Montana Law Review

Volume 37
Issue 2 *Summer 1976*

Article 6

7-1-1976

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James C. Kilbourne

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I. INTRODUCTION

As the national divorce rate rises, the problems created by family breakup are becoming more apparent to an increasing number of Americans. The trauma that results from the abrupt end of the marital relationship is often most visible in its effect on children of the broken marriage.

No longer is custody of minor children awarded automatically in a divorce proceeding. Until the last century, when a marriage broke up the children of that marriage were always awarded to the father. The courts treated the children as chattels to which the father had an unquestioned right.[1] Courts gradually changed their attitude and established the presumption that custody of children of tender years should be awarded to the mother because of her traditional role in child rearing.[2] Today, the courts hold paramount the principle that neither parent has a *prima facie* right to the child's custody. Instead, in awarding custody or in modifying a custody decree the court must look to the best interests of the child.[3]

The recent Montana case, *Gilmore v. Gilmore*,[4] illustrates the process used by the court in deciding whether a custody decree should be modified. Although certain statutory presumptions upon which *Gilmore* partially relied have since been repealed,[5] that decision still has importance because the substantive common law principles which it applied have been codified in Montana's newly effective Uniform Marriage and Divorce Act.[6]

II. GILMORE v. GILMORE

A. *The Facts*

In *Gilmore*, the father and mother had previously obtained a divorce in North Dakota. As part of the divorce decree, the mother

1. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969).

2. *Id.*; Note, *Measuring the Child's Best Interests—A Study of Incomplete Considerations*, 44 DEN. L.J. 132, 134 (1967).

3. Podell, Peck, and First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 53 (1972) [hereinafter cited as Podell]; Watson, *supra* note 1 at 56; Note, *Measuring the Child's Best Interests—A Study of Incomplete Considerations, supra* note 2 at 133.

4. Gilmore v. Gilmore, ___ Mont. ___, 530 P.2d 480 (1975).

5. REVISED CODES OF MONTANA, 1947 [hereinafter cited as R.C.M. 1947], § 95-4515 (repealed, effective July 1, 1975, LAWS OF MONTANA (1974), ch. 365, § 2).

6. R.C.M. 1947, §§ 48-332, 48-339.

agreed to give custody of their three children to the father because he was better able to care for them emotionally and financially. Both mother and father subsequently moved to Montana.

At the time of this action, the father was employed at a salary of $900 per month, working four days a week from 9:30 a.m. to 9:30 p.m. and Saturdays from 9:30 a.m. to 6:00 p.m. His children, aged 7, 5, and 3, were either in school, at a day care center, or with a baby sitter when he was not at home. The mother had remarried, was four months pregnant, and planned to quit her job. Her new husband was employed at a monthly salary of $450. They were also purchasing a new mobile home.

The father petitioned the Montana district court seeking affirmation of the North Dakota court's decree granting him custody and control of the children. The mother counter-petitioned requesting the court to modify the decree to award her custody of the children and reasonable child support. She sought the modification based on an alleged substantial change in circumstances since the original custody decree, specifying her remarriage which allowed her to provide care and attention to the children, her return to emotional health, and her children's need for their mother's attention and care in a normal home life. The trial court, however, did not find a substantial change in circumstances and held in the father's favor.[7]

B. The Opinion

On appeal to the Montana supreme court, the mother cited the case of *Bayers v. Bayers*[8] for two principles to guide the court in deciding modification of custody decrees: (1) that the paramount concern of the court is the welfare and best interests of the child, and, (2) that a court may change a child custody decree only when there is adequate cause arising out of changed circumstances. The appellant argued there was a priority relationship between these two principles, apparently trying to imply that substantial evidence of the best interests of the child lessened the need for strong evidence on the substantial change of circumstances issue. Although the supreme court did not make clear what was meant by such a "priority relationship," it flatly rejected that notion. It held, instead, that these two principles bore a "qualifying relation" to each other,[9] but it failed to clearly set out the qualification. What the court seemed to say was that a petition for modification had to be predicated upon

