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# ARTICLES

## RECENT DEVELOPMENTS IN FAMILY LAW IN MONTANA

by Thomas H. Mahan\*

### INTRODUCTION

Family law in Montana is passing through a period of significant change. The recent adoption of the Uniform Marriage and Divorce Act<sup>1</sup> has altered the entire statutory foundation of divorce law. Thoroughgoing changes have also occurred in the statutes governing parentage and non-parental child custody.<sup>2</sup> Though the trend of court decision in the previous decade was toward modernization of the law, this process has been hastened by the legislature.

With change comes uncertainty. In the ten years from 1962 through 1972, there were approximately thirty family law cases decided by the Montana supreme court. During the next three years, there were another thirty. Since the beginning of 1976, however, more than forty decisions have been handed down, including an unusually large number of reversals. Some of these are the predictable transition cases, requiring the supreme court to establish by case law that the new statutes mean what they say. Others, however, involve important questions of first impression in Montana, and in the United States.

It has been said that the UMDA codifies the policy of "no-fault" divorce. Though one of the stated purposes of the Act is to strengthen the integrity of marriage,<sup>3</sup> it makes the legal dissolution of marriage a relatively uncomplicated and nearly irresistible procedure. All previously known defenses to a divorce action are abolished;<sup>4</sup> and under the Act's "irretrievable breakdown" standard,<sup>5</sup>

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1. *The Uniform Marriage and Divorce Act*, REVISED CODES OF MONTANA, §§ 48-301 to 341 (1947) [hereinafter cited R.C.M. 1947], enacted Ch. 536, Laws of Montana (1975), effective January 1, 1976 (hereinafter referred to as the UMDA or "the Act").

2. "Youth in need of care," R.C.M. 1947, §§ 10-1301 to 1322, enacted Ch. 328, Laws of Montana (1974); guardianship, R.C.M. 1947, §§ 91A-5-201 to 212 (Uniform Probate Code), enacted Ch. 365, Laws of Montana (1974); Uniform Parentage Act, R.C.M. 1947, §§ 61-301 to 327, enacted Ch. 512, Laws of Montana (1975).

3. R.C.M. 1947, § 48-302(2) (Supp. 1977).

4. R.C.M. 1947, § 48-317(5) (Supp. 1977).

5. R.C.M. 1947, § 48-319 (Supp. 1977). In practice, an analogous standard was often

the very act of filing the petition should furnish almost conclusive justification for granting a divorce. Despite the ease and speed with which the bonds of matrimony may be dissolved, however, all the natural complications incident to that dissolution—children, property, money—remain, and cannot be resolved without the traditional attorney-supervised negotiations or adversary litigation. The UMDA sets forth new rules for dealing with the old difficulties, but they remain. The same can be said concerning the delicate matters of adoption, guardianship, and child welfare and abuse.

This article offers a comprehensive survey of recent Montana cases decided under our family statutes. While the statutory provisions themselves are often referred to, no extensive commentary on the legislation is offered,<sup>6</sup> but rather a review of the developing case law based upon it.

## I. CHILD CUSTODY

### A. *Custody Determinations Related to Divorce*

In a dissolution proceeding, custody is to be determined in accordance with the best interests of the child. The UMDA sets forth five possible determinants of best interest which the court must consider in deciding custody: (1) the wishes of the child's parent or parents as to his custody, (2) the wishes of the child as to his custodian, (3) the interaction and inter-relationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest, (4) the child's adjustment to his home, school, and community and (5) the mental and physical health of all individuals involved.<sup>7</sup> Once a custodian is appointed after a balancing of these factors, he or she may direct the child's upbringing, including his education, health care, and religious training. Only if the court finds, upon motion of the non-custodial parent, that the child's physical health or emotional development would be significantly impaired otherwise, may it place a specific limitation upon the custodian's authority to rear.<sup>8</sup>

These standards for judicial resolution of contested custody, while articulated in much greater detail than before, do not depart significantly from previous Montana law, where custody was also

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applied under the former law; see, e.g., *Anderson v. Anderson*, 145 Mont. 244, 400 P.2d 632 (1965).

6. In addition to the commission comments which accompany the uniform acts (in the case of the UMDA, an extensive and detailed commentary), see Comment, *The Uniform Marriage and Divorce Act: New Statutory Solutions to Old Problems*, 37 MONT. L. REV. 119 (1976).

7. R.C.M. 1947, § 48-332 (Supp. 1977).

8. R.C.M. 1947, § 48-338 (Supp. 1977).

predicated on considerations of "the welfare of the child." Under the older system of divorce, the custody determination was made, in theory at least, independently of the finding of fault, and in fact custody was regularly awarded to the parent against whom the divorce decree was rendered.<sup>9</sup> Even the much-used "tender years" presumption<sup>10</sup> was often rebutted, and many custody awards of young children made to the father.<sup>11</sup> The pre-UMDA case law stood basically for the same policy embodied in the UMDA: that parental struggles for control of children should be resolved in favor of the situation likely to be most beneficial for the children in the long run.

There have been but two significant original custody appeals determined under the UMDA, both involving the "tender years" presumption.<sup>12</sup> Each, taken by the mother, involved an identical issue—whether granting custody of a small child to the father in a dissolution proceeding was proper. Both appellants argued that the tender years presumption, though now absent from the statutes, should still control at common law if the evidence indicated that both parents were fit and proper custodians, and the evidence was evenly balanced on best interest. The supreme court upheld both district court custody awards to the father, but in two problematical opinions agreed with the appellants that a tender years presumption still exists in Montana.

In *Tweeten v. Tweeten*, the court confined itself to stating that the tender years presumption exists; but "in this jurisdiction each child custody case will be decided on its own facts rather than by the use of 'controlling or conclusive' presumptions."<sup>13</sup> In *Isler v. Isler*, a more extensive but perplexing analysis was advanced. The court reaffirmed that "the presumption continues under the Uniform Marriage and Divorce Act,"<sup>14</sup> and then explained how it works:

It . . . appears that the preference for the mother comes into play in Kentucky at the close of the evidence. This is not the case in

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9. See e.g., *Hurly v. Hurly*, 147 Mont. 118, 411 P.2d 359 (1966); *Anderson v. Anderson*, 145 Mont. 244, 400 P.2d 632 (1965).

10. R.C.M. 1947, § 91-4515(2), repealed by Ch. 365, Laws of Montana (1974), provided that: "[O]ther things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor and business, then to the father."

11. E.g., *Cleverly v. Stone*, 141 Mont. 204, 378 P.2d 653 (1962); *Anderson v. Anderson*, 145 Mont. 244, 400 P.2d 632 (1965); *Veseth v. Veseth*, 147 Mont. 169, 410 P.2d 930 (1966); *Hurly v. Hurly*, 147 Mont. 118, 411 P.2d 359 (1966).

12. *Tweeten v. Tweeten*, \_\_\_ Mont. \_\_\_, 563 P.2d 1141 (1977); *Isler v. Isler*, \_\_\_ Mont. \_\_\_, 566 P.2d 55 (1977).

13. \_\_\_ Mont. at \_\_\_, 563 P.2d at 1144. Neither here, nor in *Isler*, does the court intimate whether the old statutory correlative of the tender-years presumption, the "preparation for business and labor" presumption in favor of the father, also continues to live in the common law.

Montana. Here, the parties proceed from the presumption and once it is overcome by a preponderance of the evidence there is no preference for the mother. In meeting this burden, the father need not prove the mother to be unfit.<sup>15</sup>

There are several questionable points in this analysis. First, it is difficult to see how the custody determination with the presumption operating differs from the determination as it would occur without it. The court does not say it increases the father's burden of proof. Therefore, it appears that the only way in which the presumption could have any effect in the "best interest" analysis, is if both the mother and father offered no evidence whatsoever concerning custody—an unlikely eventuality in a court contest for control of a child. Second, it is odd that the "common law" tender years presumption should be held to operate differently than the former statutory one, which by its terms was clearly meant to be applied at the close of the evidence.<sup>16</sup> Third, since the legislature repealed the tender years presumption just prior to enacting the UMDA, one must wonder why the court did not at least consider the possibility that the legislature meant to abolish it altogether. The logic of this case is elusive, but one thing is clear: an attorney representing a mother in a contested custody matter had better prove it is in the best interest of a small child to grow up under her tutelage; any presumption to that effect is "thin air."

### B. *Modifications of Custody After Divorce*

The former Montana statute conferring power on district courts to render custody decrees in divorce actions provided that: "the judge may give such direction for the custody, care, and education of the children . . . as may seem necessary or proper, and may at any time vacate or modify the same."<sup>17</sup> In a leading pre-UMDA case, the supreme court held that: "all child custody orders are interlocutory in nature, and conditioned by what the district court . . . believes to be for the well-being of the children."<sup>18</sup> Since the trial court retained jurisdiction, it was not unusual for custody battles to be waged interminably in the courts, and petitions for modification often resulted in redeterminations of the same issues relating to best interest as were decided in the first decree.<sup>19</sup> In order to avoid this undesirable result, the rule evolved that a petition for modifica-

15. *Id.*

16. The qualifying phrase in the repealed § 91-4515(2), "other things being equal," to be sensible must mean "as shown by the evidence."

17. R.C.M. 1947, § 21-138, now repealed.

18. *State ex rel. Shelhamer v. District Court*, 159 Mont. 11, 13, 494 P.2d 928, 931 (1972).

19. *E.g., Cleverly v. Stone*, 141 Mont. 204, 378 P.2d 653 (1962).

tion would not be granted unless "a substantial change of circumstances" affecting the welfare of the children could be demonstrated.<sup>20</sup> The nature of the change of circumstances which would justify modification was largely undefined, however. It was generally understood to encompass significant changes in the conduct or circumstances of either party or the child, which might indicate to the court that the best interest of the child would be served by an alteration of his custodial arrangements. The development of this doctrine did not significantly reduce the incidence of repetitious attempts to modify custody orders.<sup>21</sup>

One essential policy of the UMDA is the avoidance of unceasing custodial strife, through the judicial provision of stable custody arrangements for children. To implement this policy, the UMDA section on modifications of custody provides that:

(1) No motion to modify a custody decree may be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health.

