

SJ 22: Study of Family Law Procedures and Alternatives

Background Paper: Existing Family Law Procedures

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Background

Marriage. Husband and Wife. Reconciliation. Termination of Marriage, Child Custody, Support. Enforcement of Support. Parent and Child. Uniform Child Custody Jurisdiction and Enforcement Act. Grandparent-Grandchild Contact. Partner and Family Member Assault. A quick glance at these nine chapters in Title 40, MCA, leaves the casual observer in no doubt that the Family Law title in Montana is complex and multifaceted.

Family law cases can run the gamut from legal separations or dissolutions in which both parties agree and can settle differences and divide assets amicably to dissolution cases that involve significant assets and property and difficult decisions about child custody and support and maintenance payments. But to think of family law as only about marriage and divorce would be incorrect. More and more, cases in this area involve parenting decisions for a children whose parents were never married before parting. Decisions about how those children should be supported and by whom are also governed by Montana family law. Although family law is dominated by the parent-child relationship and exploring the rights, duties, and parameters of that relationship, Title 40 also has sections of law providing for "caretaker relatives" and for contacts between grandparents and grandchildren.

Although a brief summary cannot do justice to the breadth of law contained in this section, this paper will attempt to provide the committee with a general background on family law by summarizing key concepts and terms in Title 40.¹

Key Concepts

Marriage: Marriage in Montana is described in section 40-1-103, MCA, as "a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential." Montana law uses the term "contract" in several places to refer to a marriage. The word provides a useful framework for thinking about marriage in Montana law: the statutes set out the terms by which the marriage contract can be entered into, maintained, invalidated, or dissolved.

Laws related to marriage in Title 40, chapter 1, MCA, provide requirements to acquire marriage licenses, what premarital tests are necessary, who may solemnize a marriage,

¹Legal cases involving family law are often referred to as domestic relations cases. Many resources and statistics created and compiled by interested parties use those terms interchangeably, though I've attempted to stay with "family law" in this paper.

what marriages are prohibited, and what conditions must be met for a marriage to be invalidated (annulled) by a state district court.

Title 40, Chapter 2, MCA, furthers the contract framework, outlining the duties, rights, and powers of a husband and wife. Examples of duties contained in this chapter include the duty of one to support the other: "Insofar as each is able, the husband and wife shall support each other out of their property and labor. As used in this section, the word 'support' includes the nonmonetary support provided by a spouse as homemaker."²

Examples of protections of the rights of a person in a marriage abound, including property rights. One example is that, except for "expenses for the necessities of the family and of the education of the spouses' children," a husband or wife isn't responsible or liable for the acts or debts of the other spouse simply because they are married.³ Someone who is married can sue or be sued as an individual or continue to own and sell property separate from one's spouse. A husband and wife may also hold property in common or jointly.

In addition, chapter 2 provides for the creation and enforcement of premarital agreements.

Dissolution: Dissolution is the legal term for "divorce" in Montana. Laws governing divorce are in Title 40, chapter 4, MCA.

Montana is a "no-fault" divorce state, meaning to obtain a divorce, a person does not need the agreement of the spouse nor does there need to be a showing of wrongdoing by one spouse or the other.⁴ Instead, the court must find that a marriage is irretrievably broken to grant a divorce. In Montana, irretrievable breakdown is the sole basis for dissolution of a marriage.⁵

An individual may file for dissolution in Montana if the person has lived in Montana for at least 90 days before filing the paperwork. Before granting a divorce, a court must:⁶

²Section 40-2-102, MCA.

³Section 40-2-106, MCA.

⁴"No Fault Dissolution;" *Introduction to Family Law in Montana*; prepared by the Montana Legal Services Association; approved and distributed by the Montana Supreme Court Commission on Self-Represented Litigants; p. 5; revised July 2002; available from: courts.mt.gov/content/library/forms/.../introduction_to_family_Law.pdf; last accessed August 23, 2013.

⁵Section 40-4-101, MCA.

⁶Section 40-4-104, MCA.

- make sure it has jurisdiction, generally meaning that one of the parties lives in Montana or is stationed here and has been for at least 90 days;
- find that the marriage is irretrievably broken;
- establish that certain conciliation provisions of Montana law don't apply; and
- consider and approve or decide upon the division of any assets or property, the parenting of any children, and the support of the children and, if necessary, either spouse.

Parties: The parties to a dissolution proceeding are the husband and wife.

Irretrievably broken: The court must find that a marriage is irretrievably broken before granting a dissolution. To reach this finding, a court must support it with evidence. Evidence can be provided one of two ways. One method is to show that the parties to the marriage are separated and have been for at least 180 days. Separated means that they must have lived "separate and apart" for that time period. The second method of providing evidence is to find that there is "serious marital discord" that affects the attitude of at least one of the married individuals.

Both parties to the marriage can agree under oath that the marriage is irretrievable broken. Or, if one spouse denies there is an irretrievable breakdown, the court will consider all the "relevant factors" and then issue a ruling deciding if the marriage is "irretrievably broken." The court can suggest the parties seek counseling or require a conciliation conference.

In the end, "[a] finding of irretrievable breakdown is a determination [by the court] that there is no reasonable prospect of reconciliation."⁷

Separation: A legal separation can be granted to the parties only if they both agree; after 6 months of separation, either person can ask the court to convert the separation into a dissolution.⁸ As with a request for a dissolution, the request for separation must include a statement that the marriage is irretrievably broken.⁹ A separation is a change in legal status but it does not end a marriage.

