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# COMMENTS

## THE UNIFORM MARRIAGE AND DIVORCE ACT: NEW STATUTORY SOLUTIONS TO OLD PROBLEMS

**Karen Townsend**

### I. INTRODUCTION

The 44th Legislative Assembly passed the Uniform Marriage and Divorce Act[1] (hereinafter cited as UMDA or Act) and with this action adopted for Montana a cohesive piece of legislation which makes long needed reforms in domestic relations law. The UMDA was promulgated by the National Conference of Commissioners on Uniform State Law (hereinafter cited as NCCUSL) in August of 1970[2] as an attempt to change not only specific provisions, but also the entire conceptual framework that underlies the law of marriage and divorce. In particular, the "traditional conception of divorce based on fault has been singled out . . . both as an ineffective barrier to marriage dissolution which is regularly overcome by perjury, thus promoting disrespect for the law and its processes, and as an unfortunate device which adds to the bitterness and hostility of divorce proceedings."[3]

As a result of initial and continued opposition from the ABA Family Law Section, the UMDA did not receive the endorsement of the House of Delegates of the ABA in 1972.[4] However, after the draft of a proposed revision UMDA by the Family Law Section was completed and some critical amendments to the NCCUSL version of the UMDA were made, the adamant opposition of the Family Law Section was withdrawn. The UMDA received the House of Delegates endorsement at the 1974 mid-winter meeting of the ABA.[5] As of this writing, four states have either passed the UMDA or adopted legislation substantially similar to the model act.[6] The pur-

1. REVISED CODES OF MONTANA, (1947) (hereinafter cited as R.C.M., 1947), §48-301 *et. seq.*

2. Zuckman, "*The ABA Family Law Section v. The NCCUSL: Alienation, Separation, and Forced Reconciliation Over the Uniform Marriage and Divorce Act*, 24 CATH. U. L. REV. 61, (1974).

3. *Prefatory Note, Uniform Marriage and Divorce Act*, 5 FAM. L. Q. 205, 206 (1971).

4. Zuckman, *supra* note 2 at 63.

5. For more detailed versions of the dispute between the NCCUSL and the ABA Family Law Section over the UMDA *see* Zuckman, *supra* note 2; Merrill, *Section 305: Genesis and Effect*, 18 S. DAK. L. REV. 538 (1973); Foster, *Divorce Reform and the Uniform Act*, 18 S. DAK. L. REV. 572 (1973); Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 18 S. DAK. L. REV. 601 (1973).

6. Letter of October 24, 1975 from John M. McCabe, Legislative Director of NCCUSL on file at Montana Law Review Office lists Kentucky, Arizona and Colorado as having passed

pose of this comment is to examine the key provisions of the UMDA as passed by the Montana legislature, and point out the changes that the Act will bring about in this state.

## II. The Provisions on Marriage

### A. *Age of Consent*

The UMDA has adopted eighteen as the age at which individuals may marry without parental or judicial consent.[7] Additionally, provisions are made in the Act for the marriage of individuals under the age of 18.[8] The Montana version, while accepting 18 as the age of consent for marriage, differs from the NCCUSL draft in its provisions for those under the age of 18. In Montana, parties 16 and 17 may marry if they obtain judicial approval.[9] Judicial approval is dependent on parental consent, and a court finding "that the underaged party is capable of assuming the responsibilities of marriage and the marriage will serve his best interest."[10] No provisions are made for authorizing marriages under age 16. The NCCUSL version, on the other hand, allows marriage for those between 16 and 17 if the couple obtains the consent of either their parents or the court, and permits the marriage of those under 16 if consent of both the parents and the court is obtained.[11]

The law in Montana changes only slightly with the adoption of these age provisions of the UMDA. Prior to their adoption, 18 was the age of consent for marriage, and the marriage of those under 18 required the approval of both the court and the parents. There was, however, no age limit below which marriages simply could not be contracted.[12] By forbidding marriages below age 16, the Montana legislature may have created problems in its attempt to prevent them.[13]

### B. *Prohibited Marriages*

The UMDA prohibits bigamous and incestuous marriages. The statute defines incestuous marriages as those between ancestor and descendent, brother and sister whether the relationship is by the

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the UMDA, and Washington as having passed substantially similar divorce legislation.