(2) The court shall not modify a prior custody decree unless it finds upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

(a) the custodian agrees to the modification;

(b) the child has been integrated into the family of the petitioner with consent of the custodian; or

(c) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

(3) Attorney fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.<sup>22</sup>

This section has been set forth verbatim in several recent opinions, along with extensive supporting quotations from the Commission-

20. *Baertch v. Baertch*, 155 Mont. 98, 467 P.2d 142 (1970); *Simon v. Simon*, 154 Mont. 193, 461 P.2d 851 (1969).

21. Sometimes these attempts involved unusual procedural ramifications. In *Hurly v. Hurly*, 147 Mont. 118, 411 P.2d 359 (1966), the supreme court modified the original trial court custody award on the basis of events occurring subsequent to the trial.

22. R.C.M. 1947, § 48-339 (Supp. 1977).

ers' Notes;<sup>23</sup> and it seems clear that the supreme court intends to follow it strictly. This represents a significant departure from prior law; previously, various factors bearing on welfare of the child were open to inquiry in a modification action, whereas § 48-339 expresses a very strong presumption that the welfare of the child is best served by stable and definitive custody arrangements, whatever their character.

In its first consideration of the modification provision in late 1976, the supreme court announced that it effected no change in Montana law.<sup>24</sup> Soon thereafter, however, the campaign of strict construction began. In *Holm v. Holm*,<sup>25</sup> a noncustodial mother petitioned for modification based entirely on a substantial change of circumstances in her own (not the custodial) situation. Her petition was filed less than two years after the prior custody judgment. The supreme court found the trial court lacked jurisdiction to entertain the proceeding "based on the best interests of the children where, as here, it found the custodian 'is and has been a proper father.'"<sup>26</sup> There was no allegation that the child was seriously endangered; therefore a motion to dismiss for lack of jurisdiction should have been granted. The court also indicated the plaintiff could not have met any of the section's criteria for modification, even had the petition been timely. It remanded the cause to the district court for the possible assessment of attorney's fees against the petitioner for vexatious action.

In *Groves v. Groves*,<sup>27</sup> the supreme court followed up dicta from *Holms* concerning the exclusiveness of the three alternative prerequisites to modification set forth in § 48-339(2), by stating definitively that "it is plaintiff's responsibility to prove that modification is necessary to serve the best interests of the child, and to do so she must satisfy one of the conditions specified in subsections (a), (b) and (c), section 48-339(2)."<sup>28</sup> The court thus held that the *only* aspects of changed circumstances ever justifying a modification of custody are those enumerated in § 48-339(2): consent, integration into the household with consent, and serious danger to the child. *Groves* also describes the burden of proof required of a petitioner for

23. In one of these cases, *Holm v. Holm*, \_\_\_ Mont. \_\_\_, 560 P.2d 905 (1977), after quoting extensively from Commissioners' Note to UMDA § 409, explaining the policy of stable custody, the court stated: "This rationale is persuasive. It makes sense. It explains the purpose, intent, and operation of the statute. We adopt it." \_\_\_ Mont. at \_\_\_, 560 P.2d at 908.

24. *Foss v. Leifer*, \_\_\_ Mont. \_\_\_, 550 P.2d 1309 (1976); *Erhardt v. Erhardt*, \_\_\_ Mont. \_\_\_, 554 P.2d 728 (1976).

25. \_\_\_ Mont. \_\_\_, 560 P.2d 905 (1977).

26. *Id.* at 907-08.

27. \_\_\_ Mont. \_\_\_, 567 P.2d 459 (1977).

28. *Id.* at 462-68.

modification of custody as "heavy . . . to prevent . . . ping-pong custody litigation . . . ."<sup>29</sup>

Once more in the case *In re Dallenger*,<sup>30</sup> the noncustodial parent (this time the appellee) argued that "the best interests of the child," liberally construed, should support a modification decree, even if the strict letter of the statute were not met. The supreme court responded with a strong defense of strict construction which is worth quoting in full, since it defines current Montana policy in this area:

Section 48-339 requires a showing of a change in circumstances and that modification is necessary to serve the best interests of the child. The statute is specific, however, in pointing out how these standards are to be applied. No change in custody may be made unless subsections (a), (b), or (c) under section 48-339(2) are satisfied. Here only subsection 2(c) is applicable, and it requires: (1) the physical, mental, moral, or emotional health of the child be endangered in its present environment; and (2) the advantages to the child of a change in custody outweigh the harm likely to be caused by such a change.

This burden put on the party seeking a change in custody was developed intentionally to further the policy that custody ought to be difficult to change after a decree is made. The Comment of the National Conference of Commissioners on Uniform State Laws, quoted by this Court in *Holm v. Holm*, \_\_\_ Mont. \_\_\_, 560 P.2d 905, 908, 34 St. Rep. 118, 121, states in part:

"Most experts who have spoken to the problems of post-divorce adjustment of children believe that insuring the decree's finality is more important than determining which parent should be the custodian. See Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 *Syracuse L. Rev.* 55 (1969). This section is designed to maximize finality (and thus assure continuity for the child) without jeopardizing the child's interest. . . ."

In light of these policy considerations in addition to the clear language of the statute, we cannot hold the statute is satisfied where the court finds only that the interests of the children would be "best served" by a change in custody, and that such a change would be "to the environmental benefit" of the children. For the court in this case to have jurisdiction to modify a custody decree under section 48-339, there must be a finding of danger to the physical, mental, moral, or emotional health of the children in their present environment, and a finding that the harm likely to be caused by such a change is outweighed by its advantages to them. Here, there simply were no such findings.

29. *Id.*



Respondent argues the ultimate determination under the statute is still the best interests of the child and a finding to that effect necessarily includes a finding that one of the subsections to section 48-339(2) is satisfied. We agree the final decision remains the traditional "best interests" decision. . . . But the subsections to section 49-339(2) are jurisdictional prerequisites to modification which were placed there to serve the basic policy behind the entire section, the policy of custodial continuity. To allow these crucial issues to be resolved merely by reference to the best interests of the children would seriously weaken the statute. We hold the district court did not comply with the correct statutory standards set out in section 48-339(2)(c), R.C.M. 1947.<sup>31</sup>

Lest any doubt remain as to the law in Montana relating to modification, the court in *Giannotti v. McCracken* peremptorily reversed a lower court modification order based on changed circumstances of the noncustodial parent.<sup>32</sup> And in *Schiele v. Sager*,<sup>33</sup> in a paragraph replete with recent citations, it reversed another modification based on "changed circumstances" and on "best interest," but not on one of the three conditions specified in the statute.

### C. *Jurisdiction to Modify a Foreign Custody Decree*

In 1973, Montana reached the nadir of its participation in what one commentator has called "the disgraceful interstate custody battles that rage . . . with children as the weapons" in *Roebuck v. Roebuck*.<sup>34</sup> There, with the child having been kidnapped from Oregon during visitation, and a contempt proceeding pending in Oregon against the plaintiff for disobedience to its decree, the Montana supreme court upheld a trial court modification of custody and found that "physical presence of the minor child vests courts with jurisdiction to determine custody where the welfare of the child is

31. *Id.* at 171-72.

32. — Mont. —, 569 P.2d 929 (1977). The facts of this case exemplify one of two typical patterns under which modifications were often sought (and granted) in the past, based on changed circumstances of the noncustodial parent. Here, the separation agreement had included a provision for re-negotiation as to custody if the mother remarried. She did, set up family housekeeping, and expected to regain her children. The trial court appeared to fulfill this expectation, but was reversed. The other common situation is where the noncustodial parent, usually the mother, suffers from severe emotional or financial disruption at the time of divorce, and the best interests of the child dictate custody be awarded to the father. In the past, the non-custodial parent who after a period of time regained the ability to serve as a "fit and proper" parent, could bring a modification action on that basis. This was the situation in *Holm*; the modification petition was dismissed.

One might venture to say it verges on malpractice to counsel divorce clients today to make current decisions on custody on the basis of possible future modifications.

33. — Mont. —, 571 P.2d 1142 (1977).

34. 162 Mont. 71, 508 P.2d 1057 (1973).

concerned."<sup>35</sup> The same result did not ensue three years later. In a landmark decision,<sup>36</sup> the court refused jurisdiction to a Washington father who had kidnapped his children, and, keeping them in violation of a valid Washington custody decree, petitioned a Montana court for modification based on changed circumstances. Finding that the plaintiff had "unclean hands," that the court lacked personal jurisdiction over the mother, and that the situs of the marriage and the domicile of the child and mother was Washington, the court granted a writ of supervisory control to dismiss the proceeding. Thus, the court reached a result as sound as it would have been compelled to reach by the Uniform Child Custody Jurisdiction Act, which is now the law in Montana.<sup>37</sup>

#### D. *Adoptions and Youth in Need of Care*

In Montana there are three procedures which may be used in various circumstances to terminate parental rights. Children may be removed from parents who are unwilling or unable to provide an adequate home environment through custody proceedings initiated under the "youth in need of care" statutes.<sup>38</sup> Children may be placed through adoption after consent of the natural parent(s),<sup>39</sup> or pursuant to an order placing permanent custody with the right to consent to adoption in the Department of Social and Rehabilitation Services, following a finding that one of the exceptions to the required parental consent is applicable.<sup>40</sup> Parental rights of putative fathers may be terminated through procedures provided in the Uniform Parentage Act.<sup>41</sup>

The provisions of these three statutes may be interrelated in many cases where the welfare and placement of children are at issue. Consideration must also be given to the provisions of the Uniform Marriage and Divorce Act which, though focussed primarily on custody awards in the context of marital dissolutions, have implications for custody proceedings commenced in other contexts.

