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Recent Developments--Legislation

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THE NEW MONTANA ANTI-DISCRIMINATION LAW

The Equal Dignities provision of the new Montana Constitution, MONT. CONST., art. II, § 4, opened the door for pervasive anti-discrimination laws in Montana. The Montana Legislature has responded by passing S.B. 697, Freedom From Discrimination and Human Rights Commission Act. Ch. 283, Laws of Mont., 1974; R.C.M. 1947, §§ 64-301 through 64-312 and § 82A-1015. The new law substantially expands the scope of prohibited discriminatory practices in Montana and provides more effective remedies for those injured.

The expansion runs in two directions. First, in addition to the former prohibition against discrimination according to race, creed, color, or national origin, the present law prohibits, in specified instances, discrimination due to sex, physical handicap, mental handicap, age, and religion. Secondly, the areas subject to the limitations now include education, financial institutions, state and political subdivisions, and labor organizations, besides the areas of housing accommodations and employment which were formerly covered.

Perhaps the most important feature of the new law is that it creates a Commission of Human Rights to assist in its enforcement. This should be of considerable interest to the Montana practitioner encountering discrimination problems. Unfortunately the sections relating to this Commission were compromised to appease various interests, leaving it a less than dynamic enforcement body. The original proposal, H.B. 558, more clearly defined the function of the Commission and gave it subpoena power. These key provisions were simply deleted from the Senate Bill (No. 697) finally approved. Also, a part of the function of the Commission was delegated to the Department of Labor. Certainly this Department has a stake in the law but not of sufficient breadth to ensure adequate treatment of non job-related discrimination.

At any rate, the procedure presently provides that anyone who believes he is aggrieved by any discriminatory practice should file a complaint with the Labor Department. The Department will investigate the allegations and attempt to bring the parties to a conciliation. If the attempts of the Department fail, the Human Rights Commission is notified; and the Commission then conducts a hearing under the guidelines of the Montana Administrative Procedure Act to determine the rights of the parties. The Commission has broad remedial discretion, and its orders can be enforced by injunction if necessary. There are also criminal penalties for willful violations of a Commission order.

Theoretically there is now relief for almost every conceivable type of discrimination in Montana. In practice the Human Rights Commission and Department of Labor have devoted most of their efforts to defining their respective responsibilities, so there are no visible results as of yet. A number of clarifying amendment proposals will be presented to the next legislature along with a request for more adequate funding. Approval of these is a must if the Anti-Discrimination Law is to be an effective deterent to unfair discriminatory practices in Montana. At this writing it represents a significant first step.

—Phil Grainey—

LOCAL GOVERNMENT STUDY COMMISSION

The delegates to Montana's recent Constitutional Convention indicated their concern with the structure and operation of Montana counties and cities by including within the new constitution an article devoted solely to local government and containing many innovative provisions that may well lead to widespread changes in the form of and method of operating local government units. MONT. CONST., art. XI (1972). Paramount among these provisions were directions to the legislature to provide optional or alternative forms of government to local government units (MONT. CONST., art. XI, § 3(1)) and permitting local government units to adopt self-government charters (MONT. CONST., art. XI, § 5). Furthermore, MONT. CONST., art. XI § 9(1), directs the legislature to "... provide procedures requiring each local government unit or combination of units to review its structure and submit one alternative form of government to the qualified electors."

Two bills passed in the legislative session were in response to these constitutional directives. The first, H.B. 774 enacted as R.C.M. 1947, §§ 69-5116 through 69-5121, established a commission of nine members to be appointed by the governor with the responsibilitiy of making a detailed study of local government operation and structure. Based upon these studies, the commission is then "... to prepare a revised code of local governmental law" (R.C.M. 1947, § 16-5118(1)) and is further to make

available "[w]ritten reports with substantive recommendations adopted by the commission to the governor, members of the legislature, and to units of local government." R.C.M. 1947, 16-5118(3). A further important provision allows the commission to consult with and assist local government study commissions.