7. R.C.M. 1947, § 48-306(1).
8. R.C.M. 1947, §§ 48-306(1) and 48-308(1)(2).
9. R.C.M. 1947, § 48-306(1).
10. R.C.M. 1947, § 48-308. The statute goes on to specify that "Pregnancy alone does not establish that the best interest of the party will be served."
11. UMDA § 203.
12. R.C.M. 1947, § 48-143 (repealed January 1, 1976).
13. *See generally* the discussion on age restrictions and youthful marriages in *Note: The Uniform Marriage and Divorce Act—Marital Age Provisions*, 57 Minn. L. Rev. 179 (1972).

half or the whole blood, or between first cousins.[14] Once again, Montana differs from the national draft in that the NCCUSL version of the UMDA permits marriages between first cousins, but forbids marriages between adopted siblings,[15] while Montana prohibits marriages between first cousins, but makes no mention of adopted siblings. The newly adopted Montana UMDA does not differ from the old law with respect to prohibited marriages.

### C. *Declaration of Invalidity*

The drafters of the UMDA state in their Comment to the section known as "Declaration of Invalidity" that: "This section is designed to replace the traditional law of annulment of marriage."[16] Although the Montana version follows the NCCUSL version to a large degree, the changes it makes in both grounds and time limits represent a departure from the underlying philosophy of that national draft. The result of the Montana version is that prior statutory law on annulment changes very little. Declarations of invalidity may be given if a party lacked capacity to consent to the marriage because of mental incapacity or infirmity, influence of alcohol, drugs or other incapacitating substance.[17] To these two grounds from the original national draft, Montana followed the lead of the Commissioners and their 1973 version by adding the traditional annulment ground of inducement by force, duress, or fraud.[18] The remaining grounds for a declaration of invalidity are lack of physical capacity to consummate the marriage, non age, and that the marriage is prohibited.[19] By adopting these grounds, Montana's version is consistent with both the NCCUSL version and prior Montana law on annulment.

Differences do occur, however, in the sections governing time limitations for bringing an action seeking a declaration of invalidity. The national draft has specified relatively short time periods for bringing such actions, while the Montana version generally retains the same statutes of limitations which existed previously.[20] Two changes in these statutes of limitations from prior Montana law are

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14. R.C.M. 1947, § 48-310.
15. UMDA, § 207.
16. Comment to UMDA § 208.
17. R.C.M. 1947, § 48-311(1)(a).
18. R.C.M. 1947, § 48-311(1)(a).
19. R.C.M. 1947, § 48-311(1)(b),(c) and (d).
20. R.C.M. 1947, § 48-311(2)(a),(b)—for lack of capacity to consent due to mental incapacity or influence of alcohol, drugs or other incapacitating substances—1 year. R.C.M. 1947, § 48-311(2)(c)—for lack of capacity to consent due to force, fraud or duress—2 years. R.C.M. 1947, § 48-311(2)(d)—for lack of physical capacity to consummate the marriage—4 years. The national version adopts ninety (90) day time limits for lack of capacity to consent and a 1 year time limit for lack of physical capacity. UMDA § 208(b)(1) and (2).

made, however. First, as to underage parties, declarations of invalidity can be sought only until the party reaches the age of consent. This same limitation applies both to the parties to the marriage and to the parents or guardians.[21] Under prior Montana law, while the parent or guardian lost his right to seek annulment upon the individual reaching the age of consent, the party to the marriage could seek an annulment for two years after reaching the age of consent.[22] The second change that will result is the limitations of actions seeking a declaration of invalidity to the lifetime of the parties to the marriage. Death of either party cuts off the possibility of seeking a declaration of invalidity or terminates the action if it is in process.[23]