It should be noted that the threshold requirement for termination of parental rights through adoption is different than for termination following a finding that the child is a "youth in need of care"—the terminology which is applied to all children who fall

35. *Id.* at 76, 508 P.2d at 1060-61.

36. *State ex rel. Muirhead v. District Court*, \_\_\_ Mont. \_\_\_, 550 P.2d 1304 (1976).

37. R.C.M. 1947, §§ 61-401 to 61-425, enacted Ch. 537, Laws of Montana (1977), effective July 1, 1977. Under § 61-415, the court in *Roebuck* would have had to dismiss for lack of jurisdiction because of its finding that the Oregon court had concurrent jurisdiction in the matter.

38. R.C.M. 1947, §§ 10-1301 to 10-1322 (Supp. 1977).

39. R.C.M. 1947, § 61-205(1) (Supp. 1977).

40. R.C.M. 1947, § 61-205(1)(a)-(f), (2) (Supp. 1977).

41. R.C.M. 1947, §§ 61-301 to 61-327 (Supp. 1977).

within the statutory definitions of abused, neglected or dependent children. The Montana supreme court has been consistent in holding that strict compliance with the statutory provisions regarding consent by the natural parent to adoption, or a finding of a valid exception, is a jurisdictional prerequisite to the issuance of a valid adoption decree.<sup>42</sup> *In Re Biery*, a much-cited case in subsequent decisions, states the policy reasons for requiring strict compliance: "while the best interests of the child are of utmost concern in both custody and adoption cases, we have required strict compliance with section 61-205, R.C.M. 1947, because of the harshness of permanently terminating parental rights."<sup>43</sup>

Custody proceedings initiated under the "youth in need of care" statute constitute the primary exception to the parental consent requirement. Once a child has been determined to be a youth in need of care, the court may in its discretion terminate the rights of the parent(s), and allow the adoption of the child without consent. The threshold requirement in these cases, however, is a clear finding of parental unfitness. The court in a recent case<sup>44</sup> held that § 10-1312 "make[s] plain that a finding of abuse, neglect or dependency is the jurisdictional prerequisite to any court ordered transfer of custody. It is then, and only then, that the 'best interest of the child' standard has its application . . . ."<sup>45</sup>

The uncertain interplay of the child custody statutes is illustrated by a recent case, in which the court voided an adoption decree but placed permanent custody in the adoptive parents.<sup>46</sup> Finding that the natural mother had not received notice of, nor given consent to the adoption, the court held the adoption decree void for want of jurisdiction. Nevertheless, it refused to return the

42. *In re Biery*, 164 Mont. 353, 522 P.2d 1377 (1974); *In re Smigaj*, \_\_\_ Mont. \_\_\_, 560 P.2d 141 (1977).

43. *In re Biery*, 164 Mont. at 359, 522 P.2d at 1380 (1977).

44. *In re Fish*, \_\_\_ Mont. \_\_\_, 569 P.2d 924 (1977).

45. *Id.* at \_\_\_, 569 P.2d at 927. The court continued:

. . . It is important to note the mother was never . . . declared to be unfit to have the custody of the children. This being so, the district court had no jurisdiction to take the children away from their natural mother. The 'best interests of the child' test is correctly used to determine custody rights between natural parents in divorce proceedings. In this situation the 'equal rights' to custody which both the father and mother possess under section 61-105, R.C.M. 1947, are weighed in relation to each parent's ability to provide best for the child's physical, mental, and emotional needs upon the breakdown of the marital relationship. 'Fitness' of each parent is determined only in relation to the other and not to society as a whole. However, where third parties seek custody, it has long been the law in Montana that the right of the natural parent prevails until a showing of a forfeiture of this right. (Citing cases). The Uniform Marriage and Divorce Act does not change this law. This forfeiture can result only where the parent's conduct does not meet the minimum standards of the child abuse, neglect and dependency statutes.

46. *In Re Adoption of Hall*, \_\_\_ Mont. \_\_\_, 566 P.2d 401 (1977).

child to the mother, who had sought not only to void the decree but had requested the child's return upon a writ of habeas corpus. Instead the court upheld the trial court's quashing of the writ, and its award of custody to the adoptive parents pursuant to a hearing held by agreement of the parties as to the best interests of the child. The natural mother was *not* found to be unfit, but the court agreed that the best interests of the child would be served by his remaining with the adoptive parents, now permanent custodians.

In this case, the child had been adopted when it was less than a month old and was, at the time of the hearing, four and a half years old—a fact which no doubt carried considerable weight in the placement determination. In a vigorous dissent, Justice Shea characterized the decision as one which could be interpreted as allowing “adverse possession” of children. “In effect, this Court is holding that permanent custody of a child can be acquired by a hybrid form of adverse possession and it does not matter that the initial possession was acquired by illegal means.”<sup>47</sup> Despite the fact that the court has often rejected the contention that custody and adoption proceedings which result in placement of children with non-parents for extended periods, operate to bar custody in the natural parents,<sup>48</sup> it is clear that the practical effect can be to increase the likelihood of permanent placement with the non-parental custodian. Both the legislature and the courts have recognized this problem and have attempted to remedy it. The “youth in need of care” act provides that custody cases should be given priority before the courts, a policy which was emphasized by the supreme court in the *Fish* case.<sup>49</sup>

The dissent in *Hall* raises another significant issue. Under the UMDA, petitions to modify custody decrees can be filed only after a two-year period, or else must show that the child's physical, mental, moral or emotional health is being “endangered seriously” in its present environment.<sup>50</sup> In this case, the natural mother, who originally lost her child through an invalid adoption proceeding, was denied custody following a hearing on the best interests of the child, wherein no finding of her unfitness to have the child was made. Such a hearing would appear to violate the *Fish* principle that best interest cannot be a factor until a threshold showing of parental unfitness is made. Nevertheless, the mother in *Hall* will be unable to make any attempt to modify custody for another two years, at

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47. *Id.* at \_\_\_\_, 566 P.2d at 405.

48. *In re Fish*, \_\_\_\_, Mont. at \_\_\_\_, 569 P.2d at 928-29.

49. R.C.M. 1947, § 10-1310(2) (Supp. 1977); *In re Fish*, \_\_\_\_, Mont. at \_\_\_\_, 569 P.2d at 929.

50. R.C.M. 1947, § 48-339(1) (Supp. 1977).

which time it is likely that the argument for the child remaining with the present custodians will be even stronger, it being admitted by all that they are proper custodians. Her only recourse may be a petition for reasonable visitation rights under the UMDA.

As previously noted, many of the adoption cases considered by the court in recent years turn on the question of consent, or the finding of a statutory exception. In a case decided in May, 1977, *In Re Adoption of Challeen*,<sup>51</sup> a district court's adoption decree in favor of the stepfather was reversed because the petitioner failed to establish an exception under § 61-205(1)(f). That section provides that consent is not required for adoption if the parent has not contributed to the support of the child for a period of one year prior to the petition, if able to do so. Petitioner proved that the natural father had not contributed to the support of the child for over five years but failed to prove that he had the ability to do so. The court made a similar holding in an earlier case, *In Re Smigaj*,<sup>52</sup> in which the term "support" was construed to mean financial support only.

Appointment of counsel for the child in custody disputes has been discussed by the court in several recent cases. In *Stubben v. Flathead County Department of Public Welfare*,<sup>53</sup> the court noted that it is within the district court's discretion under § 10-1310(12) to appoint counsel for the child, but held that in this case it was not error for the court to have failed to do so. Less than a year later, however, in *In Re Gulette*,<sup>54</sup> the court adopted the Oregon rule that "where custody is in serious dispute, the court shall appoint independent counsel for the child or make a finding stating the reasons such appointment was unnecessary."<sup>55</sup> That holding seems to indicate a tendency by the court to go further than in previous years toward recognition that the interests of the child may be different from either those of the natural parent or of other persons seeking custody. In the *Fish* case, where counsel for the child was retained by the persons seeking adoption, the court emphasized that counsel for the child must in fact be independent.<sup>56</sup> In *Schiele v. Sager*,<sup>57</sup> reversing and remanding a modification of custody determination, the supreme court for the first time explicitly directed the trial court to appoint independent counsel to represent the child. Whether this

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51. \_\_\_ Mont. \_\_\_, 563 P.2d 1120 (1977).

52. \_\_\_ Mont. \_\_\_, 560 P.2d 141 (1977).

53. \_\_\_ Mont. \_\_\_, 556 P.2d 904 (1976).

54. \_\_\_ Mont. \_\_\_, 566 P.2d 396 (1977). A new opinion was rendered on July 8, 1977, after the case was resubmitted, but the adoption of the Oregon rule was unaffected.

55. *Id.* at \_\_\_, 566 P.2d at 400.

56. *In re Fish*, \_\_\_ Mont. at \_\_\_, 569 P.2d at 928.

57. *Schiele v. Sager*, \_\_\_ Mont. \_\_\_, 571 P.2d 1142 (1977).

will become a common procedure in Montana remains to be seen.<sup>58</sup>

Other supreme court rulings which will affect the outcome of cases involving child placement address the question of the admissibility of welfare reports. In early 1976 the court decided *In Re Fisher and Ronquillo*,<sup>59</sup> reversing a district court decree awarding permanent custody to the Department of Social and Rehabilitation Services. Petitioner, in attempting to prove the mother an unfit person to have custody, relied on a "report to the court" prepared by the County Department of Public Welfare. The court ruled the evidence was hearsay and therefore inadmissible, resulting in an insufficiency of credible evidence to sustain the lower court's decree. The following year that holding was refined in *In Re Swan, Youths in Need of Care*,<sup>60</sup> where similar reports were held to be inadmissible as hearsay evidence. The court in *Swan* stated that all procedural rules must be followed in cases involving termination of parental rights since "[a]ny relaxing of these procedural rules would create a custody procedure ripe for abuse . . . . Unsworn reports where there is no right to cross-examine come within the hearsay rule and are inadmissible."<sup>61</sup>

The court in *Fisher*<sup>62</sup> noted that the question of privilege between a social worker and the mother whose rights were sought to be terminated had been raised, but did not consider the matter since the insufficiency of evidence was determinative. It seems likely, however, that a parent's assertion that a social worker cannot testify against him because of privileged communications between the two will be considered in a subsequent case.

