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INTRODUCTION

This survey discusses the significant developments in family law made by the Montana Supreme Court during 1980. Section I of this survey is concerned with property dispositions upon divorce. Section II discusses the requirement that a trial court value divorcing parties' assets before distribution, and Section III deals with child custody and support.

I. PROPERTY DISPOSITIONS

A. *Retirement Benefits*

During 1980 the Montana Supreme Court reviewed the distribution and valuation of retirement benefits upon divorce in three cases, each of first impression. In *Knudsen v. Knudsen,*[1] the court followed a United States Supreme Court decision which held that railroad retirement benefits belong only to the beneficiary and therefore cannot be divided in a property settlement upon divorce.[2] The United States Supreme Court also held,[3] and the Montana court agreed,[4] that other properties cannot be given to the non-employee spouse to compensate for the loss of the retirement benefits.

This decision was possible only because the Railroad Retirement Act explicitly limits the rights of the non-employee spouse to reach the benefits upon or after divorce.[5] The United States Supreme Court determined that the purpose of the Railroad Retirement Act, to encourage early retirement, would be frustrated by distribution of a "share of one spouse's expectation in retirement benefits . . . ."[6]

Miller v. Miller,[7] the second case, involved military retirement benefits. In *Miller,* the husband and wife divorced after the husband's retirement, at which time he was already receiving retire-

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1. _ Mont. _, 606 P.2d 130 (1980).
2. Hisquierdo v. Hisquierdo, 439 U.S. 572, 583-87 (1979). *See also,* Knudsen, _ Mont. _, 606 P.2d at 132. The United States Supreme Court also held that these same retirement benefits could be reached for maintenance or child support. Hisquierdo v. Hisquierdo, 439 U.S. 572, 587 (1979).
3. Hisquierdo v. Hisquierdo, 439 U.S. 572, 588-89 (1979).
4. Knudsen, _ Mont. _, 606 P.2d at 132.
5. 45 U.S.C. § 231m (1976) states that "no annuity . . . shall be . . . subject to . . . any . . . legal process under any circumstances whatsoever . . . ."
6. Knudsen, _ Mont. _, 606 P.2d at 132.
7. _ Mont. _, 609 P.2d 1185 (1980).

ment benefits. The trial court awarded the wife a percentage of the monthly benefits as they were to be received by the husband, and he appealed.

The husband argued that military retirement benefits were like railroad retirement benefits, but the Montana court disagreed. The court held (1) that the statute authorizing military retirement[8] did not have an explicit provision dealing with benefit distribution upon divorce similar to the one found in the Railroad Retirement Act,[9] and (2) that the purpose of Congress in enacting the military retirement statute would not be frustrated by distributing benefits to the non-employee spouse.[10]

The husband also argued that his retirement benefits were income rather than a vested property right because he remained a member of the armed forces and was subject to recall to active duty. As income, the benefits were due to his own efforts and not to community effort, therefore they should not be subject to division.[11] The supreme court also disagreed with this argument. The court held that a retiree has "earned" his pension by his years of active service. "The husband's military retirement pay resembles an ordinary private pension, and just as a private pension, it should be treated as a vested property right which can be distributed as part of a court's property division."[12]

Ebert v. Ebert[13] is the most important of the three cases. In *Ebert,* at the time of the divorce, the husband had served more than 20 years in the military and was eligible to retire with a pension but had not done so. His pension had *vested* because it was not subject to forfeiture if the employment relationship terminated before retirement, but it had not *matured* because the benefits were not immediately due and payable.[14] The trial court, apparently believing that the benefits were a mere expectancy, ruled that the pension was not a divisible marital asset. On appeal, the supreme court remanded for valuation and distribution of the unmatured pension.[15] This decision brings Montana in line with recent changes made in other jurisdictions in valuing and distribut-