7. Gilmore v. Gilmore, *supra* note 4 at 481.
8. Bayers v. Bayers, 129 Mont. 1, 281 P.2d 506, 508 (1955).
9. Gilmore v. Gilmore, *supra* note 4 at 481.

a substantial change in circumstances from those existing at the time of the original decree.[10] This was the preliminary requirement to any petition for modification. The substantial change in circumstances could be a change in the mother's, the father's, or the child's circumstances. The court would grant the modification only if, in considering the changed circumstances, the best interests of the child were served by a change in the custodial parent.[11]

The appellant relied upon a similar change in circumstances in the case of *McCullough v. McCullough*[12] as authority supporting her contention that her change in circumstances was substantial. In *McCullough* the mother had received neither legal custody nor physical control of the child at the time of the divorce. In petitioning for modification of the custody decree, the mother alleged her remarriage and her return to a normal emotional state as a substantial change in circumstances. The district court found the changes substantial, modifying the original custody decree and awarding custody to the mother. The supreme court affirmed the lower court's findings.

In the *Gilmore* opinion, the supreme court's treatment of the *McCullough* case emphasized the importance of the district court's ruling in a modification proceeding. Although the court said that the *Gilmore* and *McCullough* cases could be distinguished on their facts, it chose to rest its decision upon the finding that there was substantial evidence to support the trial court's decision.[13] Even though the appellant-mother alleged there were similar changes in the two cases, the supreme court found credible evidence to support the trial court's decision that the changes in the *Gilmore* case were not substantial.

The *Gilmore* decision took into account a factor not considered in *McCullough*—a child's need for continuity in relationships. The

10. R.C.M. 1947, § 21-138 (repealed Jan. 1, 1976, LAWS OF MONTANA (1975), ch. 536, § 45) provided that the court shall have continuing jurisdiction after the divorce judgment to vacate or modify the custody decree *as it deemed necessary and proper*. Some states hold that the order granting custody is res judicata upon all circumstances existing at the time the order was entered, whether or not the court was aware of them. Other states allow a petition for modification of a custody decree based on material facts which were either concealed from or unknown to the court at the time of the original award. Foster and Freed, *Child Custody* (pt. 2), 39 N.Y.U. L. REV. 615, 624 (1964) [hereinafter cited as Foster (pt. 2)].

Montana case law, under the repealed statute, held that a custody decree was final upon all conditions then existing. *Trudgeon v. Trudgeon*, 134 Mont. 174, 329 P.2d 225, 228 (1958). See also, *Svennungsen v. Svennungsen*, ___ Mont. ___, 527 P.2d 640, 642 (1974); *Simon v. Simon*, 154 Mont. 193, 461 P.2d 851, 853 (1969). Under the UMDA, however, a petitioner may seek modification of a custody decree based on facts that were unknown to the court at the time of the entry of the prior decree, as well as facts that have arisen since that prior decree. R.C.M. 1947, § 48-339(2).

11. Gilmore v. Gilmore, *supra* note 4 at 482.

12. McCullough v. McCullough, 159 Mont. 419, 498 P.2d 1189 (1972).

13. Gilmore v. Gilmore, *supra* note 4 at 482.

respondent-father relied upon an earlier Montana decision that stressed this need for continuity in relationships with the custodial parent or party.[14] In looking for evidence to support the trial court's decision, the supreme court cited evidence of that very nature: the fact that the children had lived with the father for over a year, and the testimony of the social worker who investigated the parties' home situations, concluding that the children were experiencing a very satisfactory situation with the father. Citing *In Re Biery*, the court said that the trial court must consider the ties of affection that the child has formed, and the consequences of breaking those ties in determining the best interests of the child.[15]

III. Guidelines for Modification

Since the *Gilmore* decision, the Uniform Marriage and Divorce Act (UMDA), adopted by the Montana legislature in 1975,[16] has become effective. The UMDA not only changed procedural law and statutory presumptions in custody proceedings, but also codified much prior case law.