Another aspect of adoption and custody proceedings was recently clarified by the supreme court. The court affirmed a decision of the district court consolidating matters before it, and delaying decision until all petitioners had been heard. Two competing adoption petitions and a third petition by the county to have the child declared a youth in need of care were before the court in separate actions.<sup>63</sup> Adoption was awarded and the petitioner who did not receive the child alleged error in the district court's decision to hear all petitions before ruling. The court held that the paramount consideration in these cases is the best interest of the child and that

58. It also remains to be seen who will pay for counsel if such appointments do become common. The legislature modified the national draft of this section in a manner aimed apparently at deterring such appointments. Compare R.C.M. 1947, § 48-324 with UMDA § 310, 9 U.L.A. 495 (1973).

59. \_\_\_ Mont. \_\_\_, 545 P.2d 654 (1976).

60. \_\_\_ Mont. \_\_\_, 567 P.2d 898 (1977).

61. *Id.* at \_\_\_, 567 P.2d at 900.

62. *In re Fisher*, \_\_\_ Mont. at \_\_\_, 545 P.2d at 654-55.

63. *In re Adoption of Redcrow*, \_\_\_ Mont. \_\_\_, 563 P.2d 1121 (1977).

the district court was correct in its disposition. The court also ruled that the district court's finding that both of the couples petitioning for adoption would be suitable adoptive parents was not equivalent to a finding that each would equally promote the best interests of the child.

No cases have yet been decided under the Uniform Parentage Act. It should be noted, however, that a primary purpose of this act is to provide putative fathers<sup>64</sup> with certain rights, one of which is the right to consent to adoption. Putative fathers must be given notice of any action in which parental rights may be terminated,<sup>65</sup> and may be considered as potential custodians of their children.

## II. PROPERTY DIVISION

With the adoption of the UMDA, Montana officially joined many other jurisdictions in recognizing the marital partnership concept in property division.<sup>66</sup> The marital partnership or shared enterprise concept places equal weight upon the financial and personal contributions of the parties in a marriage. Upon the dissolution of that relationship the district court is directed by statute "equitably" to apportion property and assets owned by the parties. Property apportionment provides the dependent spouse an alternative to traditional alimony and "encourages the court to provide for the financial needs of the spouse by property disposition rather than by an award of maintenance."<sup>67</sup>

Prior to the effective date of the Act, Montana case law on property division incident to divorce tended to embody a marital partnership concept. In a 1977 decision, *Biegalko v. Biegalko*,<sup>68</sup> the Montana supreme court outlined the major cases on property division since 1960. Even though some of the cases pre-date the Act by fifteen years, the court concluded that "the provisions of the Act for consideration of property division are very similar to the case law."<sup>69</sup>

64. R.C.M. 1947, § 61-305 (Supp. 1977).

65. R.C.M. 1947, § 61-325 (Supp. 1977).

66. Krauskopf, *A Theory for 'Just' Division of Marital Property in Missouri*, 41 Mo. L. REV. 165 (1976). The National Conference of Commissioners on Uniform Laws made a similar recommendation. The Commissioners urged that the "distribution of property upon the termination of marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a (business) partnership." HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM LAWS 111, note 3, at 178 (1970).

67. Commissioners' Note, 9 U.L.A. 493 (1973).

68. *Biegalko v. Biegalko*, \_\_\_ Mont. \_\_\_, 564 P.2d 987 (1977).

69. *Id.* at \_\_\_, 564 P.2d at 990. The court based its decision upon prior case law and not the Act as such. However, in *Zell v. Zell*, \_\_\_ Mont. \_\_\_, 570 P.2d 33 (1977), the court said that "[R.C.M.] section 48-321(1) controls the district court's consideration and disposition of the marital property. Guidelines for the district court's consideration in a property division were outlined by the court in *Biegalko*." 570 P.2d at 35.

It then set forth ten "guidelines" drawn from the cases. Since *Biegalko* has since been cited in every property division case decided under the UMDA, the principles enunciated in its "guidelines" must be considered in conjunction with the Act.

### A. Property Division and the Act

Promoting a policy of minimum court involvement in divorce, the Act encourages parties to a marriage independently to divide their property, and to settle their own financial affairs by agreement.<sup>70</sup> The parties to the marriage may in a written separation agreement dispose "of any property owned by either of them, and [for] support, custody, and visitation of their children."<sup>71</sup> Then in a dissolution proceeding, the terms of the separation agreement, except those concerning the support, custody and visitation of children, will be binding upon the court, unless found unconscionable.<sup>72</sup> Separation agreements found not unconscionable may be set out in the separation or dissolution decree, or may be identified in the decree. They will then have behind them all enforcement powers related to judgments, including contempt, and will also be enforceable as contract terms.<sup>73</sup>

In case there is no agreement as to property, the Act permits a district court equitably to apportion between the parties "the property and assets belonging to either or both, however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both."<sup>74</sup> The Act establishes a variety of tests to be used in dividing up the property,<sup>75</sup> and also provides for the division

70. State Bar of Montana Continuing Legal Education, UNIFORM MARRIAGE AND DIVORCE ACT 15 (1975); Citizens' Advisory Council on the Status of Women, RECOGNITION OF ECONOMIC CONTRIBUTION OF HOMEMAKERS AND PROTECTION OF CHILDREN IN DIVORCE LAW AND PRACTICE, (CACSW Item 40-N, 1975); Comment, *The Uniform Marriage and Divorce Act*, *supra* n.6 at 126.

71. R.C.M. 1947, § 48-320(1) (Supp. 1977).

72. R.C.M. 1947, § 48-320(2) (Supp. 1977).

73. See Commissioners' Note, 9 U.L.A. 489 (1973).

74. R.C.M. 1947, § 48-321(1) provides:

In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, *without regard to marital misconduct*, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both *however and whenever acquired*, and whether the title thereto is in the name of the husband or wife or both. (emphasis added)

The portions of the statute italicized above were those emphasized by the Montana Supreme Court in the recent case *Morse v. Morse*, \_\_\_ Mont. \_\_\_, 571 P.2d 1147 (1977). The court there stated that the plain meaning of the provisions expresses the law.

75. R.C.M. 1947, § 48-321(1) provides:

In making apportionment the court shall consider the duration of the marriage, and



of property acquired prior to the marriage or individually during the marriage.<sup>76</sup>

### B. *Equity Court's Power in the Disposition of Property*

The powers of the district court in the apportionment of the property and assets of the parties are far-reaching and pervasive. Its equitable jurisdiction allows it to make a division of the property and assets of the parties according to their contributions to the marital partnership. In such an allocation the district court is guided by general standards of "reasonableness."<sup>77</sup>

Until rather recently, however, one might not be able fully to adjudicate real property rights in an action for divorce in Montana. In *Rufenach v. Rufenach*,<sup>78</sup> the supreme court affirmed a district court finding that it had no power to divest title in one spouse in order to transfer title to the other spouse.<sup>79</sup> In 1971, *Libra v. Libra*<sup>80</sup> expressly overruled earlier cases holding that district courts in divorce actions lacked power to adjust certain property interests of the parties. The court found that under "proper circumstances" it "may completely divest the wife of her interest in property and provide for the payment of alimony in lieu thereof."<sup>81</sup>

Now the district court's power has been established and defined

prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

76. R.C.M. 1947, § 48-321(1) further provides:

. . . In disposing of property acquired prior to the marriage; property acquired by gift, bequest, devise or descent; property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent; the increased value of property acquired prior to marriage; and property acquired by a spouse after a decree of legal separation, the court shall consider those contributions of the other spouse to the marriage, including the nonmonetary contribution of a homemaker; the extent to which such contributions have facilitated the maintenance of this property and whether or not the property disposition serves as an alternative to maintenance arrangements.

The foregoing language is not in the national draft, but was apparently thought necessary to abrogate definitively the former Montana law governing disposition of previously-acquired property of spouses.

77. *Biegalko v. Biegalko*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 989.

78. *Rufenach v. Rufenach*, 120 Mont. 351, 185 P.2d 293 (1947). *Accord*, *Emery v. Emery*, 122 Mont. 201, 200 P.2d 251 (1948).

79. "There is no authority either in the statutes of Montana or in the decisions of this court, in an action for divorce, to divest the title of the husband to his property and to adjudge or order an involuntary assignment and transfer thereof to the wife." *Rufenach*, 120 Mont. at 353, 185 P.2d at 293.

80. *Libra v. Libra*, 157 Mont. 252, 484 P.2d 748 (1971).

81. *Id.* at 258, 484 P.2d at 751-52.

both by case law and the Act.<sup>82</sup> In *Cook v. Cook*,<sup>83</sup> the Montana supreme court described the boundaries of the district judge's discretionary power to carry out property division as "fettered only by the range of reason and his judgment will not be disturbed in the absence of an abuse of discretion."<sup>84</sup> In addition, courts have statutory direction from the Act specifying that the judge is to look at all the relevant circumstances of the marriage to arrive at an equitable apportionment of the property and assets of the parties.

