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FAMILY LAW

Randall A. Snyder and Susan R. Sharrock

I. Introduction

The field of family law in Montana is replete with new developments. Three new acts passed within the last four years direct judicial decision-making regarding families-to-be, on-going families, and the dissolution of the family unit. They are the Uniform Marriage and Divorce Act (hereinafter UMDA),¹ enacted in 1975; the act concerning abused, neglected, and dependent children or youth,² enacted in 1974; and the Montana Youth Court Act,³ enacted in 1974. Numerous first interpretations of the new statutes appear in recent decisions of the Montana Supreme Court.

This survey focuses primarily on decisions of the supreme court made between October 1, 1977, and October 1, 1978.⁴ Analysis of the cases is divided into two major categories: (1) decisions affecting the relationship between husband and wife, and (2) those affecting the relationship between parent and child. The first category includes decisions under the UMDA regarding property disposition, maintenance, and child support following dissolution of marriage. The second category includes decisions on child custody following a dissolution of marriage or a judicial finding of child abuse, dependency or neglect, and decisions relating to adoption and youth court proceedings.

II. HUSBAND-WIFE RELATIONSHIPS

A. *Property Disposition*

Dissolution decrees dividing marital property between spouses have been the basis for most of the appeals under the UMDA. The four issues forming the basis for appealed property dispositions are: (1) what is "marital property;" (2) how is the marital estate proved; (3) what is an equitable distribution of the marital estate; and (4) what is the relationship between divided property and maintenance?

1. MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 40-1-101 to 404 (1978) (formerly codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], §§ 48-301 to 341 (Supp. 1977)).

2. MCA §§ 41-3-101 to 504 (1978) (formerly codified at R.C.M. 1947, §§ 10-1300 to 1322 (Supp. 1977)).

3. MCA §§ 41-5-101 to 924 (1978) (formerly codified at R.C.M. 1947, §§ 10-1200 to 1252 (Supp. 1977)).

4. For a recent overview of family law in Montana see Mahan, *Recent Developments in Family Law in Montana*, 39 MONT. L. REV. 1 (1978).

1. Marital Property

The UMDA empowers the district judge to divide property "whether title is in either or both spouses' name, and regardless of when the property was acquired."⁵ This conforms with case law prior to the act, where the Montana court held that district judges could as a matter of equity divide marital property in a divorce action regardless of who held title.⁶

The discretionary power of the district judge under the UMDA was challenged in *Hebel v. Hebel*, where the appellant was divested of certain "premarital property."⁷ The marriage lasted only eighteen months, and there was a wide disparity in assets prior to the marriage. Nonetheless, the supreme court upheld the decree, giving force to the judge's power to dispose of "any or all property, however acquired or held."⁸ Such broad discretion is somewhat unique. Montana, Washington, and Indiana are the only three of the seven jurisdictions having passed the Uniform Act⁹ that so empower district judges.¹⁰

Gifts to and inheritance by individual spouses are also included in a property disposition in Montana's Act.¹¹ The statute is silent, however, on how a judge is to dispose of such gifts and inheritance. In *Vivian v. Vivian*,¹² the district judge had awarded the husband the family home, but deducted from its value the husband's inheritance of \$13,726.15. Observing that there was no evidence the money was used to improve the home or increase its value, the supreme court reversed the decree. The court upheld the judge's statutory power to consider inheritance, but it affirmatively declined to make any rule regarding its disposition.¹³ Thus, the court held, inheritance

5. MCA § 40-4-202 (1978) (formerly codified at R.C.M. 1947, § 48-321 (Supp. 1977)).

6. *Cook v. Cook*, 159 Mont. 98, 495 P.2d 591 (1972).

7. ___ Mont. ___, 578 P.2d 591 (1978).

8. *Id.* at ___, 578 P.2d at 593.

9. Uniform Marriage and Divorce Act [hereinafter cited as UMDA], National Draft, 9 UNIFORM LAWS ANNOTATED [hereinafter cited as U.L.A.] 415-516 (1973).

10. Indiana provides that a court "shall divide the property whether owned by either spouse prior to marriage, acquired by either . . . after the marriage . . . or acquired by their joint efforts. . . ." IND. CODE ANN. § 31-1-11.5-11 (Burns) (1978 Supp.). In Washington, both the separate estates of the spouses and the community property of the marriage are considerations in a property division. WASH. REV. CODE ANN. § 26.09.080 (1977 Supp.). Arizona's version is significantly amended from the national draft, see 9 U.L.A. 360 (1977 Supp.), and divides the marital estate according to community property law. ARIZ. REV. STAT. ANN. § 25-318 (1978 Supp.). Colorado, Illinois, Kentucky, and Missouri all expressly assign a spouse's individual property to that spouse. COLO. REV. STAT. § 14-10-113 (1976 Supp.); ILL. ANN. STAT. ch. 40, § 503 (1977 Supp.); KY. REV. STAT. 403.190(1) (1978 Supp.); MO. ANN. STAT. § 452.330 (Vernon 1978 Supp.).

11. MCA § 40-4-202 (1978) (formerly codified at R.C.M. 1947, § 48-321 (Supp. 1977)).

12. ___ Mont. ___, 583 P.2d 1072 (1978).

13. *Citing Morse v. Morse*, ___ Mont. ___, 571 P.2d 1147 (1977).

is to be considered and divided based on the particular facts of each case.¹⁴

*Morse v. Morse*¹⁵ presented issues of present and future inheritance. Before the petition for dissolution, the appellant's wife had received \$200,000 from her deceased father. She also stood to receive an additional inheritance at the time of the proceeding from her aging mother. The record was unclear whether the \$200,000 was considered part of the marital estate, and the district court did not consider the possibility of any future inheritance. The justices unanimously concurred that it was reversible error not to have considered the received inheritance.¹⁶ Only a majority, however, refused to grant the appellant's request that his wife's future inheritance also be considered.¹⁷ A received inheritance, then, must be considered in a property disposition. Reasoning that future inheritances are too speculative, the court ruled in *Morse* that they cannot be considered.¹⁸

Justice Harrison, joined by Justice Daly, dissented in *Morse*, because the wife had already received a sizeable inheritance from her deceased father, her mother was eighty-two and in poor health, and the wife's parents maintained a mutual will.¹⁹ The dissent is persuasive for an equitable result, and on the facts in *Morse*, the wife's potential inheritance appears all but certain. Nevertheless, Justice Harrison failed to give any indication as to how a future inheritance should be divided, just as the majority opinion failed to offer guidance in dividing an existing inheritance.

As to existing assets and liabilities, the Montana court is unanimous in requiring that all the parties' property be considered.²⁰ In *Martinez v. Martinez*,²¹ certain real property in Mexico held by the parties was omitted. The court reversed the property disposition, stating that the trial judge is required to consider the entire estate, including all assets and liabilities, in making a property disposition.²²

2. Proving the Marital Estate

In order to meet the requirement that all marital property be

14. ___ Mont. at ___, 583 P.2d at 1074-75.

15. ___ Mont. ___, 571 P.2d 1147 (1977).

16. *Id.* at ___, 571 P.2d at 1149.

17. *Id.* at ___, 571 P.2d at 1152 (Harrison, J., dissenting in part).

18. *Id.* at ___, 571 P.2d at 1149.

19. *Id.* at ___, 571 P.2d at 1150 *et seq.* (Harrison, J., dissenting in part).

20. *See* *Martinez v. Martinez*, ___ Mont. ___, 573 P.2d 670 (1977). *Accord*, *Howland v. Howland*, 337 N.E.2d 728 (Ind. App. 1976).

21. ___ Mont. ___, 573 P.2d 667 (1977).