H.B. 804 or R.C.M. 1947, §§ 16-5101 through 16-5115, establishes a procedure for review by local government units *(i.e.,* municipalities and counties) of their structure and operation. This review is to be accomplished through the use of local study commissions, the members of which are to be elected at the general election in their particular communities. Each study commission is required to compare the existing form of government with other forms available under Montana law and to present an alternative form of government to the local electors. Additionally, the study commission may draft a self-government charter to be submitted to the electors. Further important features of H.B. 804 are provisions for cooperative studies by any two or more study commissions and provisions allowing the commissions to retain consultants and to contract for studies and reports prepared by either public or private agencies.

These two bills provide an opportunity for Montana to develop more flexible, economic, and responsive local governmental structures designed to fit the needs and particularities of greatly differing Montana communities. Although it perhaps provides little opportunities for financial remuneration to the Montana lawyer, it provides him with outstanding opportunities to fill his role as a community leader, lending his expertise and experience to his community as it seeks a better way to govern itself.

—David Wing—

THE STRIP MINE SITING ACT

This act, S.B. 681, Ch. 280, Laws of Mont., 1974; and codified as R.C.M. 1947, §§ 50-1601 through 50-1616, has been in effect since July 1, 1974. It provides in § 50-1605 that, "No person may commence preparatory work (for a new strip mine) until the operator shall first have obtained from the [Department of State Lands] . . . a mine site location permit . . ., or a permit under Chapter 10, Title 50, R.C.M. 1947 [The Montana Strip Mining and Reclamation Act of 1973] . . . ." [Brackets added.] Preparatory work is any on-site disturbance associated with initiating a new strip mine; *e.g.,* railroad and building construction, roadwork, dragline erection, etc. R.C.M. 1947, § 50-1603(5). Such activities were overlooked in the 1973 Strip Mine and Reclamation Act, *supra,* which requires permits for strip mining ". . . which penetrates a mineral deposit and removes mineral directly . . . from a surface excavation . . ." and for prospecting which disturbs the surface ". . . for the purpose of determining the location, quantity, and quality of a natural mineral deposit." The effect of the new siting act is to complement the former act by bringing under the permit system work which is neither for removing mineral nor for location purposes, but is preparatory work.

Application procedure for a mine site location permit is explained in R.C.M. 1947, § 50-1607. The permit is valid for 1 year, but is renewable annually until a strip mine permit is obtained under the 1973 act. The section also provides for a $50 filing fee and requires a bond of $200 to $1,000 per acre of the proposed site to ensure compliance with this act and reclamation of the site should the operator abandon the operation.

Civil penalties are set out in R.C.M. 1947, § 50-1611, for violation of a provision of the new siting act or of any rule pursuant to it. The Department administers fines of $100 to $1,000 per day against violators; and if operators continue in violation after being served with notice, it may suspend or revoke permits, disqualify the operator for future permits, and request the Attorney General to sue for recovery or injunction. The State Board of Land Commissioners has power to make rules under the act and to hear complaints. Appeal is made in accordance with The Montana Administrative Procedures Act.

A novel "watch-dog" system created by R.C.M. 1947, § 50-1612, will be significant. A right vests in any Montana resident, knowing that a requirement of the act is not being enforced, to bring specific facts to the attention of the responsible public official; and if the official refuses or after a reasonable time neglects to enforce the act, the resident may bring an action of mandamus in district court to compel enforcement.

There is a potential confusion in the siting act. An operator under a strip mining permit, wishing to do preparatory work on a site adjacent to or near the area of his permit cannot know whether to apply to the Department for an amendment allowing expansion of his present operation under the 1973 act or to apply for a mine site location permit for a new strip mine under the new act. In this situation the distinction between an expansion and a new mine depends on the definition of a new strip mine in R.C.M. 1947, § 50-1603(4). It is a new strip mine if the Depart-

ment subjectively feels there are ". . . important differences in topography, soils, wildlife, geologic structure, or vegetation from an existing strip mine operation."

Most of the remaining sections of this act are repetitive, often verbatim, of sections in the 1973 act. Without these sections the new siting act might make an appropriate amendment to the former act.