Although no particular pleading is necessary to give the district court equitable jurisdiction, the parties must be put on notice in the pleadings of the request for property adjustment.<sup>85</sup> The Act specifies that in granting a decree for dissolution of marriage the district court *must* consider "the disposition of property," and requires that the petition specify "the relief sought."<sup>86</sup>

After the court has gained equitable jurisdiction, it has the power to grant complete relief.<sup>87</sup> In *Houser v. Houser*,<sup>88</sup> both parties to an annulment requested that the court divide their personal and real property. When the court granted the real property acquired jointly prior to the marriage solely to the wife, the defendant-husband appealed. The court noted that in his pleadings and approach at the trial, the defendant-husband "clearly requested the district court to use its equitable powers to make a disposition of the home. He cannot now complain the district court had no right to do so."<sup>89</sup>

82. *Biegalko v. Biegalko*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 989. The *Biegalko* case set forth a number of "guidelines" to be used in property division decisions. They are quoted hereafter as numbered by the court:

1. The district court does have the jurisdiction to make an equitable adjustment of property rights between the husband and wife.

83. 159 Mont. 98, 495 P.2d 591 (1972).

84. The *Cook* language has also been cited in *Roe v. Roe*, \_\_\_ Mont. \_\_\_, 556 P.2d 1246, 1248 (1976).

85. *Biegalko v. Biegalko*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 989.

2. No particular pleading is necessary, nor is any recognized cause of action necessary to give the court such jurisdiction. The only requirement is that the language in the pleading puts the parties on notice that the court is being asked to make such an adjustment.

86. R.C.M. 1947, §§ 48-316(1)(d), 48-317(2)(f) (Supp. 1977). Whether a dissolution petition, *without more*, puts a party on notice that property rights will be adjudicated is an unanswered question.

87. *Biegalko v. Biegalko*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 989:

3. The jurisdiction of the court to make such adjustment is founded on its inherent power in equity cases to grant complete relief.

88. *Houser v. Houser*, \_\_\_ Mont. \_\_\_, 566 P.2d 73 (1977).

89. *Id.* at \_\_\_, 566 P.2d at 74-75. The trial court found that even though title was placed in both names as joint tenants, the defendant-husband "had no ownership rights in the property, except a security interest for repayment" on the downpayment borrowed from his father.

One requirement necessary for the court to grant complete relief is that the court must have the full and complete valuation of all property of the parties accumulated at the time of the marriage and divorce.<sup>90</sup> The Act gives the court the power to apportion property belonging to either spouse however and whenever acquired and regardless of who holds title. Property acquired during a marriage is divided on an equitable basis regardless of which married party holds title and which party made the financial contribution.<sup>91</sup>

In *LaPlant v. LaPlant*,<sup>92</sup> a pre-UMDA case, the supreme court repeated the well established rule. "It has already been at least twice decided in this State that the trial court may make an equitable division of the litigants' property in a divorce action regardless of the state of title to that property and regardless of actual financial contribution."<sup>93</sup> The defendant-husband in *Downs* kept all the title of property in his own name during a nineteen year marriage to the plaintiff-wife. The court held that the property "division should be on an equitable basis regardless of who had title to the property."<sup>94</sup>

### C. Contribution or Court Discretion Based on Contribution of the Parties

The exercise of a district judge's discretion is not based on a fixed formula or ratio.<sup>95</sup> Instead, adjustment of property rights must be reasonable under the circumstances of each particular case.<sup>96</sup> As a guide to the courts, the Act specifies eighteen considerations which should control judicial property divisions.<sup>97</sup>

One gauge used by the court in its discretionary exercise of property division power is the contribution of the parties. "Contribution" means more than a narrow concern with financial contribution.<sup>98</sup> Contribution is to be broadly construed: it may in-

90. *Downs v. Downs*, \_\_\_ Mont. \_\_\_, 551 P.2d 1025, 1026-27 (1976).

91. *Biegelke v. Biegelke*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 989:

4. The title to or possession of property (except as to property not acquired by the joint efforts of the parties) cannot defeat the power of the court to make such an adjustment.

In view of the broad language of the Montana UMDA, this is undoubtedly a misleadingly restrictive statement of the rule. Compare Notes 74 and 76 above, with the *Biegelke* formula.

92. \_\_\_ Mont. \_\_\_, 551 P.2d 1014 (1976).

93. *Id.* at \_\_\_, 551 P.2d at 1015-16.

94. *Downs v. Downs*, \_\_\_ Mont. at \_\_\_, 551 P.2d at 1026-27.

95. *Biegelke v. Biegelke*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 989:

6. The court's exercise of its discretion in adjusting property rights between husband and wife must be reasonable under the circumstances of the case and there is no fixed formula or ratio to be applied in each instance.

96. *Eschenburg v. Eschenburg*, \_\_\_ Mont. \_\_\_, 557 P.2d 1014, 1016 (1976); *Zell v. Zell*, \_\_\_ Mont. \_\_\_, 570 P.2d 33, 35 (1977).

97. R.C.M. 1947, § 48-321 (Supp. 1977).

98. *Biegelke v. Biegelke*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 989:

clude cash;<sup>99</sup> equity in land;<sup>100</sup> work done as a ranch wife, homemaker and mother;<sup>101</sup> work done as a farm laborer;<sup>102</sup> and work done as a career officer's wife, homemaker and mother including volunteering and social activities affecting a husband's career.<sup>103</sup>

In *Berthiaume v. Berthiaume*,<sup>104</sup> the supreme court found an abuse of the trial court's discretion in its award of 90% of the property acquired in the marriage to the husband. The wife worked for four of the six years of the marriage and then had left work to care for their two children. The court remanded back to the district court to have the decree conform to its finding of fact that "[t]he properties of the parties should be divided as equally as possible."<sup>105</sup>

In spite of all this, the supreme court at times seems reluctant to alter a trial court's disposition of property, which on its face appears unfair. In *Rogers*, the plaintiff-wife contributed over \$40,000 during six years of marriage and received only \$23,500 in the final award. The supreme court found that the defendant-husband "[f]or five years . . . had a wife, a homemaker, a companion, and a provider for the home at no cost to him."<sup>106</sup> Yet the court did not find that the trial court abused its discretion.<sup>107</sup>

The court has also recognized practical matters to be considered in the property division. The marital property's size and value should be considered with an eye to the needs and abilities of the parties to support themselves.<sup>108</sup> The Act specifically provides that

5. There is no presumption of gift as between husband and wife in property matters.

7. In exercising its discretion, the court's adjustment of property rights, must be reasonable and equitably related to the "contribution" of the parties to the acquisition of such assets.

8. In determining "contribution," the court may consider cash contributions; work or effort directly furthering the acquisition or increase in value of marital assets; the performance of the ordinary duties of the wife or husband and any extraordinary services performed by the wife or husband; and other matters in the individual case which the court reasonably feels constitutes a "contribution," direct or indirect, to such acquisition.

99. *Rogers v. Rogers*, \_\_\_ Mont. \_\_\_, 548 P.2d 141 (1976).

100. *Roe v. Roe*, \_\_\_ Mont. \_\_\_, 556 P.2d 1246, 1246-47 (1976).

101. *Biegalko v. Biegalko*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 990.

102. *Zell v. Zell*, \_\_\_ Mont. \_\_\_, 570 P.2d 33.

103. *Eschenburg v. Eschenburg*, \_\_\_ Mont. at \_\_\_, 557 P.2d at 1016.

104. \_\_\_ Mont. \_\_\_, 567 P.2d 1388 (1977).

105. *Id.* at \_\_\_, 567 P.2d at 1390.

106. *Rogers v. Rogers*, \_\_\_ Mont. at \_\_\_, 548 P.2d at 142.

107. *Id.* at \_\_\_, 548 P.2d at 143. The court in effect partially reimbursed the wife for actual financial contributions made during the marriage, and allowed nothing for time, labor or other equity, even though the husband's estate was valued at \$800,000. It should be noted the husband was appealing the award, however.

108. *Biegalko v. Biegalko*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 989:

9. The court should consider the size or value of the estate to be adjusted and

the court may set aside a portion of the property for any minor, dependent, or incompetent children of the parties.<sup>109</sup>

In considering the possible property adjustment, the divisibility of the assets must be balanced with the possibility that payments of money in lieu of a property division may be more advantageous.<sup>110</sup> In *Biegalko* the property division was accomplished in such a way as to keep the ranch intact and operational.<sup>111</sup> House payments constituted the property settlement in *Thompson v. Thompson*.<sup>112</sup> However, in *Jones v. Flastad*,<sup>113</sup> a percentage of income from any oil or mineral leases, including royalty, bonus and rentals for twenty years, was treated not as a transfer of property rights but only a contract to provide support for the ex-wife. In contrast, the decree in *Englund v. Englund*,<sup>114</sup> labeled monthly payments of \$400 to the wife as "alimony" but the court held that the payments were "obviously" intended to be a part of the "property settlement." The precise relationship that should obtain between maintenance and property division in a divorce settlement—contractual or judi-

the needs of the respective parties for support and their respective abilities to support themselves.

109. R.C.M. 1947, § 48-321(2) (Supp. 1977) provides:

In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

110. *Biegalko v. Biegalko*, \_\_\_ Mont. at \_\_\_, 564 P.2d at 989-90:

10. The court should consider the nature of the marital assets; whether or not they are readily divisible; whether or not they, or any part thereof, are necessary to one party or the other to carry out the terms of the court's decree, such as a payment of money in lieu of property.

111. *Id.* at \_\_\_, 564 P.2d at 989.

112. *Thompson v. Thompson*, \_\_\_ Mont. \_\_\_, 554 P.2d 1111 (1976).

113. *Jones v. Flasted*, \_\_\_ Mont. \_\_\_, 544 P.2d 1231, 1235 (1976).