22. *Id.* at 670.

considered, the Montana Supreme Court demands proof of the marital estate. Testimony and documents must be introduced setting out the parties' assets and liabilities.²³ This demand was not met in *Martinez*, where the parties testified as to amounts in bank accounts without introducing any corroborative physical evidence, such as bank books, and where the court failed to use assessed property values.²⁴ The supreme court held that insufficient evidence of the estate and failure to consider assessed values constitute reversible error.²⁵

In *Dahl v. Dahl*,²⁶ the court went on to say that evidence must be recent²⁷ as well as reliable. In *Dahl*, the sole evidence of the husband's business assets and income consisted of uncertified financial statements and tax returns antedating the decree by two years. Such evidence, the court held, was insufficient to prove the true value of the marital estate.²⁸

A casual reading of the statutes and cases under the UMDA discloses the broad discretion a district judge has in a dissolution proceeding. Because of this, the supreme court requires fact findings by the judge to justify legal conclusions.²⁹ *Reilly v. Reilly*³⁰ directed the trial court to make findings on each element to be considered under what is now MONTANA CODE ANNOTATED (hereinafter cited as MCA) § 40-4-202 (1978),³¹ but *Caprice v. Caprice*³² seems to limit *Reilly*, holding that separate findings are desirable, but unnecessary:

[T]his Court requires specific findings to insure an adequate record for appellate review so that the unhealthy situation of speculation as to reasons for findings and conclusions on appellate review will not occur. . . . Admittedly the district court here did not make an item by item finding based on the pertinent factors in [MCA § 40-4-202 (1978)] (though it would have been laudable had it done so)³³

Thus, the more comprehensive the findings are pursuant to § 40-4-

23. *Id.*

24. *Id.*

25. *Id.*

26. ___ Mont. ___, 577 P.2d 1230 (1978).

27. *Id.*

28. *Id.* See also *Kramer v. Kramer*, ___ Mont. ___, 580 P.2d 840 (1978). *But see* *Eppley v. Eppley*, 341 N.E.2d 212 (Ind. App. 1976) (not improper for trial court to base property values on appraisals made seventeen months earlier at time of separation).

29. See generally *Berthiaume v. Berthiaume*, ___ Mont. ___, 567 P.2d 1388 (1977).

30. ___ Mont. ___, 577 P.2d 840 (1978).

31. Formerly codified at R.C.M. 1947, § 48-321 (Supp. 1977).

32. ___ Mont. ___, 585 P.2d 641 (1978).

33. *Id.* at ___, 585 P.2d at 644.

202, the less chance there is for reversal on appeal. As evidence forms the basis for a judge's findings, it is the quality and sufficiency of evidence which safeguards a property disposition.

3. *Equitable Distribution*

Before district judges acquired authority under the UMDA to distribute marital property, the supreme court followed the rule that "[a] trial judge's resolution of a property division in a divorce action is fettered only by range of reason, and his judgement will not be disturbed in absence of abuse of discretion."³⁴ This same theme appears in cases decided under the new act.³⁵ Generally, the court will reverse a decree only where the judge "acted without the employment of conscientious judgement, or if he exceeded the bounds of reason in view of all the circumstances."³⁶ The following cases illustrate particular rulings on the issue of equity.

In *Zell v. Zell*,³⁷ the court affirmed an equal division of property where the district judge found an equal contribution to the marital estate. In *Kramer v. Kramer*,³⁸ however, it reversed as inequitable a decree awarding the wife all the personal and real property and leaving the husband his truck and all the liabilities of the marriage. The appellant in *Morse* challenged the property disposition as inequitable because the district judge did not consider "fault" in the marital breakdown.³⁹ The court summarily rejected this argument, ruling that fault cannot be considered in any part of the dissolution proceeding.⁴⁰ Clearly, this was the only decision possible in light of the statutory prohibition against fault considerations.⁴¹ Nonetheless, Montana now has judicial as well as legislative impetus to the prohibition, a primary thrust of the uniform act.⁴²

4. *Conclusion: Evidence, not Equity, is Controlling*

In each of the cases discussed, the supreme court reviewed the equity or fairness of the resultant property distribution and issued a ruling based on the particular facts before it. It is apparent that the Montana court is reluctant to overturn a district judge's decree,

34. *Cook v. Cook*, 159 Mont. 98, 103, 495 P.2d 591, 593-94 (1972).

35. *See, e.g., Berthiaume v. Berthiaume*, ___ Mont. ___, 567 P.2d 1388 (1977).

36. *Zell v. Zell*, ___ Mont. ___, ___, 570 P.2d 33, 35 (1977).

37. ___ Mont. ___, 570 P.2d 33 (1977).

38. ___ Mont. ___, 580 P.2d 439 (1978).

39. ___ Mont. at ___, 571 P.2d at 1149.

40. *Id.* at ___, 571 P.2d at 1147.

41. MCA § 40-4-202 (1978) (formerly codified at R.C.M. 1947, § 48-321 (Supp. 1977)).

42. *See Commissioners' Note to UMDA* § 307, 9 U.L.A. 492 (1973).

unless the judge failed to follow statutory guidelines⁴³ or neglected to list fact findings supporting the decree.⁴⁴ Appeals will likely turn on the use of statutory guidelines or the sufficiency of justification in a decree rather than "who received what" and whether the division is fair. Even where the equity of a property disposition is questionable, the court will uphold a decree if the evidence and fact findings support the conclusions reached.⁴⁵

It is incumbent upon the attorney to ascertain that all the property of the marriage and of the spouse represented be considered and divided by the court. Any omission can be grounds for appeal and reversal. Equally important is proof of the marital estate. Financial statements should be certified by an accountant, and tax returns and assessed property values must be current.⁴⁶ This survey maintains that the strength of a decreed property disposition on appeal is determined more by the evidence and fact findings than by its equity.

5. *Property or Maintenance?*

Prior to the UMDA, periodic cash payments from an ex-husband to an ex-wife were called alimony. Now termed "maintenance,"⁴⁷ such payments are occasionally made part of a settlement agreement in lieu of liquidating and dividing valuable marital assets, such as a ranch or corporation, which might only be done at a loss.⁴⁸ The question then arises whether payments are part of the property disposition or payments of maintenance.⁴⁹ The difference can be critical. A property disposition is not subject to subsequent modification,⁵⁰ but a maintenance order may be.⁵¹ There are

43. See, e.g., *Cromwell v. Cromwell*, ___ Mont. ___, 570 P.2d 1129 (1977).

44. See, e.g., *Capener v. Capener*, ___ Mont. ___, 582 P.2d 326 (1978).

45. See *Caprice v. Caprice*, ___ Mont. ___, 585 P.2d 641 (1978).

46. See *Martinez v. Martinez*, ___ Mont. ___, 573 P.2d 670; *Kruse v. Kruse*, ___ Mont. ___, ___ P.2d ___, 35 St. Rep. 1502 (1978).

47. Payments may now be made (or ordered paid by the court) by either the husband or the wife. See MCA § 40-4-203 (1978) (formerly codified at R.C.M. 1947, § 48-322 (Supp. 1977)).

48. Property settlements, if partially in cash, may be paid immediately or over time with interest. *Hebel v. Hebel*, ___ Mont. ___, 578 P.2d 305 (1978).

49. The question has arisen only twice under the UMDA in Montana. See *Reilly v. Reilly*, ___ Mont. ___, 577 P.2d 840 (1978); *Johnsrud v. Johnsrud*, ___ Mont. ___, 572 P.2d 902 (1977). Once on appeal, however, it has always prompted a lengthy discussion by the court.

50. MCA § 40-4-208 (1978) (formerly codified at R.C.M. 1947, § 48-330 (Supp. 1977)) provides that "[a] property disposition may not be revoked or modified . . . except . . . upon written consent or if the court finds the existence of conditions that justify the reopening of a judgement under the laws of this state." The supreme court held, prior to the UMDA, that property settlements are not subject to subsequent modification. *Washington v. Washington*, 162 Mont. 349, 512 P.2d 1300 (1973). In 1978, the court cited *Washington* as authority

also important tax considerations.⁵²

The property-maintenance confusion involves two interdependent issues: (1) how is maintenance distinguished from a property settlement;⁵³ and (2) how does a property disposition affect an order for maintenance?