—William P. Richardson—

MONTANA SUBDIVISION AND PLATTING ACT

The new subdivision and platting act, Ch. 38, Laws of Mont., 1974; R.C.M. 1947, §§ 11-3859 through 11-3876 (hereinafter all citations are to R.C.M. 1947), effective February 25, 1974, replaces Ch. 6 of Title 11. The new act, highly publicized and fiercely debated, is vastly different from the old law whose existence was rarely recognized. This note will cover the law's four major provisions: (1) surveying requirements, (2) adoption of local subdivision regulations, (3) submission of subdivision plat to governing body, and (4) park dedication requirements.

(1) Surveying Requirements

Every subdivision of land must be surveyed and platted by or under the supervision of a registered land surveyor. The plats then must be filed with the local clerk and recorder who is not to record any instrument which purports to transfer title unless the survey certificate has been filed with him and the instrument adequately describes the tract. Section 11-3862 notes, however, many exceptions to this basic survey requirement. For instance, land acquired for state highways and some divisions of state land are exempt. Other exemptions are divisions made for the purpose of relocating common boundary lines or divisions made for the purpose of a gift or sale to any member of the landowner's immediate family. Further, an occasional sale or divisions made with a covenant running with the land that it will be used for agricultural purposes only are exempt as are numerous dispositions (*i.e.*, creation by operation of law and interests in some natural resources). The list of dispositions is preceded by the caveat ". . . unless the method of disposition is adopted for the purpose of evading this act." Note, too, the sale of part of a building is not a division of land and thus is not subject to the requirements.

(2) Adoption of Local Regulations

Section 11-3863 provides that following a public hearing, every governing body must adopt subdivision regulations reasonably providing for the orderly development of its area. Importantly, minimum standards have already been established by the Division of Planning and Economic Development. While zoning laws are constitutional, a governing body must not be overzealous with its regulations which could result in unconstitutional taking of private land without just compensation. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Subdividers should note that the same section requires the submission of an environmental assessment; but if the subdivision contains fewer than 10 parcels and less than 20 acres, no report is necessary.

(3) Submission of Subdivision Plat to Governing Body

By § 11-3866, every subdivider must present to the governing body for approval or disapproval a preliminary plat of the proposed subdivision which will be reviewed to determine whether it conforms to the local master plan and adopted regulations. A public hearing is also required.

(4) Park Dedication Requirements

Section 11-3864 requires that a subdivision plat show that a certain portion of the combined area of the lots is dedicated to public use. Since counties may be faced with the large burden of continual maintenance, the act provides numerous exceptions and alternatives. For example, if the dedication of land is undesirable, a cash donation may be accepted. Some other exemptions are: (a) where land is permanently set aside for a park sufficient to meet the needs of the residents; (b) where a subdivision has parcels of 5 acres or more; and (c) where land deeded to a property owners association is held in perpetuity for park use.

—Angus Fulton—

PROPERTY TAXPAYERS INFORMATION ACT

The Property Taxpayers Information Act, S.B. 741, Ch. 302, Laws of Mont., 1974; R.C.M. 1947, §§ 84-7201 through 84-7208, became effective on its approval date, March 27, 1974. Intended to provide the taxpayer with notice of proposed increases in the *ad valorem* property tax revenues, the act delineates certification of the millage value by the Department of Revenue as well as the notification procedure a taxing authority must follow if it intends to exceed the certified tax millage.

The Department of Revenue determines and certifies a millage which will provide each taxing authority with the same *ad valorem* tax revenues as levied the previous

year. Computations are made from the Revenue Department's yearly prepared tax assessment roll. Exclusions are made for all new construction and improvements in each taxing authority, and the millage set on the basis of 95 percent of the assessment roll. An estimate for the value of new construction and improvements is provided to each taxing authority. R.C.M. 1947, § 84-7202.

A taxing authority may not budget an increased amount of *ad valorem* tax revenue, exclusive of the Revenue Department's estimate of improvement and new construction, of property appearing on the assessment roll for the first time. Attempts to increase the budget must be accompanied by a newspaper advertisement which states the proposed budgetary increase. The newspaper must be in general circulation within the taxing authority's jurisdiction. R.C.M. 1947, § 84-2703.