114. *Englund v. Englund*, \_\_\_ Mont. \_\_\_, 547 P.2d 841, 842 (1976). The "property-alimony" distinction remains one of the primary areas where the common law impinges upon provisions of the UMDA with unpredictable effect. One of the most frequently-litigated divorce questions in the 1970's in Montana, was the question of the susceptibility of a separation agreement to subsequent judicial modification. It was generally understood that a property division was a final transfer, beyond the power of the court to alter, while transfers in the nature of "alimony" were within the continuing jurisdiction of the court and capable of modification upon motion and a showing of changed circumstances. Under one provision of the UMDA, separation agreements which are set forth in the divorce decree may be modified later by the court, unless modification as to any or all portions is limited or precluded by the terms of the agreement itself. R.C.M. 1947, § 48-320(6). Under another provision, however, modifications of property dispositions may not be made unless conditions justifying "the reopening of judgments under the laws of this state" are found to be present. R.C.M. 1947, § 48-330(1)(ii) (Supp. 1977). How these provisions will be integrated with each other, and with principles governing the effect of death or remarriage on alimony obligations, remains to be seen. The question as to whether a particular disposition is in the nature of alimony, or property division, is still an important one.

cial—still constitutes a major area of uncertainty under the UMDA.<sup>115</sup>

### III. THE MONTANA COURT'S TREATMENT OF OTHER PROVISIONS OF THE UMDA

Within the space of two years, the Montana UMDA has been applied and construed by the supreme court twenty times.<sup>116</sup> More than half of these cases have concerned the modification of custody provision. As the foregoing discussion has indicated,<sup>117</sup> the construction of this provision has been marked by a gradually crystallizing strictness—an increasing insistence of seeing its policy of stable custody realized. For the most part, this tendency toward strict construction has also characterized the court's dealings with other portions of the statute. This attitude has been colored, however, by the court's reiterated belief that the UMDA did not effect great change in the evolving common law of this state.

#### A. *Applicability*

Because of the prevalence of litigation relating to divorce, and the long-continuing nature of the courts' jurisdiction in such matters as custody and support, the framers of the UMDA designed an elaborate provision articulating the extent to which the new statutes should govern proceedings arising or commenced before the effective date.<sup>118</sup> This provision was adopted without change by the Montana legislature.<sup>119</sup> In the domestic relations cases decided since January

115. The recent case of *Cromwell v. Cromwell*, \_\_\_ Mont. \_\_\_, 570 P.2d 1129 (1977), involved facts which seemed to afford an ideal basis for a comprehensive examination of the relation of property division to maintenance under the Act. In the trial court, the wife had been awarded a high proportion of the martial property, while the husband was relieved of any maintenance obligation, in spite of the wife's inability to support herself immediately. The wife appealed. The supreme court remanded for trial court reconsideration, without ever discussing the question of what effect a division of property should have on a possible maintenance award.

116. See Table I, *infra*, for an annotation of Montana cases construing the UMDA, complete through Jan. 1, 1978, 570 P.2d, 34 St. Rptr.

117. Part I, *supra*.

118. UMDA § 502, 9 U.L.A. 513 (1973).

119. R.C.M. 1947, § 48-341 (Supp. 1977) provides:

Application. (1) This act applies to all proceedings commenced on or after its effective date.

(2) This act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered. Pending actions for divorce or separation are deemed to have been commenced on the basis of irretrievable breakdown. Evidence adduced after the effective date of this act shall be in compliance with this act.

(3) This act applies to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to the effective date of this act.

1, 1976, the question of which law governed was an issue in surprisingly few; but where it was, some interesting results ensued.

In *Rogers v. Rogers*,<sup>120</sup> a case obviously falling within the old law, the court properly used the UMDA as persuasive authority for the overall modernization characterizing Montana divorce law.<sup>121</sup> In two other cases,<sup>122</sup> in which notices of appeal from trial court action on petitions for custody modification had been filed in 1975 (and to which the UMDA was thus not applicable), the court declined to decide what law was applicable, stating "it makes no difference whether the new or old law controls."<sup>123</sup> Since the standards for a modification determination were held to be the same under both, the court then proceeded to apply the UMDA standards to the facts.

There was not one domestic relations case decided in 1976 to which the UMDA by its terms applied.<sup>124</sup> In 1977, the issue of applicability was specifically raised four times; in the remainder of recent cases, the Act was applied as a matter of course. The supreme court in *Solie v. Solie*,<sup>125</sup> announced the UMDA was controlling on the facts, but declined to say why. In *Biegelke v. Biegelke*,<sup>126</sup> the new law was found not applicable to a divorce proceeding tried in district court on September 18, 1975, where the findings of fact, conclusions of law, and judgment were promulgated January 20, 1976—a holding clearly incorrect under § 48-341(2). This mistake was not repeated, however, in *Morse v. Morse*,<sup>127</sup> on similar facts. *Holm v. Holm*,<sup>128</sup> presented the question whether the UMDA was applicable to a petition for modification of custody filed long before the effective date, but "continued" until 1976 because of prematurity. The supreme court held the "continuation" insignificant, as expressing merely the court's uninterrupted jurisdiction over child custody. In a somewhat problematic holding, it found the UMDA applicable

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(4) In any action or proceeding in which an appeal was pending or a new trial was ordered prior to the effective date of this act, the law in effect at the time of the order sustaining the appeal or the new trial governs the appeal, the new trial, and any subsequent trial or appeal.

120. \_\_\_ Mont. \_\_\_, 548 P.2d 141 (1976).

121. This marks perhaps one of the last family law cases in Montana to reach the appellate level with counsel relying on outdated case law—a practice for which the court showed little tolerance in its opinion.

122. *Foss v. Leifer*, \_\_\_ Mont. \_\_\_, 550 P.2d 1309 (1976); *Erhardt v. Erhardt*, \_\_\_ Mont. \_\_\_, 554 P.2d 758 (1976).

123. *Id.* at \_\_\_, 544 P.2d at 759.

124. Although there were fifteen domestic relations opinions handed down by the court during 1976, appeals were pending in each one on January 1, 1976; so it was more than a year after the effective date before the first UMDA case was decided by the supreme court.

125. \_\_\_ Mont. \_\_\_, 561 P.2d 443 (1977).

126. \_\_\_ Mont. \_\_\_, 564 P.2d 987 (1977).

127. \_\_\_ Mont. \_\_\_, 571 P.2d 1147 (1977).

128. \_\_\_ Mont. \_\_\_, 560 P.2d 905 (1977).

partly because the 1976 petition for modification was based on events which took place subsequent to the effective date. Under R.C.M. 1947, § 48-341(2) and (3), the time when the transaction occurred should not have been relevant.

### B. *Modification of Support*

R.C.M. 1947, § 48-330(1)(a) provides that an order for support or maintenance may be modified only upon "a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." One of the first questions raised after the passage of the Act was whether this section would alter the former Montana standard of "substantially changed circumstances" as justifying modifications of alimony and support.<sup>129</sup> The first appellate opinion dealing with the question under the new law<sup>130</sup> did little to provide an answer; the court seemingly remained satisfied with the old test. The doubt still continues after the recent case of *Gianotti v. McCracken*,<sup>131</sup> even though here a fairly traditional trial court order increasing a father's support obligation was reversed as an abuse of discretion. The supreme court said:

There was no showing the previously established child support . . . is in any manner unconscionable under the present state of facts. The district court made no specific finding of changed circumstances in this regard. There was no finding of an increased need for support, nor an increased ability on the part of the father to contribute to the support of his children.<sup>132</sup>

If need and ability to pay are both primary factors bearing on "unconscionability," it is still not clear what, if anything, the term adds to the "substantially changed circumstances" standard. It is doubtful whether the supreme court's construction of unconscionability as applied to support and maintenance modifications will—or could—parallel the interpretation of "unconscionability" as it relates to the judicial evaluation of separation agreements, where the word specifically retains much of its U.C.C. contract flavor.<sup>133</sup> It is still too early to tell what additional burden, if any, will be imposed on a plaintiff who seeks to modify a support or maintenance decree.

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129. Comment, *The Uniform Marriage and Divorce Act*, *supra* n. 6 at 127. For the most recent articulation of the former standard, see *Burris v. Burris*, \_\_\_ Mont. \_\_\_, 557 P.2d 287 (1976).

130. *Solie v. Solie*, \_\_\_ Mont. \_\_\_, 561 P.2d 443 (1977).

131. \_\_\_ Mont. \_\_\_, 569 P.2d 929 (1977).

132. *Id.*

133. R.C.M. 1947, § 48-320; Commissioners' Note to UMDA § 306, 9 U.L.A. 488-89 (1973).



### C. Modification of Visitation Rights

R.C.M. 1947, § 48-337(2) indicates that, though a decree establishing visitation privileges may be modified in accordance with the best interests of the child, a modification which has the effect of restricting or denying a noncustodial parent's visitation must be supported by evidence manifesting a more critical necessity than simple best interest. The child's physical or emotional health must be seriously endangered. The code comment makes clear that, as with other aspects of the Act regulating parent-child relations in a divorce, conduct of the parent which does not significantly affect his relationship with the child is not to be considered in determining his legal rights.<sup>134</sup> In *Solie v. Solie*,<sup>135</sup> a noncustodial father, who, among other things, had been consistently uncooperative and delinquent in his support obligations, was stripped of a substantial part of his visitation privileges by the court's decree. He argued on appeal that this restriction of visitation was imposed as a punitive measure, and relied heavily on the commission comment referred to above. Without agreeing that the modification was punitive, the court brushed aside the references in the comment to the irrelevance of parental misconduct, as being based on the last sentence of § 402 of the national draft, which was omitted in Montana.<sup>136</sup> If the court is serious in its view that those portions of the Act dealing with parent-child matters (including original custody) are not based on a no-fault concept because of the affirmative action of the legislature in omitting the last part of § 402, then it may be that the worst fears of some of the UMDA's Montana proponents will prove justified.<sup>137</sup> Carried to its logical conclusion, this reasoning would allow custody to be awarded in the original dissolution proceeding partly or wholly on the basis of parental misconduct, including adultery. Thus, it is not at all clear that an attorney can afford to ignore the possible "fault" of his client if child-custody and related matters are in dispute, even if the conduct at issue can be shown not to affect the client's relationship with his child.