The Montana court appears to have answered the first question. Both prior and subsequent to the passage of the UMDA, the court has held that where periodic cash payments are supported by consideration, such payments are part of the property disposition.⁵⁴ For example, if a wife gives up rights to certain property and future support in exchange for monthly payments, such payments are part of the property division and are not subject to subsequent modification.⁵⁵ *Reilly* added that if periodic payments are part of the property division, they also constitute a contribution to the assets of a subsequent marriage.⁵⁶

The uniform act attempted, in a dissolution proceedings, to separate the division of property from an order for maintenance.⁵⁷

for the same position. *Reilly v. Reilly*, ___ Mont. ___, 577 P.2d 840 (1978).

51. "Any decree respecting maintenance or support may be modified by a court upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable, or if consented to in writing." MCA § 40-4-208 (1978) (formerly codified at R.C.M. 1947, § 48-330 (Supp. 1977)).

52. See Comment, *Federal Income Tax Consequences of Divorce and Separation*, 16 J. FAM. L. 779 (1978).

53. Montana has not distinguished settlement agreements, made by the parties and approved by the court, from court-decreed dispositions and payments (used interchangeably in this survey). Missouri and Washington, however, distinguish the two situations when considering subsequent petitions for modification. Compare *Vorhof v. Vorhof*, 532 S.W.2d 830 (Mo. App. 1975) (periodic payments subject to modification if decreed by court, but not subject to modification if contractual) with *Thompson v. Thompson*, 82 Wash.2d 352, 510 P.2d 827 (1973) (alimony subject to modification even if provided by contract; property settlements, by contract or by decree of court not subject to modification).

54. *Washington v. Washington*, 162 Mont. 349, 512 P.2d 1300 (1973) ("alimony" actually part of property settlement); *Taylor v. Taylor*, 167 Mont. 164, 537 P.2d 483 (1975); *Johnsrud v. Johnsrud*, ___ Mont. ___, 572 P.2d 902 (1977).

55. *Washington v. Washington*, 162 Mont. 349, 512 P.2d 1300 (1973). *Accord*, *Scott v. Scott*, 529 S.W.2d 656 (Ky. 1975). *But see* *Movius v. Movius*, 163 Mont. 463, 517 P.2d 884 (1974) ("alimony" subject to modification where not supported by consideration). *Accord*, *Carstens v. Carstens*, 10 Wash. App. 964, 521 P.2d 840 (1974).

56. ___ Mont. at ___, 577 P.2d at 844.

57. Procedures and considerations for property dispositions and maintenance are set out in separate sections. See MCA §§ 40-4-202, 203 (1978) (formerly codified at R.C.M. 1947, §§ 48-321, 322 (Supp. 1977)). See also Commissioners' Note to UMDA § 308, 9 U.L.A. 494 (1973): "The dual intention of this section [on maintenance] and the section [on property disposition] is to encourage the court to provide for the financial needs of the spouses by property disposition rather than an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment to his skills and interests or is occupied with child care may an award of maintenance be ordered." See *Johnsrud v. Johnsrud*, ___ Mont. ___, ___, 572 P.2d 902, 905 (1977).

Justice Shea, in *Johnsrud v. Johnsrud*,⁵⁸ explained the difference as follows:

Under the Uniform Marriage and Divorce Act, there is a need to distinguish between a property right in the marital estate, and the maintenance provisions. Upon dissolution of the marriage the property interests vests in the spouse to whom it is awarded. On the other hand, an award of maintenance is related only to the "needs" of the spouse seeking maintenance, and ceases, for example, upon the happening of a certain event, such as death.⁵⁹

He also explained how to make the distinction:

It is first the duty of the district court to equitably distribute the marital property. After the court makes a decision on property division, then any additional needs of a spouse petitioning for maintenance should be readily apparent.⁶⁰

Johnsrud sets out numerous examples of creative property settlements. Many of these provide for a schedule of periodic cash payments. While flexibility is desirable, poorly drawn agreements and inadequately explained decrees may result in subsequent litigation when circumstances change and a former spouse seeks modification.⁶¹

The second question in the property-maintenance anomaly is compounded by language in the UMDA. MCA § 40-4-202 (1978)⁶² states that a consideration in property division is whether the division is "in lieu of or in addition to maintenance." Here, instead of property being given up for maintenance, property is divided *in lieu* of maintenance. To illustrate, a wife is awarded a larger share of the marital estate than is the husband. The husband, in turn, is relieved of paying maintenance to the wife. This appears satisfactory, but difficulties arise when the wife's property award, typically the home and furniture, cannot be readily liquidated.⁶³ Thus, she is without income. Should the wife be awarded maintenance even though she has received a disproportionately large share of the marital estate?

58. ___ Mont. ___, 572 P.2d 902 (1977).

59. *Id.* at ___, 572 P.2d at 906.

60. *Id.* at ___, 572 P.2d at 905. This is an oversimplification. Computation of maintenance and support provisions is the subject of numerous works of attorneys, judges, and economists, all of whom appear to have their own formula for determining fair and adequate payments. See, e.g., P. EDEN, ESTIMATING CHILD AND SPOUSAL SUPPORT (1977).

61. Again, the problem is determining whether cash payments are maintenance or are part of the property settlement. See *Johnsrud v. Johnsrud*, ___ Mont. ___, 572 P.2d 902 (1978); *Taylor v. Taylor*, 167 Mont. at 164, 537 P.2d at 483; *Movius v. Movius*, 163 Mont. 463, 517 P.2d 884 (1974); *Washington v. Washington*, 162 Mont. 349, 512 P.2d 1300 (1973); *Early v. Early*, 6 Ariz. App. 10, 430 P.2d 456 (1967).

62. Formerly codified at R.C.M. 1947, § 48-321 (Supp. 1977).

63. See, e.g., *Cromwell v. Cromwell*, ___ Mont. ___, 570 P.2d 1129 (1977).

This issue was raised in *Cromwell v. Cromwell*;⁶⁴ however, the court remanded that case for reconsideration without discussing the effect of a property disposition on maintenance.⁶⁵ Thus, the second question in regard to the property-maintenance confusion remains unresolved.

As complete a settlement as possible should be made solely with the marital property to make the parties financially independent of each other,⁶⁶ following the instructions in *Johnsrud*. If cash payments are part of the property settlement, this fact and the consideration should be expressly stated. If maintenance is part of the agreement, it should be separate and distinct from the paragraphs dividing assets and liabilities. In considering maintenance provisions, attorneys and clients alike must be cognizant that "more property" does not always mean less need for financial support. Spouses must not be overeager to bargain away maintenance payments to receive a more favorable property settlement. Maintenance provisions should state (1) that payments are not a vested interest, but are for the needs of the spouse receiving them; (2) when payments are to begin and end; and (3) whether, and under what circumstances, the schedule or amount of payments may be modified.

B. Maintenance, Support, and Modifications

The statutes authorizing periodic cash payments for the needs of a former spouse and the children are set out in separate sections of the UMDA as the considerations for each differ significantly.⁶⁷ A third section establishes the considerations for a modification of maintenance or support.⁶⁸ Notwithstanding these separate statutory considerations, Montana and other UMDA jurisdictions follow a single theme with regard to periodic cash payments or their modification. There must be a showing of need *and* a corresponding ability of the other spouse to make payments.⁶⁹

64. ___ Mont. ___, 570 P.2d 1129 (1977).

65. *Id.* at ___, 570 P.2d at 1131. After reconsideration in district court, *Cromwell* was appealed and reargued in November, 1978.

66. See Commissioners' Note to UMDA § 308, 9 U.L.A. 494 (1973). Such a simplistic solution, however, appears to presume that each spouse, subsequent to dissolution, has an equal earning power. Cf. Inker, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 10 SUFFOLK U. L. REV. 1 (1975) (each spouse on equal footing respecting right to receive maintenance).

67. See MCA §§ 40-4-203 (maintenance) and 204 (child support) (1978) (formerly codified at R.C.M. 1947, §§ 48-322, 323 (Supp. 1977)).