8. 10 U.S.C. § 1401 through 1455 (1976).
9. 45 U.S.C. § 231m (1976).
10. Miller, _ Mont. _, 609 P.2d at 1187.
11. *Id.* at _, 609 P.2d at 1186-87.
12. *Id.* at _, 609 P.2d at 1187.
13. _ Mont. _, 616 P.2d 379 (1980).
14. For more complete definitions of vesting and maturing, *see In re* Marriage of Brown, 15 Cal. 3d 838, 842, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976).
15. Ebert, _ Mont. _, 616 P.2d at 380.

ing vested but unmatured and unvested retirement benefits.[16]

The traditional rule for the division of unmatured pensions upon divorce was that the pensioner had no rights in the benefits due to employer contributions until those benefits became immediately due and payable, that is, until maturity.[17] This rule lead to inequitable division of assets acquired through community effort because a division of the pension was dependent upon whether the pension matured before or after the divorce.[18] The title of a law review article sums up the situation well: *Retirement Pay: A Divorce in Time Saved Mine.*[19]

Over the last 30 years this rigid rule has been modified by the courts, and at present, the great majority of states follow a distribution theory that almost disregards the concepts of vesting and maturing.[20] The rationale of this modified theory is that retirement benefits are not a mere gratuity given by the employer but are the subject of a contingent contract right to receive deferred compensation. The existence of the contingency does not prevent a contract from arising. Under this analysis, a retirement pension is a chose in action—a traditional form of property—and is divisible upon divorce.[21]

The more difficult problem is valuing and dividing this contingent interest. In *Ebert,* the Montana Supreme Court cites four leading cases from other jurisdictions which have dealt with this problem.[22] These four cases, discussed below, present two methods for valuing and dividing an unvested or unmatured retirement pension. Application of the following discussion is not limited to military retirement pensions, since it is reasonably apparent that the court intended to endorse this new distribution theory with re-

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16. *See generally In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Shill v. Shill, 100 Idaho 433, 599 P.2d 1004 (1979); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); *In re* Marriage of Jacobs, 20 Wash. App. 272, 579 P.2d 1023 (1978).

The *Ebert* decision also appears to be consistent with a Montana statute that requires a trial court to consider a spouse's opportunity to acquire future income. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 40-4-202(1) (1979).

17. French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941). *See also In re* Marriage of Cromwell, _ Mont. _, 588 P.2d 1010, 1012 (1979).

18. Shill v. Shill, 100 Idaho 433, 599 P.2d 1004 (1979).

19. Gudebski & Jovovich, *Retirement Pay: A Divorce in Time Saved Mine,* 24 HAST. L. J. 347 (1975).

20. *See generally In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Shill v. Shill, 100 Idaho 433, 599 P.2d 1004 (1979).

21. *Id.*

22. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Shill v. Shill, 100 Idaho 433, 599 P.2d 1004 (1979); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); *In re* Marriage of Jacobs, 20 Wash. App. 272, 579 P.2d 1023 (1978).

spect to many types of pensions, public and private.

Under the first method the trial court values and divides the pension at the time of the divorce.[23] The following valuation formula should be useful, but it cannot be over-emphasized that the formula is based on estimates only:

(1) Estimate the pensioner's length of service.

(2) Estimate the pensioner's average pay over the time period specified in the statute or contract.[24]

(3) Determine the amount of the monthly payments from the length of service and the average pay.[25]

(4) Compute the sum of these monthly payments using a pensioner's actuarial table to estimate life-span.

(5) Discount this sum for the possibility that the benefits will never mature.[26]

(6) Discount the above sum to determine a present value.

(7) Determine the non-employee spouse's share as a lump sum payable immediately or in installments.

The advantage of this method is that it allows a final determination of the rights of the parties thereby lessening the possibility of subsequent litigation.[27]

The disadvantage is that inequitable property divisions can be caused by reliance upon statistical data. Reality does not always conform to statistics. For example, if a wife is awarded $100,000 upon divorce as her share in her husband's pension with an estimated value of $200,000, and if the husband dies before retirement the wife will receive $100,000 but the husband and his estate will receive nothing. A more subtle inequity can occur in a case where the court predetermines the non-employee spouse's share as a fixed percentage of the monthly benefits as collected. If, subsequent to the divorce, the employee spouse receives a substantial pay increase not accounted for by the court, this will increase the amount of the monthly benefits. The result is that the non-employee spouse will receive a share in the benefits not due entirely to community effort.