The UMDA, however, has not changed the four basic guidelines that case law has established for the district court to follow in deciding petitions for modification of custody decrees: (1) there must be a substantial change in circumstances; (2) the court must look to the facts and circumstances of each case; (3) the substantial change must be measured against the child's welfare rather than the parents' welfare; and, (4) the welfare and best interests of the child must be the primary concern of the court.[17] Only upon a showing of substantial change in circumstances which makes alteration of the custody award in the best interests of the child may a court modify the decree.

A. Substantial Change in Circumstances

A petitioner must show a substantial change in circumstances of the parties in the action before the court will modify a custody decree. Often, however, what might be considered a major change in a person's life will not be viewed by the court as substantial. A change in one party's situation (remarriage, for example) may, in some instances, be ruled substantial while that same change in a different party's situation may not.[18] The key to whether a change

14. In Re Biery 164 Mont. 353, 522 P.2d 1377, 1378 (1974).

15. Gilmore v. Gilmore, *supra* note 4 at 482.

16. R.C.M. 1947, §§ 48-301 *et seq*.

17. Simon v. Simon, *supra* note 10 at 854.

18. In *McCullough v. McCullough*, *supra* note 12 at 1191, the trial court viewed the mother's remarriage as a substantial change in circumstances. In *Gilmore v. Gilmore*, *supra*

is substantial is not just the nature of the particular changed circumstance, but also the context in which it occurs.[19]

The factors which have influenced the court in determining the substantiality of the changed circumstances are numerous. At varying times, the following factors have had an important bearing on the outcome of the modification decision: the relative weight of the claims of the mother and father as determined by statutory and common law presumptions, by the divorce agreement, and by the sex of the children;[20] the morals of the parties involved;[21] the child's wishes if he is of sufficient age to form an intelligent opinion;[22] the race, religion, and social views of the contesting parties;[23] and the parent's desire and ability to care for the child, including his or her financial resources,[24] remarriage,[25] and ability to care for the child as revealed by past conduct.[26]

Montana law does not impose as a threshold requirement for modification of a custody decree a showing that the person who currently has custody of the child is an unfit person or has abused the child.[27] The supreme court has indicated in dicta, however, that it would accept a showing of unfitness as an alternative for a showing of changed circumstances.[28] The petitioner would still be required to show that modification was also in the best interests of the child, although that requirement would be more easily accom-

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note 4 at 482, it did not.

19. CLARK, LAW OF DOMESTIC RELATIONS § 17.4 at 584 (1968) [hereinafter cited as CLARK].

20. *Id.* at 585.

21. Podell, *supra* note 3 at 66, stating, "the courts have repeatedly held that the personal life of a parent, whether illegal or immoral, *provided it does not affect the ability to be a parent and raise children*, is not determinative in custody questions, for a person may be a bad spouse or citizen without necessarily being a bad parent." (Emphasis added). The UMDA adopts this view, providing "[T]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." UNIFORM MARRIAGE AND DIVORCE ACT § 402 and Comment. In contrast, however, Montana's version of the UMDA omitted this sentence.

In a June, 1976, Montana supreme court decision, the court held that the fact that a parent allows her paramour to live with her for a short time before their marriage does not, by itself, constitute a "change in circumstances" sufficient to support the granting of a custodial modification order. Foss v. Leifer, ___ Mont. ___, 550 P.2d 1309, 1312 (1976). Thus, the Montana supreme court could be adopting the philosophy of the sentence omitted by the legislature.

22. R.C.M. 1947, § 48-332(2); Hurly v. Hurly, 147 Mont. 118, 411 P.2d 359, 361 (1966).

23. CLARK, *supra* note 19 at 588.

24. In Re Bourquin, 88 Mont. 118, 290 P. 250, 251 (1930); Watson, *supra* note 1 at 68. The greater financial resources of one party are not necessarily a determinative factor.