In addition, the recent case of *Lee v. Gebhardt*,<sup>138</sup> while demanding the plaintiff meet a heavy burden of proof for modification of custody, allowed the trial court to modify parental visitation rights on the basis of a factual showing which once more appeared to fall somewhat below the threshold established by the national draft, when read in the light of the commission notes. It would

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134. Commissioners' Note to UMDA § 407, 9 U.L.A. 509-10 (1973).

135. \_\_\_ Mont. \_\_\_, 561 P.2d 443 (1977).

136. Compare UMDA § 402, 9 U.L.A. 504, with R.C.M. 1947, § 48-332.

137. E.g., Comment, *The Uniform Marriage and Divorce Act*, supra n. 6 at 129.

138. \_\_\_ Mont. \_\_\_, 567 P.2d 466 (1977).

appear that the more general and liberal standard of "the best interest of the child" will govern petitions for a change or restriction of the noncustodial parent's visitation rights in Montana.

#### D. *Standing to Maintain a Custody Action*

In *Henderson v. Henderson*,<sup>139</sup> the court applied the relevant UMDA provisions<sup>140</sup> strictly to find that a non-parent had no standing to bring a custody action where the child was in the constructive custody of one of the parents, following the death of the other. Instead, as the UMDA commission comment<sup>141</sup> indicates, a "youth in need of care" action<sup>142</sup> is the only remedy for a party so situated. Such a proceeding requires of the plaintiff a showing of parental unfitness and gross misconduct to establish even a prima facie case. Only then, does the "best interest of the child" standard come into play.<sup>143</sup>

#### E. *District Court Practice*

Now, after almost two years under the UMDA, the supreme court has begun to manifest irritation at trial court procedures departing from those unequivocally prescribed by the Act. On four occasions,<sup>144</sup> the court has found it necessary to upbraid judges and attorneys below for ignoring the requirement that the court cause a record to be made of any in-chambers interviews conducted with a child whose custody is in dispute in a dissolution proceeding. One can probably expect a harsher reaction in the future to neglect of this procedure. The court has also felt compelled to outline in detail the method to be followed in using investigatory reports in child custody proceedings.<sup>145</sup> And impatience has been shown toward a departure from the notice and other rules governing affidavit practice.<sup>146</sup> It is clear from these strictures, as well as from its severe words concerning modification of custody, that the Montana supreme court entertains the firm expectation that the trial judges of

139. \_\_\_ Mont. \_\_\_, 568 P.2d 177 (1977).

140. R.C.M. 1947, § 48-331(4)(b) (Supp. 1977).

141. Commissioners' Note to UMDA § 401, 9 U.L.A. 503-4 (1973).

142. R.C.M. 1947, §§ 10-1301 to 1322 (Supp. 1977).

143. *In re Fish*, \_\_\_ Mont. \_\_\_, 569 P.2d 924 (1977); *In re Doney*, \_\_\_ Mont. \_\_\_, 570 P.2d 575 (1977).

144. *Solie v. Solie*, \_\_\_ Mont. \_\_\_, 561 P.2d 433 (1977); *Ronchetto v. Ronchetto*, \_\_\_ Mont. \_\_\_, 567 P.2d 456 (1977); *Gianotti v. McCracken*, \_\_\_ Mont. \_\_\_, 569 P.2d 929 (1977); *Schiele v. Sager*, \_\_\_ Mont. \_\_\_, 571 P.2d 1142 (1977), all referring to R.C.M. 1947, § 48-334(1) (Supp. 1977).

145. *Ronchetto v. Ronchetto*, \_\_\_ Mont. \_\_\_, 567 P.2d 456 (1977), referring to and interpreting R.C.M. 1947, § 48-335(3) (Supp. 1977).

146. *Henderson v. Henderson*, \_\_\_ Mont. \_\_\_, 568 P.2d 177 (1977), referring to R.C.M. 1947, § 48-340 (Supp. 1977).

this state will apply the provisions of the UMDA in their court-rooms.

#### F. *The Standard of Appellate Review of Factual Determinations in Family Litigation*

At the same time that it insists that the provisions of the UMDA be applied strictly to the facts in family litigation, the supreme court has shown no inclination to depart from its traditional policy of deference for trial court determinations of these facts. A typical formulation, which may be found in numerous pre-UMDA and current cases, is this:

This Court is committed to the view that the welfare of the child is the paramount consideration in awarding custody and it must, of necessity, be left largely to the discretion of the trial judge. He hears the testimony, sees the witnesses' demeanor and has an advantage in determining these difficult problems and we will not disturb the custody decision unless a clear abuse of discretion by the trial court is demonstrated.<sup>147</sup>

Naturally, cases which result in reversals tend not to emphasize this standard.

Although the review of any trial court factual determination is conducted on the basis of a presumption of correctness, this presumption is particularly strong in divorce litigation, where the sensitive and somewhat subjective nature of the decisions required to be made militates strongly against "retrial by the appellate court." It is unlikely that this standard will ever be significantly modified. The one possibly noteworthy variation in recent Montana cases has been the emphasis on a different aspect of the standard in appeals involving property division. Here, it is said that the findings below will not be overturned as an abuse of discretion unless the trial court acted "arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason, in view of all the circumstances, ignoring recognized principles resulting in substantial injustice."<sup>148</sup> What, if any, significance the distinctly different formu-

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147. *Lee v. Gebhardt*, \_\_\_ Mont. \_\_\_, 567 P.2d 466, 468 (1977). Other recent cases which have cited this *Brooks* standard are *Tweeten v. Tweeten*, \_\_\_ Mont. \_\_\_, 563 P.2d 1141, 1143 (1977), and *Solie v. Solie*, \_\_\_ Mont. \_\_\_, 561 P.2d 443, 446 (1977). For an even more elaborate explanation of the standard, see *Hurly v. Hurly*, 147 Mont. 118, 411 P.2d 359 (1966). Another often cited pre-UMDA case is *Gilbert v. Gilbert*, 166 Mont. 312, 533 P.2d 1079 (1975), holding conventionally that "a finding of fact not supported by credible evidence" amounts to an abuse of discretion.

148. *Berthiaume v. Berthiaume*, \_\_\_ Mont. \_\_\_, 567 P.2d 1388, 1390 (1977); *Zell v. Zell*, \_\_\_ Mont. \_\_\_, 570 P.2d 33, 35 (1977); *Cromwell v. Cromwell*, \_\_\_ Mont. \_\_\_, 570 P.2d 1129, 1129-30 (1977).

lations possess for future appellate practice under the UMDA is difficult to ascertain.

### G. *Relation to Former Law*

Some of the most pressing questions the adoption of the UMDA posed for the future direction of family law in Montana have already been answered, with as much clarity as one can expect given such brief experience; the answers to others remain vague or unexplored. Right now, probably the most significant area of uncertainty is the degree to which "immoral" conduct or other fault of a party will be allowed to influence trial courts in proceedings involving the determination of parental rights and duties. There is such overwhelming authority that it was a primary aim of the Conference to banish forever from legal relevance considerations of parental conduct not directly bearing on the parent-child relationship, that it will be difficult for the supreme court to follow up the ambiguous step it took in a contrary direction in *Solie*. Until a clear case presents itself, however, the action of the legislature in striking out the last sentence of UMDA § 402 will stand as an invitation to inject fault (and scandal) into determinations supposed to be conducted for "the best interests of the child." One hopes the Montana court is prepared to meet this crucial and divisive issue forthrightly when it appears suitably framed before the bench.<sup>149</sup>

There is one recurring temptation that ought to be resisted in future cases interpreting the UMDA. That is the temptation to exaggerate the continuity of the law. When the supreme court states at it did in *Biegalko* and in *Foss*,<sup>150</sup> that the UMDA makes "no change" in the previous Montana law, that is hyperbole, comfortable but dangerous. And though a careful reading of recent pre-

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149. In a recent case, *In re Doney*, \_\_\_ Mont. \_\_\_, 570 P.2d 575 (1977), the supreme court rejected the respondent's contention that a district court order divesting a natural father of custody partly on the basis of a "disgraceful" liaison, was proper. However, the respondent was a sister of the father's deceased wife, and therefore, absent a showing of abuse or neglect, the best interest of the child standard could not be applied. The crucial case will be a dissolution proceeding in which the custody determination is made on the basis of notorious scandal. This may have happened in *Brooks v. Brooks*, \_\_\_ Mont. at \_\_\_, 556 P.2d at 902, decided after *Erhardt* and *Foss*, but silent as to the policy of the UMDA.

In *Schiele v. Sager*, \_\_\_ Mont. \_\_\_, 571 P.2d 1142, 1146 (1977), evidence of parental misconduct was properly received because it affected the parent's relationship with the child. The supreme court said however:

Although Montana chose not to adopt this particular language [UMDA § 402, last sentence] case authority has established a precedent moving away from the policy of admitting evidence of misconduct which did not effect [sic] the relationship of the custodian with the child.

This would seem to indicate a return to the position of the uniform act.

150. *Biegalko v. Biegalko*, \_\_\_ Mont. \_\_\_, 564 P.2d 987 (1977); *Foss v. Leifer*, \_\_\_ Mont. \_\_\_, 550 P.2d 1309 (1976).

UMDA Montana cases on property division does reveal a striking modernity in the principles adhered to, when the court, as in *Biegalko*, sets forth ten traditional maxims as interpretive principles for the UMDA's provisions on property disposition, it embarks on a perilous course that may return to haunt it in future cases. It is one thing to look back and congratulate oneself upon anticipating the direction pursued by modern legislation, but it is another to say that modern legislation embodies just those principles enunciated by cases decided under different laws. That is perhaps over-indulging the judicial preference for the common law at the expense of certainty in the courtroom and at the conference table.

