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FAMILY LAW

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INTRODUCTION

This survey focuses on significant changes in family law made by the Montana Supreme Court in 1981. The survey considers the division of a military pension and evaluation of tax consequences in a marital property division, the effect of a voluntary change in circumstances on support decrees, a redefinition of "reasonable visitation" rights, the constitutionality of blood tests and the statute of limitations in a paternity suit, and the need for district courts to draft their own findings of fact.

I. PROPERTY DIVISION

A. *Military Pensions*

Two Montana Supreme Court cases, *Miller v. Miller*[1] and *Karr v. Karr*,[2] were appealed to the United States Supreme Court and considered in light of a recent landmark United States Supreme Court decision, *McCarty v. McCarty*.[3] *Miller, Karr* and *McCarty* all involved the issue of whether a district court should include the value of a spouse's military retirement pension when making a property division. In reviewing these cases and their holdings, it is important to understand when they were decided by the various courts. The following chronology should be kept in mind:

March 27, 1980	*Miller* decided by Montana Supreme Court;
April 1, 1981	*Karr* decided by the Montana Supreme Court;
June 26, 1981	*McCarty* decided by the United States Supreme Court;
June 30, 1981	*Miller* decided by the United States Supreme Court;
Pending	*Karr* decision by the United States Supreme Court.

McCarty, originally a California case, held that the value of a

1. ___ Mont. ___, 609 P.2d 1185 (1980), *vacated*, 49 U.S.L.W. 3978 (U.S. June 30, 1981) (No. 80-291).

2. ___ Mont. ___, 628 P.2d 267 (1981), *petition for cert. filed*, 50 U.S.L.W. 3113 (U.S. Aug. 24, 1981) (No. 81-363).

3. 101 S. Ct. 2728 (1981) (at time of publication, U.S. cite available at 453 U.S. 210 (1981)).

military pension cannot be considered part of the marital property and therefore the pension cannot be divided.[4] The United States Supreme Court reasoned that division of a federal pension by a state court defeated Congress' goals for the military retirement program.[5] Justice Blackmun wrote:

> Congress has determined that a youthful military is essential to the national defense; it is not for a State to interfere with that goal by lessening the incentive to retire created by the military retirement system . . . . Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone.[6]

The Court strongly implied that this non-division rule applies to common law property states like Montana.[7]

McCarty is a landmark case because it follows on the heels of a prior United States Supreme Court case,[8] which involved federal pensions created by the federal Railroad Retirement Act. In this earlier case, *Hisquierdo v. Hisquierdo,* the United States Supreme Court excluded the value of the railroad pension from the marital property valuation because inclusion would do major damage to clear and substantial federal interests.[9]

In *Miller v. Miller,* the Montana district court awarded the wife 38.5 percent of the husband's military pension.[10] The Mon-

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4. *Id.* at 2730.

5. *Id.* at 2742. Those goals are to induce enlistment, create career paths, ensure a young militia, and provide for the retirement needs of service personnel.

6. *Id.* at 2742-43. According to the Billings Gazette, several bills are pending in the U.S. House of Representatives which would allow ex-spouses of military personnel to receive money from the divorce directly. One bill would allow the alimony or child support to be sent directly to the ex-spouse. Another bill would divide retirement pay between those divorced military spouses whose marriages lasted at least ten years. A third bill would give the ex-spouse medical benefits. Billings Gazette, July 9, 1981, at B3, col. 1-5.

7. McCarty, 101 S. Ct. at 2741-42: "Indeed, at least one court (in a noncommunity property state) has gone so far as to hold that the heirs of the ex-spouse may even inherit her interest in military pay. See *In re Miller,* ___ Mont. ___, 609 P.2d 1185 (1980), *cert. pending sub nom. Miller v. Miller,* No. 81-291. Clearly, '[t]he law of the State is not competent to do this.' *McCune v. Essig,* 199 U.S. at 389." California is a community property law state in which all property earned by either spouse during the marriage is treated as community property. The pension in *McCarty* was held to be quasi-community property. Each spouse is entitled to a one-half interest in all community and quasi-community property. McCarty, 101 S. Ct. at 2733. Montana is a common law property state in which division of the property depends on a totality of circumstances as contemplated by the Uniform Marriage and Divorce Act [hereinafter cited as UMDA] found in the MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 40-1-101 through -404 and §§ 40-4-101 through -221 (1981).

8. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

9. McCarty, 101 S. Ct. at 2735.

10. ___ Mont. ___, 609 P.2d at 1185.

tana Supreme Court upheld this decision, and the husband appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana Supreme Court, holding, as in *McCarty*, that the military pension could not be divided.[11]

In *Karr*, the district court considered the husband's military pension as future income but did not award a specific part of it to the wife. An important distinction must be made between taking the pension into consideration and actually awarding a portion of the pension. The Montana Supreme Court, relying on prior Montana case law, confirmed the district court's decision.[12] Quoting from the district court's record, the supreme court declared:

> While a pension cannot be included in the marital property or used as a set-off, it can be considered as a source of income in arriving at an equitable apportionment required by the statute, just as it may be used in determining alimony or maintenance . . . . The federal law may hold our wrist from reaching into [the husband's] retirement salary, but it need not blind our eyes to the reality of the situation.[13]

The United States Supreme Court will probably affirm *Karr* because the district court did not specifically award a part of the military pension to the ex-spouse.[13.1] This draws a fine judicial line between permissible and impermissible dispositions of federal military pensions. After *McCarty*, *Miller* and *Karr*, property divisions that specifically award a part of the pension to the spouse will not be upheld, according to *McCarty* and *Miller;* dispositions that do not split the pension but consider it as future income will be upheld, according to *Karr*.

B. *Tax Consequences*

In *Gilbert v. Gilbert*[14] and *Beck v. Beck*,[15] the Montana Supreme Court held that "concrete" but not "theoretical" tax conse-

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11. Miller, 49 U.S.L.W. 3978 (U.S. June 30, 1981) (No. 80-291).

12. The district court divided the estate in a 2:1 ratio in the wife's favor and awarded her $190,926 in a lump sum because adequate marital real property existed and because the husband was uncooperative throughout the dissolution proceeding. Karr, ___ Mont. ___, 628 P.2d at 276 (citing Miller, ___ Mont. ___, 609 P.2d 1185 (1980); McGill v. McGill, ___ Mont. ___, 609 P.2d 278 (1980)). *McGill* was reheard by the Montana Supreme Court and was reversed for exclusion of the military pension in accordance with *McCarty*. McGill v. McGill, ___ Mont. ___, 637 P.2d 1182 (1981).

13. Karr, ___ Mont. ___, 628 P.2d at 272.

13.1. At the time of publication the United States Supreme Court had denied *certiorari*, thereby impliedly affirming *Karr*. 50 U.S.L.W. 3757 (U.S. March 23, 1982).

14. Gilbert v. Gilbert, ___ Mont. ___, 628 P.2d 1088 (1981).

15. Beck v. Beck, ___ Mont. ___, 631 P.2d 282 (1981).

quences of a marital property division must be considered by the district courts. Although the supreme court did not define "theoretical" or "concrete and immediate" tax consequences, working definitions can be inferred from the facts of the two cases.

In *Gilbert*, the district court and the husband drafted two widely differing valuations of the net marital estate. The husband, in his valuation, included the estimated tax consequences of liquidating his retirement program. The district court refused to consider the tax consequences; consequently, the husband appealed on the basis that the district court abused its discretion by not considering the tax effects of the liquidation.[16] The Montana Supreme Court held that the effects were "neither necessary nor probable, but merely conjectural,"[17] and thus the court did not abuse its discretion.

In *Beck*, prior to the marriage dissolution, the husband and wife assigned their contract proceeds from a sale of real estate to two banks as security for their unspecified debts.[18] The district court included the contract proceeds in the marital estate valuation, but the resulting tax consequences of a division of the proceeds were not considered. On appeal, the Montana Supreme Court held that the tax consequences were concrete and adverse and therefore must be considered by the district court before final judgment is rendered.[19] The supreme court cited to *Gilbert* as a comparison between "concrete" and "theoretical" tax consequences, but the court did not define either term.[20]

Following *Gilbert* and *Beck*, district courts must therefore first decide whether tax consequences of a marital property division are concrete or theoretical before dividing the property. If the tax consequences are concrete, the property division should take them into account.

II. Modification of Dissolution Decrees

A. *Voluntary Change in Circumstances*

Many jurisdictions will consider a non-custodial parent's voluntary change in circumstances as one factor in deciding whether to modify a child support or maintenance decree.[21] Other jurisdictions refuse to consider voluntary changes. Montana followed those

16. Gilbert, ___ Mont. ___, 628 P.2d at 1089.
17. *Id.*
18. Beck, ___ Mont. ___, 631 P.2d at 283.
19. These consequences were not detailed in the opinion.
20. Beck, ___ Mont. ___, 631 P.2d at 285.
21. Rome v. Rome, ___ Mont. ___, 621 P.2d 1090 (1981).

jurisdictions that consider voluntary changes as a factor in *Rome v. Rome*[22] and *Tidball v. Tidball*.[23]