The final provision of the statute on declaration of invalidity permits the court discretion in determining whether the marriage should be declared invalid from the date of the marriage or from the date of the decree.[24] This provision is obviously an attempt to resolve the conceptual problems caused by the "void/voidable" distinction in pre-Act annulment law,[25] and to insure that a spouse or child of an invalid marriage be protected through awards of support. There is a danger, however, that the former distinctions of void/voidable marriages might be read back into the law through case decisions. Such a result would be a mistake, and would be contrary to the intent of the drafters of the UMDA as evidenced in their comments.[26]

One progressive step that this new statute takes is that if a nonretroactive decree of invalidity is entered, the provisions of the UMDA relating to property rights of the spouses, maintenance, support, and custody of children will apply.[27] Thus earlier Montana law dictating that a wife was not entitled to permanent alimony following an annulment[28] would no longer be applicable.

### D. *Common Law Marriages*

The UMDA does not change Montana law on common law marriages. The statutory provisions governing Declarations of Marriage remain in full force and effect.[29]

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21. R.C.M. 1947, § 48-311(e).
22. R.C.M. 1947, § 48-203(1) (repealed January 1, 1976).
23. R.C.M. 1947, §§ 48-311(2) and 48-311(3). *See generally* Comment to UMDA § 208.
24. R.C.M. 1947, § 48-311(5).
25. For a discussion of this problem see, Comment, *Bad Laws Make Hard Cases, State Ex Rel Angvall v. District Court and The Law of Annulment In Montana*, 36 MONT. L. REV. 267 (1975); Briggs, *The Status of Annulment in Montana*, 4 MONT. L. REV. 14 (1943).
26. *See generally* Prefatory Note, *supra* note 3 at 206.
27. R.C.M. 1947, § 48-311(5).
28. State ex rel. Wooten v. Dis. Ct. of Silver Bow County, 57 Mont. 517, 189 P.233 (1920).
29. R.C.M. 1947, § 48-314.

## III. The Provisions on Dissolution

### A. *Residency and Jurisdictional Requirements*

In the past, states have imposed varying residency requirements on individuals before granting a divorce. Since these waiting periods ranged from as little as six weeks in Idaho[30] and Nevada,[31] to one year in many other states,[32] a plaintiff anxious to obtain a divorce would frequently make a temporary move to a jurisdiction with both favorable grounds and short residency requirements, wait out the necessary time, obtain the divorce, and then return to the home state. The adoption of uniform residency requirements would do much to eliminate this phenomenon of migratory divorce.

One-year residency requirements for divorce, such as Montana's,[33] have been under attack for some time for the reason that one year was more time than is necessary to establish ties between the individual and the state, and also because that much time imposes a particular hardship on those too poor to forum-shop for states with short waiting periods. Such requirements, however, survived a constitutional challenge last year.[34] The ninety-day period of the UMDA is an ideal solution to the problems raised in such cases.[35]

The UMDA does more than shorten the time period. The basis for jurisdiction rests on a finding of domicile of one of the parties to the action rather than a given period of residency. Although domicile is a more subjective concept than residence, it is more desirable because its finding is required before a state decree will be given full faith and credit in sister jurisdictions.[36] The change from the use of the word "residence" to the use of the word "domicile" in the statutes will have no substantial effect on the Montana law, since the Montana supreme court interpreted the prior statute as equating residence and domicile.[37]

### B. *Grounds*

In its treatment of grounds for divorce, the UMDA makes its most fundamental departure from the traditional statutory divorce

30. Idaho Code § 32-701 (1963).
31. Nevada Rev. Stats. § 125.020.
32. *See eg.* Cal. Civ. Code, § 128, enacted 1872, amended 1891; since amended to 6 months—Cal. Civ. Code § 4530.
33. R.C.M. 1947, § 21-134.
34. Sosna v. Iowa, ___ U.S. ___, 95 S.Ct. 553 (1975).
35. R.C.M. 1947, § 48-316(1)(a).
36. Williams v. North Carolina I, 317 U.S. 287 (1942); Williams v. North Carolina II, 325 U.S. 226 (1945).
37. State ex rel. Duckworth v. District Court, 107 Mont. 97, 101, 80 P.2d 367 (1938).

law. By conscious design, the fault concept has been removed as a basis for ending a marriage.[38] Under the UMDA, a decree of dissolution of marriage will be granted when "the court finds that the marriage is irretrievably broken."[39] There are no other grounds for such a decree.