25. Oberosler v. Oberosler, 128 Mont. 140, 272 P.2d 1005, 1007 (1954); CLARK, *supra* note19 at 601. Remarriage is not necessarily a determinative factor.

26. Cleverly v. Stone, 141 Mont. 204, 378 P.2d 653, 655 (1962).

27. Svennungsen v. Svennungsen, *supra* note 10 at 643.

28. *Id.*

plished when there was a showing that the custodial parent was unfit. Courts consider drunkenness, gross immorality, cruelty, neglect, desertion, non-support, and conviction of a crime in determining whether a party is unfit.[29]

B. Best Interests of the Child

Statutes and case law have established that the best interests of the child are to be the determinative factor in awarding custody.[30] Although a current statute provides that the father and mother of an unmarried minor child are equally entitled to its custody, services, and earnings,[31] that right is not absolute, even though the parents are fit and proper persons.[32] Prior to the UMDA, when a parent contested the custody decree, certain statutory presumptions were applied. For example, when other factors between the parents were equal, custody of a child of tender years was awarded to the mother. If the child was at an age requiring preparation for education or for labor, however, custody was awarded to the father.[33] Presumptions like these have been criticized as being too rigid, prohibiting thoughtful evaluation of the child's situation.[34] Courts that awarded custody of young children to the mother because of her traditional role in child-raising sometimes failed to consider many mothers' post-divorce circumstances—circumstances in which they usually had to assume all responsibilities for raising the children and earning an income.[35] There is a growing movement among courts to abandon these presumptions, and to rely instead on the testimony of social workers and experts in the field of human relations to determine what are the best interests of the child.[36]

Experts in child behavior agree that the most important factor in a child's development is his need for stability to develop a sense of identity. "[W]hen a child is kept suspended, never quite knowing what will happen to him next, he must likewise suspend the shaping of his personality."[37] This stability must carry into the child's relationships and surroundings. The Montana supreme court

29. Cleverly v. Stone, *supra* note 26 at 654; Foster and Freed, *Child Custody* (pt.1), 39 N.Y.U.L. REV. 423, 427-434 (1964) [hereinafter cited as Foster (pt.1)].

30. R.C.M. 1947, § 48-332; Trudgeon v. Trudgeon, *supra* note 10 at 228.

31. R.C.M. 1947, § 61-105.

32. In Re Biery, *supra* note 14 at 1378; Haynes v. Fillner, 106 Mont. 59, 75 P.2d 802, 808 (1938).

33. R.C.M. 1947, § 91-4515(2) (repealed, effective July 1, 1975, Laws of Montana (1974), ch. 365, § 2.)

34. Foster (pt.1), *supra* note 29 at 437, 441.

35. Podell, *supra* note 3 at 53.

36. *Id.* at 68; Foster (pt.2), *supra* note 10 at 615.

37. Watson, *supra* note 1 at 64.

recognized this important need for stability in the *Gilmore* and *Biery* decisions.[38]

In a custody proceeding, often the only data a court has, by which to predict the outcome of a new court-imposed relationship, is the past history of the parents' and child's interrelationship. Requiring investigation into the physical and emotional needs of the parents and child is a relatively new concept. The court cannot force a parent and child into a harmonious relationship, but can only recognize a potentially good relationship and provide an opportunity for it to grow. To cut short this opportunity for growth may seriously damage the child's development.