To assess a millage greater than the certified millage, a resolution or an ordinance must be passed by the taxing authority's governing board. The board must hold a public meeting, its date, and place fixed, advertised at least seven days prior to the meeting. Publication must be in a general circulation newspaper within the taxing authority's boundaries. The meeting may coincide with the tentative budget session which is required by law. If the increased millage resolution is not passed at the public session, the date, time, and locale for an additional meeting must be announced. If the added session is not scheduled to occur within two weeks, the advertisement procedure of § 84-2703 must be repeated. R.C.M. 1947, § 84-2704.

A copy of the proposed millage increase must be sent to the assessor, treasurer, and the Department of Revenue. R.C.M. 1947, § 84-2705.

The Revenue Department is required to notify a taxing authority of tax assessment roll changes which result from action by county or state tax appeal boards. Any required millage increase the Revenue Department makes, to match the previous year's *ad valorem* tax revenue, may be adopted without further public notice. R.C.M. 1947, § 84-7206. If a further millage increase is required, the entire notice and general board meeting process must be repeated. R.C.M. 1947, § 84-2707. There is nothing to prevent a taxing authority from reducing the millage. R.C.M. 1947, § 84-2708.

Primarily a statute creating a notification process concerning *ad valorem* property tax information, the act also contains reference to the state and county tax appeal boards. R.C.M. 1947, §§ 84-601 through 84-610, Equalization of Taxes and County Tax Appeals Boards. A lawyer will probably deal more with such an appeal, especially since recent amendments have set forth new exemptions and made all household goods and furniture exempt from property tax assessment. R.C.M. 1947, § 84-202(2).

—Michael McCabe—

TRUSTEE'S POWERS ACT

The Trustee's Powers Act, H.B. 789; Ch. 297, Laws of Mont., 1974; R.C.M. 1947, §§ 86-901 through 86-911, which became effective on March 25, 1974, is of special importance to lawyers drafting trust instruments. Contrary to the traditional manner of a trustee having those powers granted by the trust instrument, a trustee now has all powers of this act *plus* those specified in the instrument. Further, the act is not exclusive, but gives a trustee any additional powers consistent with the idea of a prudent man acting for the purposes of the trust. Therefore, the lawyer will want to be cognizant of this act both with a view to granting the trustee power as well as limiting his power.

The primary powers of trustees are delineated in § 86-904. For example, a trustee may now enter into a lease, an option to purchase or sell, or dispose of or mortgage any trust asset. Further, any mortgage or lease may extend beyond the terms of the trust itself. A trustee is also relieved of the limitation of not dealing with the trust in a way in which he has an interest. However, all but the most basic powers are, in the absence of court authorization, denied a trustee whose individual interest conflicts with the exercise of his power. Trustees are also granted powers to facilitate the smooth allocation of expenses, income, and distributable property to beneficiaries. A trustee may, consonant with existing law, allocate both income and expenses while also creating and maintaining reserves to cover depreciation, mineral depletions, amortization, or obsolescence.

Although the Trustee's Powers Act gives a trustee substantial power and freedom in dealing with a trust, the act also provides basic limitations. A trustee must always act consistent with his capacity as a fiduciary in accordance with the prudent man doctrine. Prudent man is defined in § 86-902 and is largely a liberal codification of the concept applied in case law. The trustee must act as do "men of prudence, discretion, and intelligence" with regard to their own affairs viewed, of course, in terms of the circumstances then existing. Further, the trustee must always have an eye both to producing income as well as maintaining the corpus. Beyond this, the limitations of the kinds of investments made and property held are lifted. If more than two

trustees exist, they may act by majority rule; and although the opposing trustee is not liable for the consequence of the action, he is liable for failure to prevent breach of trust or failure to administer the trust.

There are other considerations to be noted when considering the powers granted trustees. First, the act itself applies only to traditional trusts and excludes constructive, resulting, voting, and liquidation trusts. In other words, any trust not susceptible to general trust administration is not affected by this act. Secondly, any trust excluded from this act may incorporate by reference this act or any of its parts.