The husband in *Rome* remarried and switched jobs from the hardware business to the logging industry and alleged that he could not continue child support payments of $200 per month.[24] In denying the petition to modify those payments, the district court held that voluntary changes could not be considered. The district court reasoned that the petitioner voluntarily assumed the obligations of a second family and changed jobs, knowing he still owed a duty to support his first two children.[25] Further, the district court found that the changes made were insufficient and did not substantially affect his ability to pay.[26]

On appeal, the Montana Supreme Court held that a voluntary change in circumstances should be considered in modifying child support. Failure to do so, in the court's words, is "an inflexible approach [that] is too harsh."[27]

In supporting its decision, the supreme court relied on an Oregon case, *Nelson v. Nelson*,[28] but failed to employ *Nelson*'s primary criterion, whether the voluntary change in circumstances was made in "good faith." *Nelson* held that support payments cannot be changed when a petitioner voluntarily acts in bad faith to worsen his financial condition, thereby "jeopardiz[ing] his child's interests."[29] However, the Oregon Supreme Court recognized that a refusal to consider a voluntary change as a factor would freeze the petitioner in one occupation or circumstance unless he was willing to suffer financial hardship.[30] The Oregon court reasoned:

> The fact that such financial hardship is brought about through the father's change in employment, even though made with knowledge that it will result in a reduction of his financial resources, does not preclude the court from considering the change as a basis for a modification of the decree. The change must, of course, be made in good faith.[31]

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22. *Id.*
23. ___ Mont. ___, 625 P.2d 1147 (1981).
24. Rome, ___ Mont. ___, 621 P.2d at 1092.
25. *Id.*
26. *Id.*
27. *Id.*
28. 225 Or. 257, 357 P.2d 536 (1960).
29. *Id.* at 261, 357 P.2d at 538. *See also* Annot., 89 A.L.R. 2d 57 (1963).
30. Nelson, 225 Or. at 262, 357 P.2d at 539.
31. *Id.* at 263, 357 P.2d at 539. The *Nelson* case was later cited in a 1981 Illinois case, Coons v. Wilder, ___ Ill. App. 3d ___, 415 N.E.2d 785 (1981), as perpetuating the "good faith" test. The father in *Coons* contended that child support payments should be reduced because he suffered an $18,000 investment loss and because he voluntarily chose to attend

In *Tidball v. Tidball,* the Montana district court ordered the husband to pay maintenance so that the wife would not have to seek outside employment and could take care of their mentally incompetent child.[32] The husband later petitioned the district court to eliminate his maintenance duty when he found out that the wife was employed as a teacher in Arizona.[33] When the wife learned about the petition, she quit her job, ostensibly to spend more time with their child, but possibly to avoid losing the maintenance.[34]

Although the Montana Supreme Court determined that the wife's voluntary action in quitting her job effectively denied the father's petition,[35] the supreme court held that the wife's voluntary change in circumstance was of secondary importance because she was the guardian of the child.[36] The court affirmed the district court's denial of the father's petition to eliminate his maintenance payments, holding that a voluntary change alone does not require termination of maintenance.[37]

Citing *Rome,* but not *Nelson,* the supreme court again failed to use the good faith test in reaching its decision.[38] Thus, *Rome* and *Tidball* suggest that this omission was intentional. Had the court applied the good faith test to the mother's acts in *Tidball,* the results might have been different; the father's petition may have been granted if he could have proved that the mother acted in bad faith.

B. *Reasonable Visitation Rights Defined*

In *Sanderson v. Sanderson*[39] the district court originally awarded child custody to the mother and granted the father "reasonable visitation" rights but did not define the term "reasonable." The court did not define reasonable because both parents lived in the same town.[40] The mother later took the child to live with her in Salt Lake City, and the father petitioned the district court to define what was reasonable. The court treated his petition as a re-

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law school and could not earn as much as before. The Illinois Supreme Court held that the father should not be penalized for education decisions made in good faith and not made to deliberately avoid his child support responsibilities.

32. Tidball, ___ Mont. ___, 625 P.2d at 1148.
33. *Id.*
34. *Id.* at ___, 625 P.2d at 1150.
35. *Id.*
36. *Id.* at ___, 625 P.2d at 1149-50.
37. *Id.* at ___, 625 P.2d at 1150.
38. *Id.*
39. ___ Mont. ___, 623 P.2d 1388 (1981).
40. *Id.* at ___, 623 P.2d at 1389.

quest for modification of the dissolution decree and, after applying the applicable Montana statute,[41] found that the petitioner did not meet the requirements for modification. The petition was therefore denied.