Because the court in custody proceedings has continuing jurisdiction, a child's placement is never really finalized. In the past, this lack of finality invited custody challenges from a disappointed non-custodial parent and ultimately conflicted with the child's need for stability. The Montana court recognized the need to curtail litigation of this kind to prevent harrassment,[39] but failed to establish clear limits. Experts have concluded that to prevent continued custody fights, courts should have the time and resources to make a good decision on child placement. Once made, the decision should be difficult, if not impossible, to change.[40]

The Montana UMDA adopted this philosophy. If a parent so requests, the court may order an investigation of the child's custodial arrangements, which may include referring the child to professional personnel for medical and psychiatric examination to assess the child's needs.[41] To prevent continual litigation over custody decrees, the UMDA also makes modification of custody decrees more difficult to obtain than under former law. No petition for modification may be entertained by the court within two years of the original decree except on a showing of exceptional circumstances—that there is reason to believe that the child's present environment may seriously endanger his physical, mental, moral, or emotional health.[42]

The determination of the best interests of the child is unique to each case. Former statutory and case law presumptions have not allowed thorough analysis of the child's needs in relation to his circumstances. This inadequate analysis has emphasized the need for expert evaluation. The welfare of the child is best served by a

38. Gilmore v. Gilmore, *supra* note 4 at 482; In Re Biery, *supra* note 14 at 1378.

39. Bayers v. Bayers, *supra* note 8 at 509.

40. J. GOLDSTEIN, A. FREUND, and A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, 37 (1973); Watson, *supra* note 1 at 76.

41. R.C.M. 1947, § 48-335(2).

42. R.C.M. 1947, § 48-339.

placement which provides stability in the child's life and an opportunity for the development of continuing relationships. This should be the primary concern of the courts.

C. *The Role of the District Court*

In Montana, under the UMDA, as under former law, the district court does not lose jurisdiction over the parties in regard to custody matters after the divorce decree has been granted.[43] Child custody orders are interlocutory in nature and, as such, are always subject to review.

The district court judge, in determining the best interests of the child, must follow the guidelines set out above.[44] In so doing, the judge is not bound by any contract regarding custody arrangements made between the contesting parties either before or at the time of the divorce. The judge, in his own discretion, has the duty to make this determination.[45]

The supreme court has recognized the delicate nature of making such a decision in a child custody proceeding, and the superior advantage of the trial judge in evaluating the oral testimony of the parties and other witnesses.[46] Because of this advantage, the supreme court holds that custody orders will not be disturbed on appeal unless there is a strong showing that the trial judge abused his discretion. Absent such a showing, the supreme court presumes the trial judge was correct in his decision.[47]

III. Conclusion

The *Gilmore* decision reaffirmed the guidelines for deciding petitions for modification of child custody decrees: there must be a substantial change in circumstances from the time the previous order was entered; the court must look to the facts and circumstances of each case; the substantial change in circumstances must be measured against the child's welfare rather than the parents' welfare; and the best interests of the child are the paramount concern of the court. But *Gilmore* also added strength to a newly developed factor in applying those guidelines—that in determining the best

43. R.C.M. 1947, §§ 48-331, 48-333, 48-338, 48-339; R.C.M. 1947, § 21-138 (repealed, Laws of Montana (1975), ch. 536, § 45); Barbour v. Barbour, 134 Mont. 317, 330 P.2d 1093, 1095 (1958).

44. Simon v. Simon, *supra* note 10 at 854; Anderson v. Anderson, 145 Mont. 244, 400 P.2d 632, 634 (1965).

45. Kane v. Kane, 53 Mont. 519, 165 P. 457, 459 (1917); Clark, *supra* note 19 at 598.

46. Campbell v. Campbell, 126 Mont. 118, 245 P.2d 847, 849 (1952); Jewett v. Jewett, 73 Mont. 591, 237 P. 702, 703 (1925).

47. Trudgeon v. Trudgeon, *supra* note 10 at 226; In Re Bourquin, *supra* note 24 at 251.

interests of the child, the court must recognize the need for stability in a child's life. The Montana UMDA has codified this requirement by providing that the court may not entertain a petition for modification within two years of the previous decree except upon a showing of exceptional circumstances. Where a satisfying relationship already exists between the child and the custodial parent, be it father or mother, the court should be very reluctant to break those ties. Following these principles insures a more thoughtful analysis of the child's needs, and avoids problems inherent in allowing legal presumptions to determine custody decisions.