—Randi Hood—

THE ABORTION CONTROL ACT

The 1974 Abortion Control Act, Ch. 284, Laws of Mont., 1974; R.C.M. 1947, §§ 94-5-613 through 94-5-624 (effective March 25, 1974), sets down statutory limitations upon the performance of abortions intended to correspond with the guidelines set forth by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). Montana's previous abortion control statute, R.C.M. 1947, §§ 94-401-402, was held unconstitutional by the Montana Federal District Court in the case of *Doe v. Woodahl, unreported,* (1973).

The two most controversial provisions of the act provide for the "informed consent" of the woman, R.C.M. 1947, § 94-5-616(1), and written notice to the woman's husband if he is not voluntarily separated or, if she is single and under 18, to her parents, R.C.M. 1947, § 94-5-616(2). Both requirements are waived in instances where abortion of the fetus is certified by the attending physician to be necessary to preserve the woman's life. R.C.M. 1947, § 94-5-616(3).

The "informed consent" requires full disclosure by the attending physician of all information relating to the stage of development of the fetus, the abortion procedure, alternatives to abortion, and possible physical and psychological effects of abortion. R.C.M. 1947, § 94-5-615(3).

In keeping with the fourteenth amendment protection of a woman's right to abortion which the Supreme Court defined in *Roe v. Wade, supra,* the act limits the performance of abortion after the first 3-month period of gestation to a licensed hospital. R.C.M. 1947, § 94-5-618(1)(b).

In its third major provision, the act delineates protections for the life and health of a viable fetus. The act forbids the abortion of a viable fetus except when the attending physician certifies in writing to the necessity of the procedure in order to preserve the life or health of the woman. R.C.M. 1947, § 94-5-618(1)(c). The written concurrence of two other physicians is required if the procedure is undertaken to preserve health, *id.* The act defines "viability" to mean ". . . the ability of a fetus to live outside the woman's womb, albeit with artificial aid." R.C.M. 1947, 94-5-615(5).

Timing or performance of the abortion in such a way as to intentionally or negligently endanger the viable fetus is punishable as a felony. R.C.M. 1947, 94-5-618(2). The act defines as criminal homicide any act whereby a person ". . . purposely, knowingly, or negligently causes the death of a premature infant born alive, if such infant is viable." R.C.M. 1947, § 94-5-617(1).

Efforts on the part of ". . . a physician, facility, or other person or agency . . ." at "inviting, inducing, or attracting any person to come to such physician, facility, or other person or agency to have an abortion or to purchase abortifacients . . .", R.C.M. 1947, § 94-5-618(3), are classified by the act to be misdemeanors.

Finally, after establishing a comprehensive system of record keeping, the act guarantees the right of any health care facility, or of any person, to refuse to participate in abortion procedures, R.C.M. 1947, § 94-5-620(1-3), and reinforces that right by providing for injunctive relief as well as monetary damages to one whose right to refuse is interfered with, or who, as a consequence of exercise of that right, is subjected to ". . . loss of any privileges or immunities to which the granting of consent may otherwise be a condition precedent, or for the loss of any public benefits." *id.* at 11 (4).*

*Ed. Note. As this note goes to press, many of the more stringent requirements of the Abortion Control Act are being challenged before a three-judge panel in Montana Federal District Court.

—Gerald J. Navratil—

HABITUAL TRAFFIC OFFENDERS ACT

The Habitual Traffic Offenders Act, R.C.M. 1947, § 31-175 et seq., will become effective on January 1, 1975, and Montana drivers coming within the definition of an

habitual offender will face a mandatory revocation of their driving privileges for three years.

The definition, found at R.C.M. 1947, § 31-177, is based on a scale assigning a conviction point value for various traffic offenses; and a person accumulating 30 or more points in a 5-year period will be subject to the provisions of the act. The five-year period is stated to begin ". . . from and after the passage of this act," but the effective date of the act, and that chosen by the Montana Highway Patrol, is January 1, 1975.

