

West's Montana Code Annotated

Title 40. Family Law

Chapter 4. Termination of Marriage, Child Custody, Support

Part 2. Support, Custody, Visitation, and Related Provisions

MCA T. 40, Ch. 4, Pt. 2, Refs & Annos

Currentness

MCA T. 40, Ch. 4, Pt. 2, Refs & Annos, MT ST T. 40, Ch. 4, Pt. 2, Refs & Annos

Statutes are current through chapters effective July 1, 2013, and the 2012 general election. Statutory changes are subject to classification and revision by the Code Commissioner.

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Title 40. Family Law

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Part 2. Support, Custody, Visitation, and Related Provisions (Refs & Annos)

MCA 40-4-201

40-4-201. Separation agreement

Currentness

(1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, parenting, and parental contact with their children. In cases in which children are involved, the separation agreement may contain a parenting plan as required in [40-4-234](#).

(2) Subject to subsection (7), in a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, parenting, and parental contact with children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(3) If the court finds the separation agreement unconscionable, it may request that the parties submit a revised separation agreement or it may make orders for the disposition of property, maintenance, and support.

(4) If the court finds that the separation agreement is not unconscionable as to disposition of property or maintenance and not unsatisfactory as to support:

(a) unless the separation agreement provides to the contrary, its terms must be set forth in the decree of dissolution or legal separation and the parties ordered to perform them; or

(b) if the separation agreement provides that its terms may not be set forth in the decree, the decree must identify the separation agreement and state that the court has found the terms not unconscionable.

(5) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

(6) Except as provided in subsection (7) and except for terms concerning the support, parenting, or parental contact with the children, the decree may expressly preclude or limit modification of terms set forth in the decree if provided for in the separation agreement. Otherwise, terms of a separation agreement set forth in the decree are automatically modified by modification of the decree.

(7) The decree may be modified, as provided in [40-4-251](#) through [40-4-258](#), for failure to disclose assets and liabilities.

Credits

Enacted 48-320 by Laws 1975, ch. 536, § 20; Revised Code of Montana 1947, 48-320. Amended by [Laws 1997, ch. 326, § 9](#); amended by [Laws 1997, ch. 343, § 11](#).

Editors' Notes

COMMISSIONERS' NOTE

An important aspect of the effort to reduce the adversary trappings of marital dissolution is the attempt, made by Section 306 [40-4-201] to encourage the parties to reach an amicable disposition of the financial and other incidents of their marriage. This section entirely reverses the older view that property settlement agreements are against public policy because they tend to promote divorce. Rather, when a marriage has broken down irretrievably, public policy will be served by allowing the parties to plan their future by agreeing upon a disposition of their property, their maintenance, and the support, custody, and visitation of their children.

Subsection (b) [(2)] undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against onesidedness, oppression, or unfair surprise (see [section 2-302, Uniform Commercial Code \[30-2-302\]](#)), and in contract law, *Scott v. U.S.*, 12 Wall (U.S.) 443 (1870) (“contract...unreasonable and unconscionable but not void for fraud”); [Stiefler v. McCullough, 174 N.E. 823, 97 Ind.App. 123 \(1931\)](#); [Terre Haute Cooperage v. Branscome, 35 So.2d 537, 203 Miss. 493 \(1948\)](#); [Carter v. Boone County Trust Co., 92 S.W.2d 647, 338 Mo. 629 \(1936\)](#). It has been used in cases respecting divorce settlements or awards. [Bell v. Bell, 371 P.2d 773, 150 Colo. 174 \(1962\)](#) (“this division of property is manifestly unfair, inequitable and unconscionable”). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing.

The terms of the agreement respecting support, custody, and visitation of children are not binding upon the court even if these terms are not unconscionable. The court should perform its duty to provide for the children by careful examination of the agreement as to these terms in light of the standards established by Section 309 [40-4-204] for support and by Part IV for custody and visitation.

Subsection (c) [(3)] envisages that, if the court finds the agreement unconscionable, it will afford the parties the opportunity to negotiate further. If they are unable to arrive at an agreement that is not unconscionable, the court, on motion of either party, may decide the issues of property disposition, support, and maintenance in light of the standards established in Sections 307 through 309 [40-4-202 to 40-4-204]. The court's power to make orders for the custody and visitation of the children is set forth in Part IV [Chapter 4, part 2].

Subsection (d) [(4)] permits the parties, in drawing the separation agreement, to choose whether its terms shall or shall not be set forth in the decree. In the former event, the provisions of subsection (e) [(5)], making these terms enforceable through the remedies available for the enforcement of a judgment, but retaining also the enforceability of them as contract terms, apply.