68. MCA § 40-4-208 (1978) (formerly codified at R.C.M. 1947, § 48-330 (Supp. 1977)).

69. *Olsen v. Olsen*, ___ Mont. ___, 574 P.2d 1004 (1977); *Capener v. Capener*, ___ Mont. ___, 582 P.2d 326 (1978); *Burnette v. Burnette*, 516 S.W.2d 330 (Ky. 1974); *Hofstra*

All of the cases to date have arisen from petitions for modification, pursuant to MCA § 40-4-208 (1978),⁷⁰ which provides:

The provisions of any decree respecting maintenance or support may be modified by a court only as to installments accruing subsequent to the motion for modification, and either (a) upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable; or (b) upon written consent of the parties.

Clearly, if the parties consent there is little problem. Yet, "changed circumstances" and "unconscionable" are troublesome concepts to define and apply.⁷¹

1. *Changed Circumstances*

Montana has no ruling on what constitutes a change of circumstances. Anticipating that Montana will look to other jurisdictions with similar statutes for authority, the following rules in other UMDA jurisdictions may be relevant. For modifications of child support, Colorado holds that remarriage, by itself, is not a sufficient change of circumstances whether the petitioning spouse is making or receiving payments.⁷² Nor is the increased wealth of the provider a sufficient change.⁷³ The strongest facts warranting an increase in payments are those in which expenses of the receiving spouse have increased, such as from inflation, at the same time the providing spouse's income has correspondingly increased.⁷⁴

From appeals on petitions to decrease or terminate payments, Kentucky holds that the remarriage and incurring of a debt by the provider is an insufficient change in circumstances.⁷⁵ In Missouri, however, the provider's unemployment, when not imposed by choice, is a sufficient change to warrant reducing the amount of payments.⁷⁶

v. Hofstra, 13 Ariz. App. 150, 474 P.2d 869 (1974); Dreyer v. Dreyer, 10 Wash. App. 624, 519 P.2d 12 (1974). *Contra*, Shive v. Shive, 57 Ill. App.3d 754, 373 N.E.2d 557 (1978).

70. Formerly codified at R.C.M. 1947, § 48-330 (Supp. 1977).

71. The Proposed Revised Uniform Marriage and Divorce Act, reprinted at 18 S.D. L. REV. 693 (1973), promulgated by the Family Law Section of the American Bar Association, deletes the word "unconscionable" from § 316, leaving a modification of maintenance and support open to a court only upon a showing of a "real and substantial" change of circumstances.

72. *See, e.g.*, Kinnamon v. Kinnamon, 532 P.2d 755 (Colo. App. 1975).

73. *See, e.g.*, McGinley v. McGinley, 513 S.W.2d 471 (Mo. App. 1974).

74. *See* Hofstra v. Hofstra, 13 Ariz. App. 150, 474 P.2d 869 (1974); Smith v. Smith, 530 P.2d 966 (Colo. App. 1975); Sullivan v. Sullivan, 57 Ill. App.3d 958, 373 N.E.2d 829 (1978); Alexander v. Alexander, 14 Wash. App. 222, 540 P.2d 457 (1975).

75. Burnette v. Burnette, 516 S.W.2d 330 (Ky. 1974).

76. Foster v. Foster, 537 S.W.2d 833 (Mo. App. 1976).

The general trend appears to be a "bilateral change" requirement in the financial status of the parties. That is, the provider's income and the recipient's expenses must both change in the same direction before a court will grant a petition for modification.

2. *Unconscionability*

The Montana Supreme Court ruled, in the recent case of *Green v. Green*,⁷⁷ that it will not define "unconscionable."

We will follow the policy of determining on a case to case basis, from the underlying facts, whether the evidence is sufficient to be unconscionable. We thereby avoid the possibility of adopting too harsh a standard on one hand, and too lenient a standard on the other, which might later circumvent the policy of the legislature in adopting [MCA § 40-4-208 (1978)].⁷⁸

Kentucky, however, defines unconscionable as "manifestly unfair or inequitable."⁷⁹ Colorado holds that, absent fraud, overreaching, or an applicable reservation of authority, a court has no power to modify an order for maintenance.⁸⁰ Even without guidelines, the Montana court emphatically requires the petitioning spouse to allege facts showing the necessity for modification.⁸¹

C. *Summary*

Appeals in marriage and divorce litigation have been more numerous in the last three years than immediately prior to the UMDA's enactment. In some cases, the supreme court has given the act its intended interpretation, as in prohibiting fault considerations from entering a dissolution proceeding. In other areas, however, the court has been slow or has avoided statutory interpretation. To date, Montana still lacks rulings on what constitutes a change of circumstances for modification of maintenance and support, what guidelines should be used in considering inheritance, and what effect a property disposition should have on maintenance. The court declined to define "unconscionability," a necessary element of proof in a modification proceeding. Clearly, in its third year before the supreme court, the UMDA is still subject to considerable interpretation.

77. ___ Mont. ___, 579 P.2d 1235 (1978).

78. *Id.* at ___, 579 P.2d at 1238-39.

79. *Wilhoit v. Wilhoit*, 506 S.W.2d 511 (Ky. 1974).

80. *Beebe v. Beebe*, 526 P.2d 1348 (Colo. App. 1974) (one party not represented by counsel does not render a decree unconscionable).

81. *Lehman v. Billman*, ___ Mont. ___, 584 P.2d 662 (1978).

III. PARENT-CHILD RELATIONSHIPS

Issues concerning parent-child relationships addressed by the Montana Supreme Court during the October 1977-October 1978 period fall into four major categories: (1) custody of a child following dissolution of marriage, (2) custody of a child who is a youth in need of care, (3) licensing of persons placing children for adoption, and (4) due process rights of a youth in a predetention hearing. The cases primarily involve consideration of the trial court's discretion in determining the child's best interest, and interpretation of some especially troublesome sections of the UMDA and Montana laws on child abuse, neglect, and dependency. The statutes are relatively new: as already mentioned,⁸² the UMDA was enacted in 1975, and the act for abused, dependent, and neglected youth in 1974.

This section provides an overview of recent additions to the law, but also highlights problem areas within the statutes and points out what appear to be common analytical and procedural errors of attorneys. The organization generally follows the sequence of sections in the statutes. Comparisons with cases from other jurisdictions are made when appropriate.

A. Child Custody: Dissolution

1. Jurisdiction

Strouf v. Strouf,⁸³ is only the third Montana case to apply what is now MCA § 40-4-211 (1978),⁸⁴ which outlines the circumstances in which a district court has jurisdiction over child custody matters following a dissolution of marriage. Prior to *Strouf* the court had stated that according to that section, the district court had jurisdiction when the child resided in Montana at the time the custody proceeding was commenced,⁸⁵ but did not have jurisdiction when the legal custodian resided in another state and the children were in the state only after their non-custodial parent had seized them and fled to his home in Montana.⁸⁶ In *Strouf*, the supreme court held that the trial court lacked jurisdiction when the child was lawfully present in Montana as the result of the exercise of the non-custodial parent's temporary visitation rights. The opinion emphasizes that, except in cases in which the child has been abandoned, in which

82. See text accompanying notes 1-3 *supra*.

83. — Mont. —, 578 P.2d 746 (1978).

84. Formerly codified at R.C.M. 1947, § 48-331 (Supp. 1977). Subsections (1) and (2) correspond almost exactly to § 401(a) and (b) of the UMDA, 9 U.L.A. 502-03 (1973).

85. *Ronchetto v. Ronchetto*, — Mont. —, —, 567 P.2d 456, 458 (1977).

86. *State ex rel. Muirhead v. District Court*, 169 Mont. 535, 539, 550 P.2d 1304, 1306 (1976).

there is an emergency to protect the child from abuse, neglect, or dependency, or in which another state has jurisdiction, the mere physical presence of a child in Montana is not sufficient to confer jurisdiction on a Montana court to hear a proceeding concerning child custody following dissolution.⁸⁷

Once a district court has jurisdiction over a child custody matter, its power to enforce its judgment is retained until the judgment is reversed, modified, or vacated by the supreme court. Thus, in *Kramer v. Kramer*,⁸⁸ although the case was in the process of being appealed, the district court still had the power to order a writ of habeas corpus to have the children returned to their mother.