These inequitable property divisions can be minimized if a

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23. *See generally* Shill v. Shill, 100 Idaho 433, 599 P.2d 1004 (1979).

24. Different pensions use different formulas for computing this figure.

25. At this point a trial court could predetermine a fixed percentage of the retirement benefits that the non-employee spouse should receive of benefits received by the employee spouse.

26. The benefits may not mature because of death or voluntary or involuntary termination of employment. These contingencies can be accounted for statistically.

27. Shill v. Shill, 100 Idaho 433, 437, 599 P.2d 1004, 1008 (1979).

trial court values and divides a pension at the time of divorce only if the pensioner is very near retirement. The closer the pensioner is to retirement the more reliable will be the statistical data upon which the court must rest its decision. Another danger for the trial court to guard against is overburdening the pensioner with a liability by awarding the non-employee spouse a lump sum as the share of the estimated present value of the pension. A trial court should not make such an award unless the pensioner has sufficient assets to satisfy this liability—for instance, a share in a house.[28]

Under the second method the court postpones division of the retirement benefits until they mature into monthly payments.[29] At the time of maturity, based upon an actuarial estimate of the pensioner's life span, the court may award the non-employee spouse a lump sum payable immediately or in installments or may determine the non-employee spouse's share as a percentage of the benefits as they are actually received.

This second method is more accurate than the first method. However, there are still disadvantages. First, the court may actually be promoting later litigation because the rights of the parties are not settled at the time of the divorce. The post-divorce litigation could be more complicated than it would have been otherwise because of possible new interested parties, for example, a pensioner's new spouse. Another disadvantage is that the non-employee spouse must wait until the employee spouse retires to receive a share of the benefits. If the employee spouse knows he will have to share his pension, he may be loathe to retire.[30]

B. *Prospective Inheritances*

In *Cook v. Cook*,[31] the court addressed the issue of whether a prospective inheritance can be divided between divorcing spouses. During the marriage the wife inherited a remainder interest in ranch property, but her possession and use of the property was contingent on her surviving the holder of the life estate. For six years during the marriage the husband and wife had lived and worked on the ranch. Nevertheless, the trial court found that the husband had made no contribution to the maintenance of the property interest and awarded the property solely to the wife "as a portion of the property disposition and as an alternative to

28. *Id.*
29. *Id.*
30. *Id.* at 441, 599 P.2d at 1012. (Shephard, J., dissenting).
31. _ Mont. _, 614 P.2d 511 (1980).

maintenance."[32]

On appeal by the husband, the majority, in a three to two decision, remanded for reconsideration of the husband's contribution and for valuation and possible distribution of the remainder interest.[33] The dissenters would have affirmed the decision of the trial court which did give weight to the prospective inheritance as a factor in deciding upon the division of the other assets but did not consider the prospective inheritance as a divisible property interest in itself.[34]

This case is the first in Montana and one of the few cases in the United States to allow distribution of a prospective inheritance.[35] The traditional rule on the distribution of prospective inheritances and other types of contingent future interests is that a future interest not reduced to possession at the time of the divorce cannot be counted as a divisible marital asset.[36] With this in mind it appears that *Cook* opens Pandora's box for the distribution of all types of contingent future interests, but this is not the case. Currently, there are several exceptions to the traditional rule. Accounts receivable are recognized by all courts as a divisible marital asset.[37] Some courts have distributed the income potential of a professional degree.[38] Montana now allows the distribution of an unmatured retirement pension.[39] In light of these growing exceptions to the traditional rule, the majority position in *Cook* is not so novel, in fact, *Cook* may become a trend-setting case for other jurisdictions.