The phrase "irretrievable breakdown," engendered the most controversy in both the development of the UMDA, and the continuing battle with the Family Law Section prior to the final endorsement of the Act by the ABA.[40] The drafters of the UMDA quite consciously avoided defining that phrase in the statute. They believed that "the courts should continue to build the concept of irretrievable breakdown on a case-by-case basis and not be hampered by legislative preconceptions which necessarily cannot fit all cases."[41] The Family Law Secton vigorously opposed this lack of definition on the grounds that this vagueness "inevitably will lead to divorce upon demand of one party."[42] Their draft defined irretrievable breakdown in terms of proof either:

> a) That the parties have lived separate and apart for a period of more than one year preceding commencement of court action, or
> b) That such serious marital misconduct had occurred so adversely affecting the physical or mental health of the petitioning party as to make it impossible for the parties to continue the marital relation, and that reconciliation is improbable;[43]

Proponents of the NCCUSL version of the UMDA argued that the PR Draft of the Family Law Section imposed too lengthy time limits to be practicable, and that by not defining "serious marital misconduct" the draft invited judges experienced in the fault system to require proof of old fault grounds.[44] The final compromise reached between the two groups is the version endorsed by the ABA and passed by the Montana legislature.[45] Although, there may be some possibility that fault will be read back into the statute in cases

38. Prefatory Note, *supra* note 3 at 207.
39. R.C.M. 1947, § 48-316(1)(b).
40. For a discussion of this controversy, *see generally* Zuckman, *supra* note 2.
41. *Id.* at 65. *See also* Merrill, *supra* note 5 at 549.
42. ABA Family Law Section, Proposed Revised Uniform Marriage and Divorce Act, PR Draft, § 302, Comment.
43. PR Draft § 302(a)(2).
44. Zuckman, *supra* note 2 at 65-68.
45. R.C.M. 1947, § 48-316(1)(b) provides that a court can enter a decree of dissolution upon a finding that: the marriage is irretrievably broken, which findings shall be supported by evidence

> (i) that the parties have lived separate and apart for a period of more than one hundred eighty (180) days next preceding the commencement of this proceeding, or
> (ii) that there is serious marital discord which adversely affects the attitude of one or both parties towards the marriage.

where serious marital misconduct is alleged, the intent of the UMDA is clearly opposed to such a result.[46]

The adoption of "irretrievable breakdown" as the sole ground for a decree of dissolution makes a significant change in the Montana law. Although the state had taken a step towards the adoption of "no-fault" divorce in 1973 with the addition of "irreconcilable differences" to the other statutory grounds for divorce,[47] the passage of the UMDA makes the transition complete. Emphasis will no longer be placed on the faults of the defendant, but rather upon the status of the marriage itself.

The traditional defenses to divorce which have long been part of the Montana statutory picture[48] have also been abolished by the UMDA.[49] As a result, the sole defense to the action, other than jurisdictional ones, is that "the marriage is not irretrievably broken."[50] Although there have been few cases heard in Montana in which one of these traditional defenses was successfully raised,[51] and although the 1965 decision of *Burns v. Burns*[52] shows that the defense of recrimination has lost much of its force,[53] nevertheless the formal rejection of these defenses is a much needed reform.