This represents a reversal of the policy of the original 1970 Act, which required a choice between “merging” the agreement in the judgment and retaining its character as a contract. Strong representations as to the undesirability of such a choice, in the light of foreign doctrines as to the enforceability of judgments, as compared with contract terms, in this area of the law, made by persons and groups whose expertise entitled them to respect, led the Conference, in 1971, to change its former decision.

There still remains a place for agreements the terms of which are not set forth in the decree, if the parties prefer that it retain the status of a private contract, only. In this instance, the remedies for the enforcement of a judgment will not be available, but the court's determination, in the decree, that the terms are not unconscionable, under the ordinary rules of res adjudicata, will prevent a later successful claim of unconscionability. Such an agreement, unless its terms expressly so permit, will not be modifiable as to economic matters. Other subjects, relating to the children, by subsection (b) [(2)] do not bind the Court.

Subsection (f) [(6)] allows the parties to agree that their provisions as to maintenance and property division will not be modifiable or can be modified only in accordance with the terms of the agreement, even though those terms are included in the decree. If the court finds that these are not unconscionable, it may include them in its decree. The effect of including in the decree a provision precluding or limiting modification of the terms respecting maintenance or property division is to make the decree nonmodifiable or modifiable only in the limited way as to those terms. Subsection (f) [(6)] thus permits the parties to agree that their future arrangements may not be altered except in accord with their agreement. Such an agreement maximizes the advantages of careful future planning and eliminates uncertainties based on the fear of subsequent motions to increase or decrease the obligations of the parties. However, as stated in the subsection, this does not apply to provisions for the support, custody, or visitation of children.

Concerning the effect of a decree as a lien on the property of the spouse against whom it is rendered, the Conference took the position that the general laws of the state, as to judgment liens, would apply. However, in jurisdictions with special statutes respecting the liens created by decrees for support, maintenance, and the like, care should be taken in preparing the repealer section not to disturb provisions it is desired to retain.

[Notes of Decisions \(115\)](#)

MCA 40-4-201, MT ST 40-4-201

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MCA 40-4-202

40-4-202. Division of property

Currentness

(1) In a proceeding for dissolution of a marriage, legal separation, or division of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to divide the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both. In making apportionment, the court shall consider the duration of the marriage and prior marriage of either party; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; custodial provisions; whether the apportionment is in lieu of or in addition to maintenance; and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit. In dividing property acquired prior to the marriage; property acquired by gift, bequest, devise, or descent; property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent; the increased value of property acquired prior to marriage; and property acquired by a spouse after a decree of legal separation, the court shall consider those contributions of the other spouse to the marriage, including:

- (a) the nonmonetary contribution of a homemaker;
- (b) the extent to which such contributions have facilitated the maintenance of this property; and
- (c) whether or not the property division serves as an alternative to maintenance arrangements.

(2) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

(3) Each spouse is considered to have a common ownership in marital property that vests immediately preceding the entry of the decree of dissolution or declaration of invalidity. The extent of the vested interest must be determined and made final by the court pursuant to this section.

(4) The division and apportionment of marital property caused by or incident to a decree of dissolution, a decree of legal separation, or a declaration of invalidity is not a sale, exchange, transfer, or disposition of or dealing in property but is a division of the common ownership of the parties for purposes of:

(a) the property laws of this state;

(b) the income tax laws of this state; and

(c) the federal income tax laws.

(5) Premarital agreements must be enforced as provided in Title 40, chapter 2, part 6.

Credits

Enacted 48-321 by Laws 1975, ch. 536, § 21; Revised Code of Montana 1947, 48-321. Amended by Laws 1983, ch. 613, § 1; amended by Laws 1987, ch. 189, § 13.

Editors' Notes

COMMISSIONERS' NOTE

Alternative A, which is the alternative recommended generally for adoption, proceeds upon the principle that all the property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution among them, upon consideration of the various factors enumerated in subsection (a) [(1)]. It will be noted that among these are health, vocational skills and employability of the respective spouses and these contributions to the acquisition of the assets, including allowance for the contribution thereto of the "homemaker's services to the family unit." This last is a new concept in Anglo-American law.

Subsection (b) [(2)] affords a way to safeguard the interests of the children against the possibility of the waste or dissipation of the assets allotted to a particular parent in consideration of being awarded the custody or support of a child or children.

[Notes of Decisions \(1148\)](#)

MCA 40-4-202, MT ST 40-4-202

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MCA 40-4-203

40-4-203. Maintenance

Currentness

(1) In a proceeding for dissolution of marriage or legal separation or a proceeding for maintenance following dissolution of the marriage by a court that lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) lacks sufficient property to provide for the spouse's reasonable needs; and

(b) is unable to be self-supporting through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order must be in amounts and for periods of time that the court considers just, without regard to marital misconduct, and after considering all relevant facts, including:

(a) the financial resources of the party seeking maintenance, including marital property apportioned to that party, and the party's ability to meet the party's needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) the standard of living established during the marriage;

(d) the duration of the marriage;

(e) the age and the physical and emotional condition of the spouse seeking maintenance; and

(f) the ability of the spouse from whom maintenance is sought to meet the spouse's own needs while meeting those of the spouse seeking maintenance.