Despite the importance of the issue, however, the majority opinion in *Cook* is too brief and simplistic to be of aid to a trial judge. The opinion makes no attempt to discriminate between prospective inheritances that have differing probabilities of becoming possessory. Only those prospective inheritances that have a high

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32. *Id.* at _, 614 P.2d at 512.

33. *Id.* at _, 614 P.2d at 516.

34. Justices Daly and Sheehy filed a dissenting opinion to *Cook v. Cook* which is reported at _ Mont. _, 619 P.2d 530, 530-31 (1980).

35. Oregon may be the only state to ever allow distribution of a contingent inheritance. *See* Ofenheim v. Ofenheim, 40 Or. App. 865, 596 P.2d 1007 (1979); Rinehart v. Rinehart, 26 Or. App. 513, 552 P.2d 1346 (1976).

36. *See generally* French v. French 17 Cal. 2d 775, 112 P.2d 235 (1941); Mey v. Mey, 373 A.2d 664 (N.J. 1977); Storm v. Storm, 470 P.2d 367 (Wyo. 1970).

37. *In re* Marriage of Johnson, 40 Colo. App. 250, 576 P.2d 188 (1978); *In re* Marriage of Luken, 16 Wash. App. 481, 558 P.2d 279 (1976).

38. *See generally* Krauskopf, *Marital Property at Marriage Dissolutions*, 43 Mo. L. REV. 157 (1978); Dostart, *Professional Education as a Divisible Asset*, 64 IOWA L. REV. 705 (1979). *See also In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978); Diment v. Diment, 531 P.2d 1071 (Okla. 1974).

39. Ebert, _ Mont. _, 616 P.2d 379 (1980).

probability of becoming possessory should be counted as a marital asset. Otherwise the court is merely speculating. If the evidence shows that the prospective inheritance has only a reasonable chance of becoming possessory, then the court should give it some weight in dividing the other assets but should not consider it as a divisible asset in itself. If the inheritance is only a pipe dream, then it should not be considered at all.[40] Evidence is the key, and due to the risks, the burden of establishing the probability that a prospective inheritance will become possessory should be on the party seeking a share of it.

C. *Gifts and Inheritances*

In *Herron v. Herron*,[41] the Montana Supreme Court advanced guidelines for the division of gifts and inheritances received by one spouse during the marriage. The wife's father had transferrred over $250,000 to the couple jointly in several intervivos gifts over a period of years and in an inheritance at his death. The money had been used mostly for real estate acquisitions which later appreciated due to the efforts of both spouses. Almost all of the marital assets were traceable to the paternal gifts. The trial court awarded a 50/50 split of the marital estate.

On appeal by the wife, the supreme court held that a 50/50 split was inequitable "considering the source of the marital assets . . . ."[42] Despite the joint title, the court found that the gifts had been given principally for the benefit of the wife.[43]

In deciding the husband's share, the supreme court discussed two earlier Montana cases involving similar situations. The first was *Balsam v. Balsam*,[44] in which a gift received by the husband had not appreciated during the marriage. There the trial court awarded the gift solely to the husband and the supreme court affirmed. In the second case, *Brown v. Brown*,[45] the trial court awarded the wife a 5-7% interest in ranch property inherited by her husband on which she had worked with her husband for 14 years. The supreme court held the division inequitable because of the wife's substantial contribution to the maintenance of the

40. In Morse v. Morse, 174 Mont. 541, 545, 571 P.2d 1147, 1149 (1977), the court did not consider a prospective inheritance in the distribution plan, however, it did hint that had more evidence been available the trial court could have considered the inheritance as a factor in determining the division of the other assets.

41. _ Mont. _, 608 P.2d 97 (1980).

42. *Id.* at _, 608 P.2d at 100.

43. *Id.*

44. _ Mont. _, 589 P.2d 652 (1979).

45. _ Mont. _, 587 P.2d 361 (1978).