2. Initial Custody Proceeding

a. Best Interest of Child

Custody of a child following dissolution of marriage is determined in Montana according to the best interest of the child.⁸⁹ MCA § 40-4-212 (1978)⁹⁰ provides that in determining the best interest of the child the court shall consider all relevant factors, including (1) wishes of the parents; (2) wishes of the child; (3) interaction and interrelationships of the child with his parents, 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.

A case of significant import in the area of the child's best interest is *In re Kramer*.⁹¹ While the court had stated in previous cases that consideration of the child's wishes in a custody proceeding is mandatory, in *Kramer* the court went further and held that the trial judge must make a specific finding stating the wishes of the children as to their custodian, and, that if the court determined a custody arrangement contrary to the wishes of the children, it must state in its findings the basis for that determination.⁹² During the course of

87. In *Graton v. Graton*, 24 Ariz. App. 194, 537 P.2d 31 (1975), and *Hawley v. Shaver*, 528 S.W.2d 669 (Ky. 1975), the Arizona and Kentucky courts in two cases on point decided the issue the same way. In addition, it should be noted that MCA § 41-3-103 (1978) (formerly codified at R.C.M. 1947, § 10-1302(1) (Supp. 1977)), the jurisdiction section of the act for abused, dependent, and neglected youth, provides that the youth court has concurrent jurisdiction with the district courts over all youths who are within the state for any purpose.

88. ___ Mont. ___, 578 P.2d 317 (1978).

89. See MCA § 40-4-212 (1978) (formerly codified at R.C.M. 1947, § 48-332 (Supp. 1977)); *Allen v. Allen*, ___ Mont. ___, 575 P.2d 74 (1978); *In re Kramer*, ___ Mont. ___, 580 P.2d 439, 444 (1978).

90. Formerly codified at R.C.M. 1947, § 48-332 (Supp. 1977).

91. ___ Mont. ___, 580 P.2d 439 (1978).

92. *Id.* at ___, 580 P.2d at 444. The instructions are consistent with Rule 52, MONT. R. Civ. P., which provides that the court shall make findings specially and state its conclu-

the proceeding, the children had let it be known on three separate occasions, both on and off the record, that they wanted to live with their father, but the court made no mention of the wishes of the children in its findings of fact, and the mother was awarded custody of the children. The case was remanded.

In another significant case, *Schiele v. Sager*,⁹³ the court found that under what is now MCA § 40-4-212(3) (1978),⁹⁴ reputation evidence concerning the violent conduct of the petitioner's present spouse was relevant and admissible as evidence affecting his relationship with the child. The decision is not inconsistent with the court's previous opinions in which evidence of misconduct that did not affect the relationship of a custodian with the child was held inadmissible.⁹⁵

b. *Court Interviews with Child*

A judge may interview a child in chambers to ascertain his wishes regarding custody, as provided in MCA § 40-4-215(1) (1978).⁹⁶ In *Schiele v. Sager*⁹⁷ and *Easton v. Easton*⁹⁸ the court repeated its earlier holdings that such interviews are discretionary on the part of the district judge, but pointed out in *Schiele* that once the interview is called, it is mandatory that the interview be recorded and included in the case record.⁹⁹ Subsequently, the court held in *Lehman v. Billman*¹⁰⁰ that the right to the interview being recorded and put on the record can be waived by the parties so long as the waiver is voluntary and intentional.

c. *Representation of Child and District Court Practice*

In *In re Kramer*¹⁰¹ the supreme court articulated the role the court-appointed attorney should play in representing children in a custody matter under what is now MCA § 40-4-205 (1978).¹⁰² In that case, the attorney did not attend the dissolution hearing, even though substantial evidence relating to the best interests of the

sions of law thereon separately, and with the holding of the Colorado court when it faced a similar issue in *In re Jaramillo*, 543 P.2d 1281 (Colo. App. 1975).

93. ___ Mont. ___, ___, 571 P.2d 1142, 1146 (1977).

94. Formerly codified at R.C.M. 1947, § 48-332(3) (Supp. 1977).

95. *Solie v. Solie*, ___ Mont. ___, 561 P.2d 443 (1977); *Foss v. Leifer*, 170 Mont. 97, 550 P.2d 1309 (1976).

96. Formerly codified at R.C.M. 1947, § 48-331(1) (Supp. 1977).

97. ___ Mont. ___, ___, 571 P.2d 1142, 1145 (1977).

98. ___ Mont. ___, ___, 574 P.2d 989, 993 (1978).

99. ___ Mont. at ___, 571 P.2d at 1145.

100. ___ Mont. ___, ___, 584 P.2d 662, 665 (1978).

101. ___ Mont. ___, ___, 580 P.2d 439, 445 (1978).

102. Formerly codified at R.C.M. 1947, § 48-324 (Supp. 1977).

children was presented. Nor did he attend the *in camera* interview with the children. The mother received custody of the children even though they had expressed a preference to live with their father. The attorney did question witnesses at a hearing on a motion for a new trial, but he took no position as to which parent would make the best custodian in terms of the best interest of the children.

The court declared that the purpose of what is now § 40-4-205 is to "provide the children with an advocate who will represent their interests and not the parents' interest."¹⁰³ This means the attorney should "represent the children actively [at the hearing] and present to the court all the evidence he can marshal concerning the best interest of the children."¹⁰⁴ The court found error in holding the hearing on the child custody issue without the presence of the children's attorney and remanded the case. Thus, the court considers it crucial to the determination of the child's best interest that an attorney appointed to represent a child in a custody hearing be an active and independent participant in the proceedings.

d. *Investigation and Report*

MCA §40-4-215 (1978)¹⁰⁵ provides that in a contested custody hearing the court may order the county welfare department to make an investigation and report concerning the proposed custodial arrangements. The court must mail the investigator's report to counsel and to any party not represented by counsel at least ten days prior to the hearing, and the investigator must make his files available to counsel or any unrepresented party. Any party has the right to call the investigator and any person whom he has consulted for cross-examination at the hearing, and this right cannot be waived prior to the hearing.

(1) *Distribution of Report and the Right to Cross Examine.* The court pointed out in *Schiele v. Sager*,¹⁰⁶ that it is within the judge's discretion whether to order an investigation or not. In *Allen v. Allen*,¹⁰⁷ the trial court ordered that an investigation be undertaken. The order had been given in response to a request by the father made late in the trial. There was no timely motion for continuance. An investigation followed and a copy of the report was filed with the court prior to its entering of the decree, but no copy was mailed to the father's counsel as required by § 40-4-215(3). Custody was awarded to the mother. The father contended that the district

103. ___ Mont. at ___, 580 P.2d at 445.

104. *Id.*

105. Formerly codified at R.C.M. 1947, § 48-335 (Supp. 1977).

106. ___ Mont. at ___, 571 P.2d at 1146.

107. ___ Mont. ___, ___, 575 P.2d 74, 76 (1978).

court's judgment concerning child custody should be vacated because he did not receive a copy of the investigator's report, and was therefore unable to cross-examine the investigator and offer rebutting evidence. The supreme court disagreed and said that since the father did not request the investigation to be made until after testimony concerning the children's welfare and did not submit a timely motion for continuance, the judgment should be affirmed.