#### H. *Interrelation of Statutory Provisions*

There are a number of questions which remain open concerning the way in which various provisions of the UMDA affect one another, and other areas of the law.<sup>151</sup> One vivid example: there is clearly a strong policy of "freedom of contract" embodied in the UMDA section<sup>152</sup> on separation agreements; as the statute itself states, a written separation agreement, embodying the parties' own negotiated solutions to the whole spectrum of problems incident to divorce, is the best, indeed virtually the only way, to bring about "amicable settlements of disputes between parties to a marriage attendant upon their separation."<sup>153</sup> Yet what if the parties' agreements violate the essential policies of the UMDA? What if the Act's promotion of freedom of contract conflicts, for instance, with the Act's predominating policy of stable custody arrangements for children? Are some of the traditional "shifting" custody arrangements entirely ruled out? What about joint custody, now looked

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151. The UMDA, of course, does not address itself to, nor does it solve, some of the baroque jurisdictional and conflict-of-laws problems associated with divorce. For an excellent illustration and discussion of the issues involved in a petition to modify a sister-state support order, see *Knodel v. Knodel*, 14 Cal. 3d 752, 537 P.2d 353, 122 Cal. Rptr. 521 (1975). In addition, actions under URESA (R.C.M. 1947, §§ 93-2601-41 to 81) pose problems in the case of mobile litigants; see e.g., the leading recent Montana case on the subject, *Campbell v. Jenne*, \_\_\_ Mont. \_\_\_, 563 P.2d 549 (1977).

Another area that will become increasingly important is property disposition and custody determinations in the dissolution of non-marital domestic partnerships. This form of relationship is so prevalent today that the traditional doctrine which ignores its existence is obsolete. But the tenuous legal character of the relationship—and the fact it is entered into by the parties with varying expectations, and is still disfavored by public policy—creates many difficulties in handling problems incident to dissolution, though these problems often precisely parallel those treated by the UMDA. The leading case on the subject is *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), holding the divorce code not applicable to a non-marital dissolution, but equitably apportioning the property of the parties in a manner analogous to that mandated by the UMDA.

152. UMDA § 306; see Commissioners' Note, 9 U.L.A. 488-90 (1973).

153. R.C.M. 1947, § 48-320(1) (Supp. 1977).

upon with increasing disfavor?<sup>154</sup> The Commissioners' Note to § 306<sup>155</sup> indicates that the policies of the UMDA relating to children should be enforced in spite of the agreement of the parties, and the language of the law allows this result, but it does not compel it.<sup>156</sup> There is wide latitude in the possible rules which might develop in this area. How far can a practitioner, old-fashioned or newly ingenious, go in formulating negotiated arrangements that suit his fancy, or those of his client, before a trial judge can strike them down? How far can he go before the judge *must* strike them down? These are entirely open questions at present, but we may expect answers to them before the end of the decade. In providing these answers, the Montana supreme court has a very real opportunity for creative jurisprudence: interpreting the UMDA is an open field.

154. See *e.g.*, *Spencer v. Spencer*, 567 P.2d 112, 113, n. 1 (Okl.App. 1977).

155. 9 U.L.A. at 489.

156. R.C.M. 1947, § 320(1) (Supp. 1977), provides that the parties "may" enter into a separation agreement "containing provisions for . . . custody . . . of their children." The court is in no way bound by this agreement, but one looks in vain in the Act for any language forbidding the court to endorse the parties' agreed-upon custody arrangement, and it is only by implication and by consulting the Commissioners' Note that one concludes the court is expected to enforce the UMDA policies irrespective of the parties' own wishes.

TABLE I: TABLE OF MONTANA CASES CONSTRUING THE UMDA

UMDA SEC- TION CON- STRUED (R.C.M. 1947)	TOPIC	CASE  (S.R. = State Reporter)	
48-301 et seq.		<i>Rogers v. Rogers</i> , 33 S.R. 328, 548 P.2d 141 (1976)	Trend of state public policy
48-321	Disposition of property	<i>Biegalko v. Biegalko</i> , 34 S.R. 403, 564 P.2d 987 (1977)  <i>Berthiaume v. Berthiaume</i> , 34 S.R. 921, 567 P.2d 1388 (1977)  <i>Zell v. Zell</i> , 34 S.R. 1070, 570 P.2d 33 (1977)  <i>Cromwell v. Cromwell</i> , 34 S.R. 1193, 570 P.2d 1129 (1977)  <i>Morse v. Morse</i> , 34 S.R. 1334, 571 P.2d 1147 (1977)	
48-322	Maintenance	<i>Cromwell v. Cromwell</i> , <i>supra</i>	
48-323	Child support	<i>Berthiaume v. Berthiaume</i> , <i>supra</i>	
48-324	Representation of child	<i>In re Gullette</i> , 34 S.R. 277, 566 P.2d 396 (1977)  <i>Schiele v. Sager</i> , 34 S.R. 1358, 571 P.2d 1142 (1977)	

48-330(1)	Modification of maintenance and support	<i>Solie v. Solie</i> , 34 S.R. 142, 561 P.2d 443 (1977)  <i>Gianotti v. McCracken</i> , 34 S.R. 1087, 569 P.2d 929 (1977)	
48-331(1)	Jurisdiction for child custody proceedings	<i>Ronchetto v. Ronchetto</i> , 34 S.R. 797, 567 P.2d 456 (1977)  <i>State ex rel Muirhead v. District Court</i> , 33 S.R. 443, 550 P.2d 1304 (1976)	
48-331(4)(b)	Standing to commence child custody proceeding	<i>Henderson v. Henderson</i> , 34 S.R. 942, 568 P.2d 177 (1977)	Quotes Commissioners' Note, UMDA §401
48-332	"Best interest of the child"	<i>Tweeten v. Tweeten</i> , 34 S.R. 337, 563 P.2d 1141 (1977)  <i>Isler v. Isler</i> , 34 S.R. 545, 566 P.2d 55 (1977)  <i>Solie v. Solie, supra</i>	Tender years presumption  Tender years presumption  Interprets omission of UMDA § 402 final sentence, in Montana
		<i>In re Gulette, supra</i>	Applicability of UMDA standard to guardianship proceedings.
		<i>Schiele v. Sager, supra</i>	Interprets omission of UMDA § 402, final sentence, in Montana
48-333	Temporary orders	<i>Henderson v. Henderson, supra</i>	
48-334(1)	Interviews with child	<i>Solie v. Solie, supra</i>  <i>Ronchetto v. Ronchetto, supra</i>  <i>Gianotti v. McCracken, supra</i>  <i>Schiele v. Sager, supra</i>	
48-335	Investigations and reports	<i>Ronchetto v. Ronchetto supra</i>	

48-337 (2)	<b>Modification of visitation</b>	<i>Solie v. Solie, supra</i>  <i>Lee v. Gebhardt</i> , 34 S.R. 810, 567 P.2d 466 (1977)	
48-339 (1)	<b>Modification of custody: 2-year requirement</b>	<i>Holm v. Holm</i> , 34 S.R. 118, 560 P.2d 905 (1977)  <i>Groves v. Groves</i> , 34 S.R. 790, 567 P.2d 459 (1977)  <i>Ronchetto v. Ronchetto</i> , <i>supra</i>	Quotes Com- missioners' Note to UMDA, § 409
84-339 (2)	<b>Modification of custody: "best interest" criteria</b>	<i>Foss v. Leifer</i> , 33 S.R. 528, 550 P.2d 1309 (1976)  <i>Erhardt v. Erhardt</i> , 33 S.R. 883, 554 P.2d 758 (1976)  <i>Holm v. Holm, supra</i>  <i>Groves v. Groves, supra</i>  <i>Ronchetto v. Ronchetto, supra</i>  <i>Lee v. Gebhardt, supra</i>  <i>In re Dallenger</i> , 34 S.R. 938, 568 P.2d 169 (1977)  <i>Gianotti v. McCracken</i> , <i>supra</i>  <i>Schiele v. Sager, supra</i>	Quotes Com- missioners' Note to UMDA § 409
48-339 (3)	<b>Attorney fees for harassment</b>	<i>Holm v. Holm, supra</i>  <i>Lee v. Gebhardt, supra</i>	
48-340	<b>Affidavit practice</b>	<i>Henderson v. Henderson</i> , <i>supra</i>	
48-341	<b>Applicability</b>	<i>Holm v. Holm, supra</i>  <i>Solie v. Solie, supra</i>  <i>Morse v. Morse, supra</i>	



TABLE II: PROVISIONS WHEREIN MONTANA DIFFERS FROM NATIONAL DRAFT

R.C.M. 1947	UMDA	Effect
48-308	205 Judicial approval of marriage	Substantially different, <i>cf.</i> 37 <i>Mont. L. Rev.</i> 119, 120
48-311	208 Declaration of invalidity	Substantially different, <i>cf.</i> 37 <i>Mont. L. Rev.</i> 119, 121
48-317 (4)	303 Procedure for dissolution	Clarifies default divorce provision
48-321	307 Disposition of property	Specifically applies intent of UMDA § 307 to previous Montana common law on property acquired outside marriage
48-324	310 Representation of child	Problematic concerning responsibility for fees of court-appointed attorney representing child
48-330	316 Modification of maintenance, support, property disposition	Substantial additions providing for modification with mutual consent
48-332	402 "Best interest of child" standard: relevance of fault	Uncertain: <i>see, Solie v. Solie</i> , — <i>Mont.</i> —, 561 P.2d 443 (1977); <i>Schiele v. Sager</i> , — <i>Mont.</i> —, 571 P.2d 1142 (1977); 37 <i>Mont. L. Rev.</i> 119, 129 (1976)