### C. *Separation Agreements, Maintenance Awards and Property Distribution*

The basic theme of the UMDA eliminating the consideration of any element of fault or wrong by one of the parties is carried over to the provisions regulating property distribution following a decree

46. Prefatory Note, *supra* note 3 at 207.

47. R.C.M. 1947, § 21-103 (repealed effective January 1, 1976) lists as grounds for divorce: incurable insanity, adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction of a felony, and with the 1973 amendment "irreconcilable differences which have existed and persisted for a period of six months before the commencement of an action and which have caused the irremediable breakdown of the marriage."

48. R.C.M. 1947, § 21-118 (repealed effective January 1, 1976) declares that "Divorces must be denied upon showing of connivance, collusion, condonation and recrimination." Additionally, for certain actions, a divorce had to be denied for an unreasonable lapse of time. R.C.M. 1947, § 21-130 (repealed effective January 1, 1976).

49. R.C.M. 1947, § 48-317(5).

50. UMDA § 303 Comment.

51. Examples of cases which discussed these defenses: *Shaw v. Shaw*, 122 Mont. 593, 208 P.2d 514 (1949), petty act fully condoned cannot be grounds for divorce; *Cooper v. Cooper*, 92 Mont. 57, 10 P.2d 939 (1932), no connivance found as a result of continued support payments; *Farwell v. Farwell*, 47 Mont. 574, 133 P. 958 (1913), no connivance found; *Bordeaux v. Bordeaux*, 30 Mont. 36, 75 P. 524 (1904), continuing to live with wife after learning of her adultery constituted condonation; *Morrison v. Morrison*, 14 Mont. 8, 35 P. 1 (1894), no condonation despite continued cohabitation.

52. 145 Mont. 1, 400 P.2d 642, 13 A.L.R. 3rd 1355 (1965).

53. This case is analyzed carefully in Recent Decisions, *Divorce—Recrimination Is No Longer an Absolute Defense—A Decree of Divorce May Be Awarded to Both Parties in Certain Situations*, 26 MONT. L. REV. 254 (1965).

of dissolution or separation. Such an approach is a major change in the way that these matters were previously handled. In the past, the finding of fault in one of the parties often served as justification for not only the award itself, but often the amount of the award.[54] Montana has followed the general pattern of many states and refused to award alimony to a wife when the divorce was granted to the husband.[55] Additionally, there has been no provision in Montana for any award of alimony to a husband.[56] The sections in the UMDA which govern property distribution will change these past practices.

First, property settlements are not only permitted but encouraged.[57] Although Montana has recognized property settlement agreements,[58] such agreements were not provided for by statute. The new statute, however, not only encourages such an agreement, but makes it binding upon the court unless the court finds the agreement "unconscionable."[59] Upon a finding of unconscionability, the court may request the parties to file a revised agreement, or make its own orders for disposition of the property.[60] The agreement is also automatically incorporated into the decree unless the agreement provides to the contrary.[61]

Not only does the statute provide for the approval of property settlement agreements, but the court is also given power to apportion the property of the parties where no agreement is reached, and if necessary make awards for continued maintenance of one of the spouses.[62] This provision reflects a new notion that the disposition of property is to be done "like the distribution of assets incident to

54. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, §§ 14.5, 14.8 (1968).

55. *See, Grush v. Grush*, 90 Mont. 381, 3 P.2d 402 (1931); *Albrecht v. Albrecht*, 83 Mont. 37, 269 P. 158 (1928); *Damm v. Damm*, 82 Mont. 239, 266 P. 410 (1928); *Bischoff v. Bischoff*, 70 Mont. 503, 226 P. 508 (1924). *See also* Annot., 34 A.L.R. 2d 313 (1954) for cases from other jurisdictions which agree with the Montana holding.

56. R.C.M. 1947, § 21-139 (repealed effective January 1, 1976) provides that alimony awards may be made to the wife for an offense of the husband. This statute was challenged as unconstitutional in three recent cases: *Clontz v. Clontz*, ___ Mont. ___, 531 P.2d 1003, 32 St. Rptr. 169 (1975); *Grant v. Grant*, ___ Mont. ___, 531 P.2d 1007, 32 St. Rptr. 191 (1975), and *Taylor v. Taylor*, ___ Mont. ___, ___ P.2d ___, 32 St. Rptr. 575 (1975). The court did not decide the constitutional question in any of these cases as there was a failure to provide the required notice to the attorney general under Rule 38, M. R. App. Civ. P. in the *Clontz* and *Grant* cases, and there were other grounds on which to decide the case in *Taylor*.