The supreme court has frequently cited the Commissioners' Notes to the uniform act as an appropriate guideline for interpretation of the Montana UMDA. The Commissioners' Note to § 405 of the uniform act, subsections (a) and (b) which are identical to Montana's § 40-4-215(1) and (2), states that the section's purpose is to "assure that investigations will be conducted with due regard to fair hearing values, while encouraging investigators to provide accurate information to the court."¹⁰⁸

In *Lewis v. Lewis*,¹⁰⁹ the Kentucky court construed an identical statute in similar circumstances, but reached a contrary result. The court granted a dissolution decree, but withheld determination of custody pending an investigation into the parties' new home situations following their remarriages. The opinion does not state whether either party submitted a motion for continuance of the trial. No report was sent to the parties' attorneys, and no hearing was held prior to the entering of the judgment awarding custody to the mother. The father maintained that the court erred in not following the procedures outlined in subsection (3) of the statute. The court agreed with his contention, saying that the father had a statutory right to examine the report and the underlying file and to cross-examine the investigator. Since his right could not be waived prior to a hearing and there had been no hearing, the father still retained the right. The case was remanded to allow the father to cross-examine the investigator at an evidentiary hearing. The court stressed that by allowing the report to be fully explored, the district court would thereby be more fully informed as to which parent would be the best custodian.

The Commissioners' Note and *Lewis* stress fundamental fairness of the evidentiary hearing on child custody. In *Lewis*, the Kentucky court considered it mandatory that a supplemental hearing be held following a receipt of the investigator's report. The Montana court distinguished *Allen* from *Lewis* on the basis of the father's late request for the court order. The court order in *Lewis*, however, was also made after the testimony concerning the children's welfare had

108. Commissioners' Note to UMDA § 405, 9 U.L.A. 508 (1973).

109. 534 S.W.2d 800 (Ky. 1976).

been heard. Perhaps a distinguishing factor is whether the trial judge or a party initiated the court order. In *Lewis*, in which the court initiated the order, the Kentucky court appears to have placed greater value on the hearing of all available evidence. In *Allen*, in which a party requested the order, the Montana court appears to have placed the greater value on proper procedure. The result in Montana could be very harsh where the future well-being of a child is at stake.

Based on its opinion in *Allen*, the Montana court apparently expects a request for a court order for an investigation to be submitted well before the hearing date. If the request is submitted during the trial, the requesting party must also submit a motion for continuance. The motion must be granted in order to ensure the requesting party's right to cross-examine the investigator or any of his informants, or to offer evidence to rebut the report.¹¹⁰

(2) *Is the Report Hearsay?* In *In re Kramer*,¹¹¹ the supreme court affirmed its decision in the leading case of *In re Swan*¹¹² and declared that the investigator's report is hearsay and therefore should be excluded as evidence. But the court went on to point out that, according to what is now MCA § 40-4-215(2) (1978),¹¹³ the report could be received as evidence if the requirements of § 40-4-215(3)¹¹⁴ were met. Those requirements are that the court mail a copy of the report to counsel and to any party not represented by counsel; that the investigator make his underlying file available to counsel and to any party not represented by counsel, and that either party has the right to cross-examine the investigator and any of his informants. In *Kramer*, the district court excluded the investigator's report as hearsay and limited the investigator's testimony to her opinion regarding the best suited parent. The supreme court held that the report's exclusion and the limitation on testimony was error, and remanded the case for a new trial.

3. *Modification of Custody Following Dissolution*

The modification of child custody statute, MCA § 40-4-219

110. The decision appears to be in conflict with Rule 614(a) of the MONT. R. EVID., which provides that "The court may, on its own motion or at the suggestion of a party, call witnesses and all parties are entitled to cross-examine witnesses thus called." Based on the ruling of *Ronchetto v. Ronchetto*, ___ Mont. ___, ___, 567 P.2d 456, 458 (1977), decided by the court prior to *Allen*, it also appears that the supreme court has allowed the district court to consider hearsay evidence.

111. ___ Mont. at ___, 580 P.2d at 444.

112. ___ Mont. ___, 567 P.2d 898, 900 (1977). *Kramer*, ___ Mont. at ___, 580 P.2d at 444, also followed the rule as announced in the more recent case, *Ronchetto v. Ronchetto*, ___ Mont. ___, 567 P.2d 456 (1977).

113. Formerly codified at R.C.M. 1947, § 48-335(2) (Supp. 1977).

114. Formerly codified at R.C.M. 1947, § 48-335(3) (Supp. 1977).

(1978),¹¹⁵ is perhaps the most problematical statute that the supreme court has dealt with in the area of parent-child relationships. The statute is a change from pre-UMDA law, and in interpreting the new statute, the court has construed the language very strictly. The terms appearing in the statute lend themselves to diverse definitions, however, and the court is just beginning the process of interpreting meanings of words and phrases. Because the statute is new and unexplored, many attorneys handling custody modifications have made errors fatal to their cases.

Subsection (1) of the statute provides that when modification of custody is sought during the first two years following the custody decree, the petitioner must submit an affidavit containing facts which show that the child's present environment may seriously endanger his physical, mental, moral, or emotional health.

Subsection (2) provides that there shall be no modification of custody in any case unless there are:

- (1) changed circumstances relating to the custodial parent or to the child, and
- (2) given the existence of one of the following three circumstances, the best interest of the child is served by modification:
 - (a) the custodian agrees to modification, or
 - (b) the child has been integrated into the family of the petitioner with the consent of the custodian, or
 - (c) the child's present environment seriously endangers his physical, mental, moral, or emotional health, and the harm of a change in custody is outweighed by the advantage of a change in custody.

The court's interpretation of the statute's purpose was first expressed in *Holm v. Holm*,¹¹⁶ in which the court adopted this statement of the commissioners of the uniform act: "This section is designed to maximize finality (and thus assure continuity for the child) without jeopardizing the child's interest."¹¹⁷ The statute makes it very difficult to modify custody, especially during the first two years following the decree, but does provide for a "safety value" for emergency situations. In recent cases, the court continues to adhere strongly to the evaluation of the commissioners that the finality of the custody decree is of greater importance to the best interest of the child than the determination of which parent should have custody.¹¹⁸

115. Formerly codified at R.C.M. 1947, § 48-339 (Supp. 1977).

116. ___ Mont. ___, ___, 560 P.2d 905, 908 (1977).

117. Commissioners' Note to UMDA § 409, 9 U.L.A. 512 (1973).

118. See, e.g., *Easton v. Easton*, ___ Mont. ___, ___, 574 P.2d 989, 993 (1978).

As in pre-UMDA cases, the best interest of the child in UMDA cases is the primary consideration of the court;¹¹⁹ however, in response to the new statute, the court has altered its concept of what it considers to be in the best interest of the child. There is now, in effect, a rebuttable presumption that it is in the best interest of the child that the custody decree be final. The presumption can be rebutted by showing the existence of the circumstances listed in subsection (2) if the petition for modification is submitted more than two years following the initial decree, or those listed in subsections (1) and (2) if the petition is submitted less than two years following the decree. In UMDA cases prior to and during the October-October period, subsections (1) and (2) and the subsections thereof were held to be jurisdictional prerequisites to petitions for modification of custody decrees.¹²⁰

The topics in the following parts of this section present problem areas within the custody modification statute to which the court addressed itself during the October-October period. Complicating analysis of the cases is the fact that the court has not yet found it necessary to define "custody" or "custodial parent." It has used the terms inconsistently to refer either to the legal custodian or to the parent in physical possession of the child at the time the petition is submitted. To avoid that confusion, the term "custody" (and its derivatives) refers here only to the responsibility for the child's care and welfare entrusted to a parent by a court of law.

a. "Jurisdictional Prerequisites" to Modification within Two Years

In the leading case of *Holm v. Holm*,¹²¹ the court recognized that according to what is now MCA § 40-4-219 (1978),¹²² there is a double requirement for a custody modification petition submitted during the two-year period following the custody decree. The *Holm* analytical mode has been the standard followed by the court in most subsequent cases.¹²³ In the recent cases of *Olson v. Olson*,¹²⁴ and

119. In re Dallenger, ___ Mont. ___, ___, 568 P.2d 169, 172 (1977); Gianotti v. McCracken, ___ Mont. ___, ___, 569 P.2d 929, 932 (1977); Schiele v. Sager, ___ Mont. ___, ___, 571 P.2d 1142, 1145 (1977).