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Herron, the court decided, lies between *Balsam* and *Brown.* The husband should not receive half because "the marital assets came to the marriage principally as gifts for Mrs. Herron's benefit." However, the husband should receive more than a "small portion" because of his contribution to the maintenance and appreciation of the property. The court held that "[b]oth parties . . . should share equally in the portion of the value of the gift property attributable to contribution from the marriage and appreciation during the marriage."[46]

D. *Maintenance as a Corrective Device*

Under the Montana Uniform Marriage and Divorce Act, maintenance is to be awarded only if a property division cannot equitably satisfy the rights and needs of both parties.[47] Equity, however, cannot be determined merely by reference to the amount of property given to each spouse. The potential for property to earn or consume income should also be considered. As illustrated by *Herron v. Herron,*[48] an award of maintenance may be used to balance a property division where one party receives income producing property and the other party receives income consuming property.

In *Herron,* the trial court divided the property equally and awarded the wife maintenance of $400 per month for 48 months. The husband received his successful medical practice—the income producing property. On appeal, the supreme court held that this 50/50 split was inequitable considering that the property came principally from the wife's father.[49] The court directed that the husband should retain his medical practice but the wife should receive more than half of the marital estate (mostly real property) and should retain her maintenance award of $400 per month for 48 months at the very least.[50]

The supreme court was explicit in its reasoning for upholding the maintenance award:

> The danger exists of creating a situation in which Mrs. Herron would be "property poor," i.e., in possession of a large quantity of property but unable to generate the income to maintain the property. In contrast, the marital assets received by Dr. Herron should

46. Herron, _ Mont. _, 608 P.2d at 102.
47. MCA § 40-4-203 (1979).
48. _ Mont. _, 608 P.2d 97 (1980).
49. *Id.* at _, 608 P.2d at 100.
50. *Id.* at _, 608 P.2d at 102.

allow him to continue making a handsome salary.[51]

It is commendable that the court would consider the income potential of the medical practice in granting this award of maintenance. All awards of maintenance are granted on an assumption of a continuing ability to pay,[52] and the income potential of property should be considered just as the income potential of a person is considered. However, when a court grants maintenance on an assumption that property will continue to generate income, the type of property should be considered. In this case, it may be a reasonably safe assumption that the medical practice will remain successful for at least four years, but the same assumption may not hold true for another type of income producing property. Depending on the type of property or business, the chance of failure may be quite high. It is the duty of the attorneys to present reliable and credible data to the judge so that he can determine the probability that the property will continue to generate income.

II. Valuing Marital Assets

Since the inception of the Uniform Marriage and Divorce Act in Montana in 1976, the Montana Supreme Court has stressed the requirement that trial judges determine the value of all marital assets and the net worth of both parties before making a property division.[53] During 1980, in two irreconcilable cases, the Montana Supreme Court dealt with the effect of a stipulation and the effect of a separation agreement in this requirement.

In *Cook v. Cook*,[54] the husband and wife made a stipulation prior to the trial court's ruling, regarding the division of certain assets. These assets were never valued before the trial court entered its judgment. The supreme court remanded in a three to two decision stating that the "determination of net worth, and the valuation of assets [are] two important steps that *must* be made by the district court in the apportionment process, regardless of whether the parties enter into any stipulations concerning their marital estate."[55] The dissent argued that when a stipulation is made the trial court should not have to value the assets because the parties themselves have considered the matter.[56]

The argument of the *Cook* dissenters prevailed only one

51. *Id.* at _, 608 P.2d at 103.
52. *In re* Marriage of Caprice, _ Mont. _, 585 P.2d 641, 645-46 (1978).
53. Metcalf v. Metcalf, _ Mont. _, 598 P.2d 1140 (1979).
54. _ Mont. _, 614 P.2d 511 (1980).
55. *Id.* at _, 614 P.2d at 515.
56. Cook v. Cook, _ Mont. _, 619 P.2d 530 (1980) (Daly, J., Sheehy, J., dissenting).

month later in *Miller v. Miller*.[57] In *Miller*, a separation agreement was incorporated into the divorce decree but the trial court failed to value the assets. The wife's subsequent motion to reopen or vacate the judgment was denied. She appealed on the basis that the trial court had failed to value the marital assets and determine the net worth of the parties.