On appeal the Montana Supreme Court held as error the district court's decision to apply modification of dissolution decree standards to what the court classified as a "clarification."[42] Because it was a "clarification" and not a "modification," the supreme court held that the district court should have set up a visitation schedule and should not have applied the stricter modification standards.[43]

As for defining "reasonable visitation" rights, the supreme court exchanged one vague phrase for another. Such a schedule should allocate "time for the father's visitation so that a meaningful relationship can be nurtured."[44]

Sanderson requires a district court to first determine whether a petition to change visitation rights is a clarification or a modification before determining whether the new conditions warrant altering the court decree. A clarification requires the court to draft a visitation schedule; a modification requires the court to apply statutory requirements.[45]

III. PATERNITY

A. *Blood Tests*

In *Rose v. District Court*,[46] the putative father in a paternity suit challenged court-ordered blood tests, which help determine paternity, claiming that the tests were unreasonable searches.[47] The Montana Supreme Court held that blood tests per se were not

41. MCA § 40-4-208 (1981).
42. Sanderson, ___ Mont. ___, 623 P.2d at 1389.
43. *Id.*
44. *Id.*
45. *Id.* (citing Rivard v. Rivard, 175 Wash. 2d 415, 451 P.2d 677 (1969)). The Washington Supreme Court permitted the noncustodial parent to request the district court to specify reasonable visitation rights when the parents could not agree on a schedule. This distinction between modification and clarification was offered:

> A modification of visitation rights occurs where the visitation rights given to one of the parties is either extended beyond the scope originally intended or where these rights are reduced, giving the party less rights than those he originally received. A clarification, on the other hand, is merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.

Rivard, 175 Wash. 2d at 417, 451 P.2d at 679.
46. ___ Mont. ___, 628 P.2d 662 (1981).
47. *Id.* at ___, 628 P.2d at 664.

unreasonable searches, but in this particular case, the tests did violate constitutional rights because the district court did not follow proper procedure before ordering the tests.[48] The district court must first find a *prima facie* case against the putative father; no such finding was made, so the action was remanded for an informal pretrial proceeding on the existence of the *prima facie* case.[49] The supreme court held that the blood tests were generally reasonable because the tests could conclusively exclude a putative father as the natural father, which would permit the district court to dismiss the action against him.[50]

B. *Statute of Limitations*

In *State v. Wilson*,[51] the Montana Supreme Court consolidated two paternity actions, brought by the Social and Rehabilitation Services, that were dismissed because the three-year time limit[52] had run before either case was filed. The supreme court held the statute of limitations constitutional when the paternity action is brought by a state agency but not when brought on the child's behalf by a representative or guardian.[53]

A child, through a representative, can bring a paternity action anytime before reaching majority age because the "child is entitled to support from its father throughout its minority."[54] The state, however, cannot bring a paternity action (where there is no presumed father) three years after the child's birth because:

> The State is not a child, . . . it cares not so much about the relationship of father and child but more about economic reimbursement for welfare and other dependent aid. The rights given to the State are not equal to the rights and interest of the child or the reasons or necessity for finding the child's father. The statute of limitations, therefore, provides a protection against the inadvertance and delay of the State in actions for paternity.[55]

In his dissent, Chief Justice Haswell wrote that the state's paternity actions should not have been barred because the state and the child have identical interests.[56]

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48. *Id.* at ___, 628 P.2d at 666.
49. *Id.*
50. *Id.*
51. ___ Mont. ___, 634 P.2d 172 (1981).
52. MCA § 40-6-108(3) (1981).
53. Wilson, ___ Mont. ___, 634 P.2d at 174.
54. *Id.*
55. *Id.* at ___, 634 P.2d at 174-75.
56. *Id.* at ___, 634 P.2d at 175.

IV. COURT FINDINGS

In *Tomaskie v. Tomaskie,*[57] the Montana Supreme Court made it clear that the district court must make its own findings of fact and conclusions of law according to the applicable statutes and cannot adopt automatically one party's proposed findings. In *Tomaskie,* the district court adopted the husband's proposed findings verbatim even though the findings did not comply with Montana Code Annotated § 40-4-204 (1981). Justice Shea wrote:

> It is a wise practice for the trial court to prepare and file its own findings and conclusions. Only in that fashion can the parties know that the trial court has carefully considered all the relevant facts and issues involved . . . . It is becoming increasingly apparent to this Court, however, that the trial courts rely too heavily on the proposed findings and conclusions submitted by the winning party. That is wrong! See Canon 19, Canons of Judicial Ethics, 144 Mont. at xxvi-xxvii.[58]

57. ___ Mont. ___, 625 P.2d 536 (1981).
58. *Id.* at ___, 625 P.2d at 538-39.