120. See *Holm v. Holm*, ___ Mont. ___, ___, 560 P.2d 905, 908 (1977); In re Dallenger, ___ Mont. ___, ___, 568 P.2d 169, 172 (1977); Gianotti v. McCracken, ___ Mont. ___, ___, 569 P.2d 929, 931-32 (1977); Schiele v. Sager, ___ Mont. ___, ___, 571 P.2d 1142, 1145 (1977).

121. ___ Mont. at ___, 560 P.2d at 907-08.

122. Formerly codified at R.C.M. 1947, § 48-339 (Supp. 1977).

123. In *Easton v. Easton*, ___ Mont. ___, ___, 574 P.2d 989, 992 (1978), the statute was incorrectly cited as prohibiting modification of the custody decree within two years after entry unless the requirements of subsection (2)(c) alone were met. It is possible that by

Strouf v. Strouf,¹²⁵ for example, the court found that the trial court lacked jurisdiction when the petitioner did not file the affidavit required in subsection (1)¹²⁶ and when the affidavit filed did not contain facts sufficient to show that the child's present environment seriously endangered his physical, mental, moral, or emotional health.¹²⁷

b. "Present Environment"

The court has either implied or specifically defined the term "present environment" under MCA § 40-4-219(1) and (2)(c) (1978)¹²⁸ to refer both to the child's immediate surroundings at the time the petition for custody modification is submitted,¹²⁹ and to what his surroundings were while with the parent not in possession of the child at the time the petition is submitted.¹³⁰ Despite the apparent inconsistencies, however, as the court has applied the term, "present environment" can be understood consistently to refer to "present legal custody arrangement" rather than to the present, immediate surroundings of the child. In all cases, what the court appears to have considered in the end is the arrangement the custodial parent has made for the care of the child, whether that arrangement included retaining possession of the child or giving temporary possession of the child to the non-custodial parent or another relative.

The recent case of *Hamilton v. Hamilton*¹³¹ is especially revealing. In *Hamilton*, the court explicitly stated that the child's "present environment" was that which he was experiencing while in the possession of his father, the non-custodial parent, during the period the father petitioned for modification.¹³² Since there was no showing that the child's environment with the father seriously endangered him, the trial court was held to have lacked jurisdiction to hear the petition to modify custody. But then the supreme court went on to consider that the father had made no allegations concerning what the child's environment would be if returned to the possession of his mother, the custodial parent. Since there were no

meeting the requirements of subsection (2)(c), the requirements of subsections (1) and (2)—the correct prerequisites—would be met, but that is not necessarily the case.

124. ___ Mont. ___, 574 P.2d 1004 (1978).

125. ___ Mont. ___, 578 P.2d 746 (1978).

126. *Olson v. Olson*, ___ Mont. at ___, 574 P.2d at 1007.

127. *Strouf v. Strouf*, ___ Mont. at ___, 578 P.2d at 748.

128. Formerly codified at R.C.M. 1947, § 48-339(1) and (2)(c) (Supp. 1977).

129. *Weber v. Weber*, ___ Mont. ___, 578 P.2d 1102 (1978).

130. *Groves v. Groves*, ___ Mont. ___, ___, 567 P.2d 459, 463 (1977).

131. ___ Mont. ___, 580 P.2d 104 (1978).

132. *Id.* at ___, 580 P.2d at 106.

facts offered to show that that environment would seriously endanger the child, the trial court was held also to have lacked jurisdiction to modify custody on that basis.¹³³

c. "Change in Circumstances"

The "change in circumstances" in MCA § 40-4-219(2) (1978),¹³⁴ is a term of art defined by the court to refer to circumstances changed so substantially that the best interests and general welfare of the child can be promoted by alteration of the decree.¹³⁵ In *Weber v. Weber*,¹³⁶ the court said that a change in the custodial parent's health which was serious enough to require out-of-state medical treatment over a period of a few months was not a change substantial enough to require modification of the custody decree under § 40-4-219(2)(b) and (c).

d. "Integration into Petitioner's Family"

In *Weber*,¹³⁷ a child had been left by the custodial parent, the mother, in the care of the father temporarily while she sought out-of-state medical treatment and subsequently to enable the child to attend school in the father's community. The court found that the child had not been integrated into the petitioning father's family so as to meet the requirements for modification of custody under what is now MCA § 40-4-219(2)(b) (1978),¹³⁸ because the mother had not consented to the father retaining permanent custody. Instead, upon the filing of the petition for modification, the mother sought a temporary restraining order and the child was returned to her.

e. Affidavits

According to MCA § 40-4-220 (1978),¹³⁹ a crucial step in petitioning for modification of a custody decree is the submission of an affidavit setting forth facts which support the jurisdictional prerequisites of the appropriate subsections of MCA § 40-4-219 (1978).¹⁴⁰ As mentioned above, in *Olson*,¹⁴¹ *Hamilton*,¹⁴² and *Strouf*,¹⁴³ the peti-

133. *Id.*

134. Formerly codified at R.C.M. 1947, § 48-339(2) (Supp. 1977).

135. *See Foss v. Leifer*, 170 Mont. 97, 101, 550 P.2d 1309, 1311 (1976).

136. ___ Mont. ___, ___, 576 P.2d 1102, 1104 (1978).

137. *Id.* at ___, 576 P.2d at 1103-04.

138. Formerly codified at R.C.M. 1947, § 48-339(2)(b) (Supp. 1977).

139. Formerly codified at R.C.M. 1947, § 48-340 (Supp. 1977).

140. Formerly codified at R.C.M. 1947, § 48-339 (Supp. 1977).

141. ___ Mont. at ___, 574 P.2d at 1007.

142. ___ Mont. at ___, 580 P.2d at 106.

143. ___ Mont. at ___, 578 P.2d at 748.

tioners either did not submit the prescribed affidavit, or the affidavit they did submit did not set forth facts supporting the requested modification. All three petitioners lost their cases, in part at least, because of that neglect.

In *Strouf*,¹⁴⁴ the court pointed out that the affidavit statute requires that three steps be taken before a court has jurisdiction to issue an order to show cause. Although not set out in the case, based on the structure of the statute, the steps must be: (1) the petitioner must file the affidavit; (2) the petitioner must give notice and a copy of the affidavit to the opposing party, who may respond thereto by his own affidavit; and (3) the court must find that adequate cause for hearing the motion is established by the affidavits. In *Strouf*, the petitioner neglected to give notice, and as a result, the order to show cause was vacated.

4. *Modification of Visitation Rights*

The Montana court apparently considers visitation and custody to be relative matters, that is, that visitation over an extended period—two months, for example—is the equivalent of custody. In *Olson*,¹⁴⁵ the district court had modified the decree so that the children remained year-round in the custody of the father, but the mother's visitation rights were extended to include the period from June 15 through August 15 of every year and every other Christmas vacation. The modification of the decree took place less than two years after the initial decree. The supreme court determined that the district court had modified the custody decree rather than the mother's visitation rights, and that the mother's petition thus had to meet the requirements of what is now MCA § 40-4-219(1) (1978).¹⁴⁶ The court declared, "Labeling this 'visitation' does not change its substance which is 'custody.'"¹⁴⁷

B. *Child Custody: Youth in Need of Care*

Montana's act for abused, neglected, and dependent youth was enacted in order to further the state's policy to "ensure that all youth are afforded an adequate physical and emotional environment to promote normal development," and in proper cases "to

144. *Id.*

145. ___ Mont. ___, 574 P.2d 1004 (1978).