This extended period is different from the systems used by most states. California provides for revocation after an accumulation of 4 or more points in 12 months, 6 or more in 24 months, or 8 or more conviction points in 36 months. (WEST'S ANN. CALIF. VEH. CODE, § 12810). Other states generally choose the two- or three-year period for accumulation of points. Montana also differs from the California statute in that it does not differentiate on the basis of total mileage driven, as does California. But failure to do so was not found to be discriminatory in a District of Columbia case under a statute similar to our own. *Glenn v. Com. of District of Columbia,* 146 A.2d 575, 576 (1958). The court in that decision stated that the purpose of the act was not to punish the individual driver, but to protect society, which is the purpose stated in the Montana act at R.C.M. 1947, § 31-175.

It should be noted that the filing of a civil complaint to declare a defendant an "habitual traffic offender" is mandatory if the Chief of the Montana Highway Patrol certifies to the County Attorney that the permissible number of conviction points has been exceeded by the defendant.

Unless the District Court finds that either the defendant is not the one named in the complaint, or that he does not meet the definition of an habitual traffic offender, the act instructs the Court to order the defendant to surrender his license.

The penalty set out by the act for operating a motor vehicle while such a judgment is in effect is one year's imprisonment or $1,000 fine or both.

Decisions in states with similar conviction point systems have upheld the assignment of points for offenses committed outside that state, and the Montana act fails to exclude such assignment. But California decisions have prohibited the use of a prior conviction for the purpose of suspending a driver's license if it is an invalid one. These two items may become subjects for defenses under the act since they are not resolved by the language contained therein.

—G. Geoffrey Gibbs—

PENALTIES FOR VIOLATION OF CITY ORDINANCES

Chapter 202, Laws of Mont., 1974, is a bill which amends R.C.M. 1947, § 11-950. This section deals with the power of city or town councils to set penalties for violations of local ordinances. Prior to the amendment, the maximum fine could not exceed three hundred dollars ($300.00), and imprisonment could not exceed ninety (90) days. The act increases the maximum fine to five hundred dollars ($500.00) and the maximum imprisonment to six (6) months.

This bill was introduced in the 1974 legislative session at the request of the Montana League of Cities and Towns. It's purpose was to rectify an inconsistency between the maximum penalties available to justices of the peace and police court judges. This resulted in a different maximum penalty for substantially the same offense, depending upon the location of the offense.

For example, if a person were to be arrested for petit larceny within the boundary of a city or town, the maximum penalty available to the police judge was three hundred dollars ($300.00) or imprisonment of ninety (90) days or both. However, if the same person were arrested for misdemeanor theft in a rural area, the maximum penalty available to the justice of the peace would be five hundred dollars ($500.00) or imprisonment of six (6) months or both. This inconsistency was compounded in certain areas of Montana where the same person acts as both justice of the peace and police judge.

The effect of the bill will be to simplify judicial procedure by establishing conformity in the maximum penalties available to police judges and justices of the peace.

—Charles Erdmann—

INCORPORATION OF PUBLIC ACCOUNTING FIRMS

Since 1963 certified public accountants and public accountants in Montana have been able to incorporate as a professional service corporation under Chapter 21 of Title 15 of the Revised Codes of Montana 1947 (hereinafter cited as R.C.M. 1947). At this time, though, the incorporation of public accountants was prohibited by the

code of professional ethics of the American Institute of Certified Public Accounts (hereinafter cited as AICPA Code). AICPA Code, Rule 4.06 (1965). Consequently, many public accounting firms did not incorporate as a professional service corporation. The AICPA Code no longer prohibits incorporation of public accounting firms and allows its members to practice as a professional corporation provided that such corporations retain certain characteristics. AICPA Code, Rule 505 (1973).

Effective July 1, 1974, many of the characteristics set forth in the AICPA Code become requirements under S.B. 536, Ch. 207, Laws of Mont., 1974; codified as R.C.M. 1947, §§ 66-1829.1 and 66-1831.1, which mandates that a professional service corporation organized for the practice of public accounting register with the Montana Board of Public Accountants. This note will place emphasis on the requirements needed to register and on the reasons for those requirements.