57. R.C.M. 1947, § 48-320.

58. Clontz v. Clontz, *supra* note 56 at 173; Ryan v. Ryan, 111 Mont. 104, 106 P.2d 337 (1940); Grush v. Grush, 90 Mont. 381, 3 P.2d 402 (1931).

59. R.C.M. 1947, § 48-320(2).

60. R.C.M. 1947, § 48-320(3).

61. R.C.M. 1947, § 48-320(4)(a).

62. R.C.M. 1947, § 48-321.

the dissolution of a partnership."[63] In making the property division, the judge is to look at all the relevant circumstances of the marriage and the spouses. The court is also directed by the statute to consider the relative contributions each spouse has made in the acquisition of the property to be apportioned, including the "nonmonetary contribution of a homemaker."[64]

The UMDA makes a definite policy decision not to place the traditional reliance upon maintenance as the primary means of support for a divorced spouse.[65] However, such awards are possible, and if they are to be made, the court is again directed to consider "all relevant facts" except "marital misconduct."[66]

The Montana law in this area will undergo some change.[67] First, and most importantly, marital misconduct cannot be considered in making decisions about property division.[68] Thus case law which refused to permit alimony awards to "guilty" wives will no longer be applicable.[69] Second, since maintenance awards under the UMDA can be made to either spouse, the constitutional weakness that the prior statute suffered will no longer be a problem.[70] Finally, there may be some change in the standard used to determine whether an award should be modified. However, until there is some case law interpreting the UMDA term "unconscionable", an exact determination whether the law has changed cannot be made.[71]

### D. *Child Custody and Support*

When a marriage is dissolved and minor children are involved, custody decisions must be made. The UMDA adopts the familiar "best interest of the child" standard to govern the custody decision.[72] The considerations which are enumerated in the statute are designed to "codify existing law in most jurisdictions."[73]

Custody decisions are not only made at the time of a proceeding for dissolution, but also under other circumstances. The Act is designed to cover these cases also.[74] Custody proceedings may be

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63. Prefatory Note, *supra* note 38 at 207.
64. R.C.M. 1947, § 48-321.
65. R.C.M. 1947, § 48-322. *See also* Prefatory Note, *supra* note 37 at 207.
66. R.C.M. 1947, § 48-322(2).
67. R.C.M. 1947, § 48-330(1)(a) and (b).
68. R.C.M. 1947, § 48-330(1).
69. *See* note 54 *supra*.
70. *See* note 56 *supra*.
71. Montana cases which have discussed modification of alimony have required that there be a "substantial change" in the financial status, *McLeod v. McLeod*, 126 Mont. 32, 243 P.2d 321 (1952), or conditions which "demand a variation, alteration or revocation of alimony and support payments." *Daniels v. Daniels*, 145 Mont. 57, 409 P.2d 824, 826 (1966).
72. R.C.M. 1947, § 48-332.
73. UMDA § 402 Comment.
74. R.C.M. 1947, § 48-331(4).

brought by parents or non-parents, although a non-parent must have physical custody of the child in order to petition for legal custody.[75] The UMDA permits the judge to interview the child to ascertain his wishes as to custody and visitation, and, if needed, seek advice of professional personnel as to the decision.[76] The Act also authorizes a full investigation and report on the child's custody arrangement in contested custody cases, or upon request in non-contested cases.[77] Finally, the court may appoint an attorney to represent the child's interests with respect to support, custody and visitation.[78]

The non-custodial parent is to be given "reasonable visitation rights" unless the court finds, after a hearing, that "visitation would endanger seriously the child's physical, mental, moral, or emotional health."[79] As with property distribution and maintenance awards, child support awards are to be made without regard to marital misconduct after considering the financial resources of the child, of the custodial parent, of the non-custodial parent, and also the particular needs of the child.[80]