146. Formerly codified at R.C.M. 1947, § 48-339(1) (Supp. 1977).

147. ___ Mont. at ___, 574 P.2d at 1007. As was noted by the Montana court, the Colorado court in *Manson v. Manson*, 35 Colo. App. 144, 529 P.2d 1345 (1974), held that an identical statute does not apply to the modification of visitation rights. In *Manson*, the mother had custody of the children under the decree for the entire year and had petitioned to have the father's visitation rights substantially decreased.

compel . . . the parent or guardian of a youth to perform the moral and legal duty owed to the youth."¹⁴⁸ Under the act, the best interest of the child remains the paramount consideration in all cases of child abuse, neglect, or dependency;¹⁴⁹ whenever possible, however, the protection of the child's health and welfare is to be achieved in a family environment, and the unity and welfare of the family is to be preserved.¹⁵⁰

1. *Best Interest of Child*

During the October-October period, the court held in *In re Doney*,¹⁵¹ and *In re G.*,¹⁵² that a finding of dependency, abuse, or neglect of a child is a prerequisite to an application of the "best interest of the child test" in determining child custody. In *In re G.*,¹⁵³ and *In re J.J.S.*,¹⁵⁴ the court also reaffirmed that the legislative policy to preserve the unity and welfare of the family will prevail only when there is no proof of the neglect of the child.

2. *Appointment of Counsel to Represent Indigent Parents*

*In re M.D.Y.R.*¹⁵⁵ is the first Montana case in which due process and equal protection have been raised as factors to be considered in the interpretation of what is now MCA § 41-3-401(12) (1978).¹⁵⁶ In that case an indigent mother argued that the initial temporary custody hearing in a dependency and neglect proceeding is a crucial and formative stage of the permanent custody proceeding, and that because she was not appointed counsel at the temporary custody hearing, she was denied equal protection and her rights and interests were prejudiced at a formative stage in the litigation.

MCA § 41-3-401(12) (1978) provides that "The court may at any time on its own motion or the motion of any party appoint a guardian ad litem for the youth or counsel for any indigent party." In *M.D.Y.R.* the court pointed out that appointment of counsel for an indigent party is a matter of discretion for the trial judge. The court elaborated on the statutory language, however, and held that

148. MCA § 41-3-101(1) (1978) (formerly codified at R.C.M. 1947, § 10-1300(1) (Supp. 1977)).

149. *In re G.*, ___ Mont. ___, ___, 570 P.2d 1110, 1114 (1977); *In re J.J.S.*, ___ Mont. ___, ___, 577 P.2d 378, 381 (1978).

150. MCA § 41-3-101(1)(c) and (d) (1978) (formerly codified at R.C.M. 1947, § 10-1300(3) and (4) (Supp. 1977)).

151. ___ Mont. ___, ___, 570 P.2d 575, 578 (1977).

152. ___ Mont. ___, ___, 570 P.2d 1110, 1113.

153. *Id.* at ___, 570 P.2d at 1114.

154. ___ Mont. ___, ___, 577 P.2d 378, 382 (1978).

155. ___ Mont. ___, 582 P.2d 758 (1978).

156. Formerly codified at R.C.M. 1947, § 10-1310(12) (Supp. 1977).

although an indigent parent is not always entitled to an appointment of counsel in a dependent-neglect custody hearing, he is entitled in each case to a judicial decision as to his right to counsel. Furthermore, if that decision is to deny counsel, the district court must state its grounds for refusal in the records. Adopting a Ninth Circuit court rule, the Montana court held that the prescribed judicial decision must be made "whenever the indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or prolonged separation from the child."¹⁵⁷

Although the court did not require the district court in *M.D.Y.R.* to comply with its newly declared requirement of a judicial decision, it did find that the indigent mother had not been deprived of equal protection or due process. The court's decision was based on the facts that the child would have been returned to the mother at any time the Department of Social and Rehabilitation Services personnel (hereinafter SRS) were reasonably certain that the child would not be neglected, and that the mother had opposed neither the custody of the child by SRS nor the program of education in child rearing skills that had been proposed for the mother by SRS. Indeed, the court points out, the appellant's motion to dismiss and vacate the order of temporary custody had even been granted by the district court almost a year after the motion had been made and just prior to ordering the petition for permanent custody to be heard. The court summarily dismissed as speculative the appellant's argument that being deprived of child custody under the temporary order adversely affected her relationship with the child so as to influence the decision in the permanent child custody hearing.

3. *Appointment of Counsel to Represent Minor Child*

a. *Abuse of Discretion*

The rule of *Stubben v. Flathead County Dept. of Welfare*,¹⁵⁸ that appointment of counsel to represent a minor child in dependency proceedings is not mandatory, but within the discretion of the court,¹⁵⁹ has recently been modified in two cases. In *In re Gullette*,¹⁶⁰ decided just prior to the period of this survey, the Montana court had held that "where the custody [of a child] is in serious dispute, the court shall appoint independent counsel for the child or make a finding stating the reasons such appointment was unnecessary." In

157. ___ Mont. at ___, 582 P.2d at 765.

158. ___ Mont. ___, 556 P.2d 904 (1976).

159. *Id.* at ___, 556 P.2d at 905.

160. ___ Mont. ___, 566 P.2d 396 (1977).

404(2) (1978)¹⁶⁷ requires an adoption agency to be nonprofit before it can obtain a license.

D. *Youth Court: Rights of a Youth in a Predetention Hearing*

In re Marten,¹⁶⁸ is the first case to interpret what is now MCA § 41-5-102(4) (1978)¹⁶⁹ which provides that the purpose of the Montana Youth Court Act is to provide judicial procedures in which a youth is assured a fair hearing and recognition and enforcement of his constitutional and statutory rights. In this case, the court held that whether to hold a predetention hearing is a matter for the court's discretion, and further, that in a predetention hearing, it is not error to deny the assistance of available counsel to the youth when the attorney's identity as the youth's counsel is not known to a certainty by the court. The attorney had been present at the hearing and requested to address the court on a matter pertinent to the issue at hand, but was not allowed to do so until after the judge had issued the detention order. The court also held that it was proper to hold the youth in detention over the weekend prior to hearing charges against him, since his parents could not be located and the family with whom he had been living, although willing to assume responsibility for the youth, was not a licensed foster care home. Justice Shea dissented on the ground that the hearing was devoid of procedural rights.¹⁷⁰

E. *Summary*

In summary, significant changes in the law regarding parent-child relationships have generally taken the form of refinement of definition of statutory terms and the addition of new procedural rules. From cases heard during the October 1977-October 1978 survey period, the following new rules and problem areas can be identified:

In regard to child custody following dissolution, the attorney should be aware that, absent jurisdiction by another state or an emergency situation involving abuse, dependency, neglect, or abandonment, the mere presence of the child in Montana is not sufficient to give jurisdiction to a Montana court. It is mandatory that a court consider the child's wishes as to the custody arrangement and that any *in camera* interview with the child be entered in the record, unless the record requirement is waived by the parties. A party's

167. Formerly codified at R.C.M. 1947, § 10-703(2).

168. — Mont. —, 570 P.2d 1122 (1977).

169. Formerly codified at R.C.M. 1947, § 10-1202(4) (Supp. 1977).

170. — Mont. at —, 570 P.2d at 1127.

request for an investigation and report by the county welfare department should be made prior to the hearing, and the investigator must be examined on the stand in order for the report to be admitted as evidence. Any attorney appointed to be counsel for a child in a custody hearing is expected to represent his client actively.

In regard to modification of custody, the "jurisdictional prerequisites" for a hearing on a petition to modify a custody decree must be met to the letter. It is especially important to remember that a petition to modify a custody decree during the two-year prohibition period must meet the special requirements: the submission of an affidavit containing facts which show that the child's present environment seriously endangers his moral, emotional, physical, or mental health. The court's definitions of terms in the custody modification statute are non-existent or inconsistent. For example, the court's use of the terms "custody" and "present environment" can be particularly troublesome, and a lengthy extension of visitation rights is considered to be a modification of custody.

In regard to abused, dependent, and neglected youth, the attorney should be aware that in a custody hearing the court must make a judicial decision as to the right to court-appointed counsel of any indigent parent or a child old enough to appreciate the situation and express himself.

In relation to the adoption statutes, a person placing children for adoption must be licensed as an adoption agency. Finally, under the Youth Court Act, the supreme court appears not to be willing to go to great lengths to assure a youth of his constitutional rights in a predetention hearing.