The main opposition to incorporation of public accounting firms was based on the fear that incorporation would give rise to a lower professional standard which would result in the loss of public confidence in the profession. Reasons for this fear have been greatly minimized by the passage of R.C.M. 1947, §§ 66-1829.1 and 66-1831.1. To register as a corporation composed of certified public accountants, R.C.M. 1947, § 66-1829.1, requires that all the shareholders of the corporation be certified public accountants in some state and that each shareholder working in Montana be a certified public accountant licensed in Montana. R.C.M. 1947, § 66-1831.1, on the registration of a corporation composed of public accountants, differs only in that its shareholders may also be licensed but need not be certified public accountants. To further assure the continued competence and integrity of the corporation, both statutes require a written agreement binding any nonqualified shareholders and any other shareholders wishing to sell or dispose of their shares only to the corporation or to qualified shareholders. A nonqualified shareholder would include an otherwise qualified shareholder whose shares are not under his ownership or effective control.

Besides these strict qualifications on the shareholder, both statutes require that any staff member employed by the corporation who is certified or registered under Montana law must also be licensed in Montana. The corporation is also required to fill any positions of authority with qualified shareholders. In this manner, the public is assured that lay persons do not exercise any authority whatsoever over professional matters.

Finally, as if to remind the corporations that their primary obligation is to serve the public, each statute requires that the sole purpose and business be to furnish the public services not inconsistent with the practice of public accounting. The statutes thus limit the corporate practice to that field in which it is licensed as a professional but yet allow for recognition of new areas of public accounting.

—John C. McKeon—

THE UNIFORM PROBATE CODE

A substantial improvement over existing Montana probate law is H.B. 557, UNIFORM PROBATE CODE; Ch. 365, Laws of Mont., 1974; R.C.M. 1947, §§ 91A-1-101 through 91A-6-104, effective July 1, 1975. On this date the Code will apply to any wills of decedents dying thereafter, and to any pending court proceedings regardless of the time of death of the decedent. In case of conflict with any existing provisions of Montana law relating to probate, the Code takes precedence and is deemed to be controlling.

One example of modernization in the Code is that the new law uses the term "personal representative" instead of "executor" and "administrator". Another example is that the Code abolishes the distinction between real and personal property. All property not disposed of by the decedent's will passes to his heirs in the same manner.

The administration of estates system of both formal and informal probate proceedings is the heart of the Code. Formal administration will continue to require court supervision. Informal probate, however, would cut the present 12 to 15 month waiting period to only 6 months; in some cases, an estate could be handled in a few days. For example, assume Riley died leaving his estate to his wife, and the will is uncontested. The Code offers a widow a $20,000 homestead allowance, a $3,500 specific exemption, and a family allowance not to exceed $6,000. If the inventory value of the assets is less than $29,500, Mrs. Riley could distribute the property to herself immediately after obtaining a clearance from the State Department of Revenue. If an heir or creditor questions the handling of an estate during informal administration, the personal representative may then shift to formal administration. One of the key concepts of the Code is the "in and out" process that allows the personal representative to utilize formal administration only as needed, then to return to informal administration. For instance, if appointment of a personal representative is challenged,

then the proceedings may be shifted from the informal to the formal method. Later, if there is no will contest, the proceedings may return to the informal method.

The Code allows transfer and settlement of small estates (not exceeding $5,000 in value) by affidavit without use of a personal representative. Other features provide for a final assumption of intestacy if no will is probated within 3 years from death, and for a 3 year limitation of actions that bars stale claims that arose against the estate prior to death when no notice to creditors has been published.

The Code abolishes the common law estates of dower and curtesy. The intestate share of a surviving spouse is: (1) entire intestate estate if there is no surviving issue or parent, (2) first $50,000 plus one-half the balance of the intestate estate if there are no surviving issue, but one or more parents, (3) first $50,000 plus one-half the balance if there are surviving issue of both decedent and spouse, (4) one-half of the intestate estate if there are surviving issue, with one or more not being the issue of the surviving spouse. If a husband or wife desires to leave his or her surviving spouse less than this share, he or she may execute a will to this effect. However, the surviving spouse has a personal right to take an elective share of one-third of the "augmented estate".

The "augmented estate" refers to the estate less expenses, allowances, claims, and some property transferred inter vivos. If the spouse joins in the transfer or executes a written consent, the transfer is not subject to the right of election. An election does not result in a loss of benefits under the will, in absence of the surviving spouse's renunciation.