Child custody awards can be modified, but not without difficulty. No modification is permitted for two years after the initial decree unless "there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health."[81] A change in custody can be made after this initial two-year period only on the basis of facts which have arisen since the earlier decree, or that were unknown at the time of the earlier decree, and upon a finding that the circumstances of the child or custodian have changed and the modification is necessary to serve the best interest of the child.[82] Even upon such findings, the present custodian is to be retained unless there is consent to the change, or the child has been integrated into the family of the petitioner with the consent of the custodian, or thepresent environment endangers him in some manner and the harm caused by the change is outweighed by the advantages to him.[83] There is a firm policy behind the section on modification that custody awards ought to be final, and that a child needs stability in his living arrangements, particularly after the dissolution of his or her parents' marriage.[84]

75. R.C.M. 1947, § 48-331(4)(b).
76. R.C.M. 1947, § 48-334(1) and (2).
77. R.C.M. 1947, § 48-335.
78. R.C.M. 1947, § 48-324.
79. R.C.M. 1947, § 48-337.
80. R.C.M. 1947, § 48-323.
81. R.C.M. 1947, § 48-339(1).
82. R.C.M. 1947, § 48-339(2).
83. R.C.M. 1947, § 48-339(2)(a),(b) and (c).
84. UMDA § 409 Comment.

The Montana law dealing with child custody will not undergo many changes as a result of the passage of the UMDA. The best interest of the child has long been the standard applied in Montana cases.[85] Reasonable visitation rights to the non-custodial parent have been recognized since the 1917 case of *Kane v. Kane*.[86] In the past, modification of custody decrees in Montana has not been easy, with most courts requiring a showing of "substantial change of circumstances" before such a shift will be made.[87] However, the provision of the UMDA on modification suggests that a still more stringent standard must now be followed. The Comments to this section emphasize the necessity of final decisions, and assert a "presumption that the present custodian is entitled to continue as the child's custodian."[88] It will be necessary to wait for case law interpretation to see whether Montana will interpret this section as propounding a more stringent requirement. One definite change is found in the statutory provision permitting the appointment of an attorney to represent the child's interest in custody, support, and visitation.

Montana did not adopt the section of the UMDA dealing with custody which provided that "neither fault nor any act of misconduct on the part of the proposed custodian shall be considered unless it affects that person's relationship with the child."[89] The failure of the state to adopt this provision may permit the chief goal of the UMDA to be thwarted in that there is again room for consideration of fault. Clearly if marital misconduct or "fault" does not affect the relationship of a person with his child, it should not be a factor in the custody decision.

## *Conclusion*

The Uniform Marriage and Divorce Act provides useful solutions to the many aggravations of domestic relations law. By excising the concept of fault from the law governing dissolution of marriage and distribution of property following dissolution, the disruption in human lives which occurs at these times will hopefully be lessened. Although nothing can make such proceedings pleasant, the removal of acrimony should eliminate the law as a cause of emotional damage which occurred during divorces in the past.

85. The most recent case using this standard is *Gilmore v. Gilmore*, ___ Mont. ___ 530 P.2d 480 (1975), interpreting R.C.M. 1947, § 91-4515, a statute repealed by the UMDA.

86. 53 Mont. 519, 165 P. 457 (1917).

87. Gilmore v. Gilmore, *supra* note 84 at 482.

88. UMDA § 409 Comment.

89. Callow, *Custody of the Child and the Uniform Marriage and Divorce Act*, 18 S. DAK. L. REV. 551, 555 (1973). The exact phrasing of the provision is: "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." UMDA § 402.

This change in the philosophy underlying the law of divorce is the major difference in the old Montana law and the new. The provisions as to waiting periods, grounds, property division, maintenance awards and custody explained above are all examples in which this philosophy will be implemented. The cohesive reform represented by this Act has been long needed in this state.