The supreme court affirmed the trial court's judgment and held that "the presence of a valid separation agreement is fatal to the applicability" of the "requirement that assets be valued and net worth determined."[58] The court points out that, by statute, "the terms of [a] separation agreement . . . are binding upon the court unless . . . the separation agreement is unconscionable. The rule is well reasoned that persons must be able to separate amicably and divide their property without interference where such division is feasible."[59]

Cook and *Miller* are completely irreconcilable. Both a stipulation and a separation agreement are binding agreements and should have been treated the same by the court.[60] As noted above, the supreme court has, in the past few years, emphasized the need for lower courts to make detailed findings in property divisions to support their conclusions. *Cook* was the result of carrying this requirement too far and it is likely that the *Miller* rule will prevail whenever divorcing parties make any kind of an agreement regarding their property disposition.

III. Child Custody and Support

A. *Custody*

In *Markegard v. Markegard*,[61] the presumption that in a contested custody case, if all things are equal between the parents, the child of tender years should go to the mother, was expressly overruled. This presumption was codified in Montana prior to the enactment of the Uniform Marriage and Divorce Act in 1976.[62] In the change to the UMDA the statute was simply dropped. However, in a 1977 case the Montana Supreme Court held that the presumption still existed but that it was not conclusive.[63] With *Markegard*,

57. _ Mont. _, 616 P.2d 313 (1980).
58. *Id.* at _, 616 P.2d at 317-18.
59. *Id.*
60. A stipulation may "embody all the essential characteristics of a contract." 73 Am. Jur. 2d *Stipulations* § 1 (1974).
61. _ Mont. _, 616 P.2d 323 (1980).
62. Revised Codes of Montana (1947) § 91-4515.
63. *In re* Marriage of Tweeten, 172 Mont. 404, 409, 563 P.2d 1141, 1144 (1977).

there is no doubt that the presumption is theoretically abolished. Whether it will be abolished in the minds of judges is another matter.

B. *Support*

In *Fitzgerald v. Fitzgerald*,[64] the supreme court relied upon social policy to protect the interests of a minor child where a parent failed to make child support payments. The parents in *Fitzgerald* were divorced in 1971. Custody of the child was given to the mother and the father was ordered to pay child support. The portion of the decree ordering the father to pay support appeared to make visitation contingent upon the father's pecuniary obligation. The decree stated in relevant part:

> That the defendant shall not have the right to visit the child, unless and until, he pays to the plaintiff through the clerk of this court, the sum of fifty dollars ($50) per month as and for support of the minor child of the parties. If and when defendant begins to make said support payment to plaintiff, the court may, in its discretion, modify the decree to permit defendant the right to visit the child at all reasonable times and places.[65]

The father did not see the child between 1971 and 1979 except for a short visit in 1978. No child support payments were made during this period, and the wife made no attempt to collect any arrearages. In 1979 visitation was established by the court and the father began to pay child support. Subsequent to this the mother brought an action to collect eight years of back child support payments. The father defended on the basis that he did not owe any back child support because he did not visit his child for eight years, and that the mother was barred from bringing the action by the doctrine of laches.[66] The trial court held for the father, but this decision was reversed upon appeal.

The supreme court held that child support is a moral obligation of a parent and cannot be conditioned upon visitation.[67] Furthermore, laches did not bar the mother from bringing a collection action for unpaid child support even after a lapse of eight years.[68] On the issue of laches the court relied on a Wisconsin case similar to *Fitzgerald*.[69] The Wisconsin court held that the rights of chil-

64. _ Mont. _, 618 P.2d 867 (1980).
65. *Id.*
66. *Id.*
67. *Id.* at _, 618 P.2d at 869.
68. *Id.*
69. Paterson v. Paterson, 73 Wis. 150, 156, 242 N.W.2d 907, 910 (1976).

dren are to be protected, and that the doctrine of laches does not apply until the obligation for support terminates pursuant to the decree.[70]

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70. The statute of limitations begins to run at this point also.