—Charles W. Schuyler—

RENTERS SECURITY DEPOSITS

This new act establishing the rights and obligations of landlords and tenants in security deposits, Ch. 219, Laws of Mont., 1974; R.C.M. 1947, §§ 42-301 through 42-309 (effective July 1, 1974), is the first step in an effort to correct the disparate bargaining power of landlords and tenants of all residential rentals including mobile homes. Further sections of a general landlord-tenant code seeking to balance the bargaining power are expected to be introduced into the 1975 legislative session, according to the chief sponsor of the act, Robert B. Harper, Democrat of Silver Bow County.

Harper, who directs the consumer protection office of the Silver Bow County Attorney's office, said the problem of security deposits was a consistent source of complaints from tenants. The act is an ". . . effort to rectify this problem," he said. The problem facing tenants was the expense of enforcing their right to the return of a security deposit through judicial action. Most often the court expense was more than the security deposit, and therefore tenants frequently waived their right to the return of the deposit rather than seek judicial remedy. The act seeks to balance the landlord and tenants positions by placing the primary burden of responsibility for the required procedure on the landlord and by providing the tenant with a civil action in which he may be awarded an amount equal to double the amount wrongfully withheld by the landlord, and in some cases attorney's fees.

About a dozen other states have enacted statutes affecting security deposits. Montana's act, rather than following the security deposit provisions of the Uniform Residential Landlord and Tenant Act of the National Conference of Commissioners on Uniform State Laws or the American Bar Foundation's Model Residential Landlord-Tenate Code, is modeled after a Wisconsin bill that was not enacted by that state.

While the Montana statute follows the general intent and procedure of the uniform codes, the definition of "damage" in the Montana act makes it unique. This definition also presents the most questions regarding interpretation of the act. According to the act, damage is:

> . . . any and all tangible loss, injury, or deterioration of a leasehold premises caused by the willful or accidental acts of the tenant occupying same or by the tenant's family, licensees or invitees, as well as any and all tangible loss, injury, or deterioration resulting from the tenant's omissions or failure to perform any duty imposed upon the tenant by law with respect to the leasehold.

While the definition appears sufficiently broad to protect the landlord from even ordinary wear of the premises, the duties and responsibilities of landlord and tenant are defined more narrowly by prior existing statutes and recognized by the Montana Supreme Court in *Kintner v. Harr*, 146 Mont. 461, 408 P.2d 487, 498 (1965). The court said:

> Under section 42-201, R.C.M. 1047, the law imposes a duty upon the lessor of a building intended for the occupation of human beings, in absence of agreement to the contrary, to "put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenantable," except that the lessee, under the provisions of section 42-105, R.C.M. 1947,

must "repair all deteriorations or injuries thereto occasioned by his ordinary negligence."

The definition the court will probably be asked to provide is that of "ordinary negligence." Once this is provided, the meaning of the code should be sufficiently clear for landlord and tenant alike. The general procedure is not difficult but appears somewhat cumbersome. At the beginning of the relationship, the landlord is required to furnish ". . . to each prospective tenant" prior to the execution of the lease a signed written statement as to the present condition of the premises as well as a copy of a verified written list of damages, if any, caused by the previous tenant. Failure of the landlord to provide such a condition statement bars him ". . . from recovering any sum for damages. . ." unless he can ". . . establish by clear and convincing evidence that the damage occurred during the tenancy in question. . . ."

At the termination of the tenancy, the landlord must provide the tenant with a verified list of damages allegedly caused by the tenant. If this is done within the 30-day time provided by the act, the landlord may deduct from the security deposit a sum equal to the damage. Failure of the landlord to follow this procedure forfeits his right to withhold any portion of the security deposit. If the landlord does withhold any portion or all of the deposit without following the procedure, he is liable in civil action to the tenant for twice the amount withheld.

The primary responsibility of the tenant under the act is to provide the landlord with his new address in writing at the end of the tenancy. Failure of the tenant to provide his address would relieve the landlord of double liability for any portion of the security deposit wrongfully withheld but does not act as a bar to the tenant from recovering the actual amount owing him by the landlord.

—Frank Walsh—