Parenting plan: A parenting plan outlines how a child's financial, educational, health, and emotional needs will be met after a dissolution, separation, or, because parents aren't always married when they have a child, when one parent files a petition in district

⁷Section 40-4-107, MCA.

⁸Sections 40-4-104(2) and 40-4-108(2), MCA.

⁹Section 40-4-105, MCA.

court to establish a plan. If a dissolution, separation, or annulment involves a child, the court must include a parenting plan in the final order of dissolution or divorce.

As stated in section 40-4-233, MCA, the purposes of a parenting plan are to:

- protect the best interests of the child;
- provide for the physical care of the child;
- maintain the child's emotional stability and minimize the child's exposure to parental conflict;
- provide for the child's changing needs and minimize the need for changes to the parenting plan;
- set forth the authority and responsibilities of each parent with respect to the child; and
- encourage parents to meet their responsibilities to the child through agreements in the plan, not through judicial intervention.

To determine the "best interests of the child," a court will consider the "relevant parenting factors" in section 40-4-212, MCA. The factors include but are not limited to:

- the wishes of the child and the wishes of the parent or parents;
- the interactions and interrelationships between the child, the parents, any siblings, and others who affects the child's best interest;
- the mental and physical health of the child and the parties involved;
- the child's adjustment to home, school, and community and the child's developmental needs;
- physical abuse or threats of physical abuse from one parent to the other or to the child;
- chemical dependency or abuse by a parent;
- continuity and stability of care;
- whether a parent has knowingly failed to support a child financially despite having the means to do so;
- whether the child has frequent and continuing contact with both parents (which is generally considered to be in the child's best interest); and
- any adverse effects on a child from repeated and "vexatious" amendments to a parenting plan.

In section 40-4-227, MCA, which sets out the policy of the State of Montana relating to the rights of parents and children, the Legislature finds that a parent's constitutional interests in the parental control of a child "should yield" to the child's best interests if the parent's behavior is contrary to the parent-child relationship.

Maintenance: Maintenance is support paid from one former spouse to the other former spouse. It is also referred to in statute as spousal support. Many people call maintenance or support alimony although this term does not appear in Title 40. A judge may issue an order for one person to pay maintenance only if it finds that the person

seeking the payment lacks the means and ability to provide for the person's "reasonable needs."¹⁰

Child Support: When a court grants a dissolution involving minor children, it also issues an order about child support. A court can require either or both parents to pay. The amounts and duty to pay are not related to any marital misconduct or allegations of it. They are also not related to other parts of a parenting plan. So if one parent fails to abide by a provision of the parenting plan, that failure cannot be a reason used by the other parent to stop paying child support.¹¹ When considering support amounts, section 40-4-204, MCA, requires the court to consider:

- the financial resources of the child and parents;
- the standard of living of the child had the marriage not been ended;
- the child's physical and emotional condition;
- the child's education and medical needs;
- the age of the child;
- day care needs;
- the requirements of the parenting plan that was established; and
- the needs of other people that one or both of the parents must support.

The court issuing the child support order must determine the amount of support to be paid by using these standards and the uniform child support guidelines established by the Montana Department of Public Health and Human Services (DPHHS). The guidelines are issued as rules subject to the Montana Administrative Procedure Act; DPHHS also must notify the Montana Supreme Court, the state district courts, and the State Bar of Montana before issuing the guidelines.¹² Rule 1, subsection (2), of the Montana Child Support Guidelines provides that "it is the first priority of parents to meet the needs of the child according to the financial ability of the parents.... [A] child's standard of living should not, to the degree possible, be adversely affected because a child's parents are not living in the same household."¹³

¹⁰Section 40-4-203(1), MCA.

¹¹"Parenting;" *Introduction to Family Law in Montana*; prepared by the Montana Legal Services Association; approved and distributed by the Montana Supreme Court Commission on Self-Represented Litigants; p. 10; revised July 2002; available from: courts.mt.gov/content/library/forms/.../introduction_to_family_Law.pdf; last accessed September 3, 2013.

¹²Section 40-5-209, MCA.

¹³Rule 1: Authority, Policy, and Purpose (ARM 37.62.101); *Montana Child Support Guidelines*; effective July 1, 2013; available from <http://www.dphhs.mt.gov/csed/packet/guidelines.pdf>; accessed September 3, 2013.

Mediation: A court may require mediation at any point during a family law proceeding.¹⁴ Parties to a dissolution or parenting plan proceeding can request mediation or one party may request the court order mediation.

However, if a court has reason to suspect one person in the proceeding has physically, sexually, or emotionally abused the other person or the child of one of the parties, the court may not authorize or permit a mediation to continue unless each party provides "written, informed consent". The 2013 Legislature enacted legislation to clarify when a court may order mediation in family law cases, to require "written, informed consent", and provide a definition of that phrase.¹⁵ This exception was the also topic of a 2011 Montana Supreme Court ruling that helped prompt the 2013 legislation.¹⁶

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¹⁴Section 40-4-301(1), MCA.

¹⁵Laws 2013, Chapter 350. (House Bill No. 555. Short title: Revise mediation laws related to family law and domestic violence. The bill's provisions are effective October 1, 2013.)

¹⁶Hendershott v. Westphal, 2011 MT 73.