeping space is rented to guests and in which the landlord also resides," MONT. CODE ANN. § 49-2-305(2) (1985), this

does not currently contain "Mrs. Murphy's exemption," as found in the federal act.[127] This exemption accommodates the individual who rents apartments or rooms in his own home. The exemption excludes qualifying units from the provisions of the federal Fair Housing Act.[128] It allows the individual the freedom to open one's home to whomever the individual may desire without having to justify his motives to the government. This is already federal law.[129]

VII. Conclusion

Courts and legislatures across the United States increasingly prohibit the exclusion of families with children from housing developments. The Montana Human Rights Commission has recently adopted an administrative rule following this trend. Montana should continue this course, while protecting the interests of senior citizens. As one observer notes, "If you don't see kids, something dies inside of you, and if you don't like them, something's already died inside of you."[130]

differs from the federal act, which allows the exemption for permanent renters rather than merely guests. 42 U.S.C. § 3603(b)(2) (1982).

127. 42 U.S.C. § 3603(b)(2) (1982) provides an exemption from the federal Fair Housing Act for: "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."

128. 42 U.S.C. § 3603(b) (1982).

129. 42 U.S.C. § 3603(b)(2) (1982).

130. California State Senator Peter Behr, quoted in Groller, *Keep Kids Out*, Parents, Aug. 1978, at 66.