Credits

Enacted 48-322 by Laws 1975, ch. 536, § 22; Revised Code of Montana 1947, 48-322. Amended by [Laws 2009, ch. 56, § 1578](#), eff. Oct. 1, 2009.

Editors' Notes

COMMISSIONERS' NOTE

Section 308(a) [40-4-203(1)] authorizes the court to order maintenance to either spouse in three kinds of proceedings: (1) dissolution of marriage; (2) legal separation; and (3) independent proceedings for maintenance following an earlier proceeding for dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse and thus could not affect maintenance [see comment to Section 302(a) [40-4-104(1)]]. In all three kinds of proceedings the court may award maintenance only if both findings listed in (1)[(a)] and (2)[(b)] are made. The dual intention of this section and Section 307 [40-4-202] is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by 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 appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

Assuming that an award of maintenance is appropriate under subsection 308(a) [40-4-203(1)], the standards for setting the amount of the award are set forth in subsection 308(b) [40-4-203(2)]. Here, as in Section 307 [40-4-202], the court is expressly admonished not to consider the misconduct of a spouse during the marriage. Instead, the court should consider the factors relevant to the issue of maintenance, including those listed in subdivisions (1)-(6) [(a)-(f)].

[Notes of Decisions \(401\)](#)

MCA 40-4-203, MT ST 40-4-203

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MCA 40-4-204

40-4-204. Child support--orders to address health insurance--withholding of child support

Currentness

<Bracketed portion of text effective until occurrence of contingency>

(1) In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court shall order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for the child's support, without regard to marital misconduct.

(2) The court shall consider all relevant factors, including:

(a) the financial resources of the child;

(b) the financial resources of the parents;

(c) the standard of living that the child would have enjoyed had the marriage not been dissolved;

(d) the physical and emotional condition of the child and the child's educational and medical needs;

(e) the age of the child;

(f) the cost of day care for the child;

(g) any parenting plan that is ordered or decided upon; and

(h) the needs of any person, other than the child, whom either parent is legally obligated to support.

(3)(a) Whenever a court issues or modifies an order concerning child support, the court shall determine the child support obligation by applying the standards in this section and the uniform child support guidelines adopted by the department of public health and human services pursuant to [40-5-209](#). The guidelines must be used in all cases, including cases in which the order is entered upon the default of a party and those in which the parties have entered into an agreement regarding the support amount. A verified representation of the defaulting parent's income, based on the best information available, may be

used when a parent fails to provide financial information for use in applying the guidelines. The amount determined under the guidelines is presumed to be an adequate and reasonable support award, unless the court finds by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or to any of the parties or that it is inappropriate in that particular case.

(b) If the court finds that the guideline amount is unjust or inappropriate in a particular case, it shall state its reasons for that finding. Similar reasons must also be stated in a case in which the parties have agreed to a support amount that varies from the guideline amount. Findings that rebut and vary the guideline amount must include a statement of the amount of support that would have ordinarily been ordered under the guidelines.

(c) If the court does not order a parent owing a duty of support to a child to pay any amount for the child's support, the court shall state its reasons for not ordering child support.

(d) Child support obligations established under this section are subject to the registration and processing provisions of Title 40, chapter 5, part 9.

(4) Each temporary or final district court judgment, decree, or order establishing a child support obligation under this title and each modification of a final order for child support must include a medical support order as provided for in Title 40, chapter 5, part 8.

(5)(a) Unless the court makes a written exception under [40-5-315](#) or [40-5-411](#) and the exception is included in the support order, a support obligation established by judgment, decree, or order under this section, whether temporary or final, and each modification of an existing support obligation under [40-4-208](#) must be enforced by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 3 or 4. A support order that omits the written exceptions provided in [40-5-315](#) or [40-5-411](#) or that provides for a payment arrangement inconsistent with this section is nevertheless subject to withholding for the payment of support without need for an amendment to the support order or for any further action by the court.

(b) If an obligor is exempt from immediate income withholding, the district court judgment or order must include a warning statement that if the obligor is delinquent in the payment of support, the obligor's income may be subject to income-withholding procedures under Title 40, chapter 5, part 3 or 4. Failure to include a warning statement in a judgment or order does not preclude the use of withholding procedures.

(c) If a support order subject to income withholding is expressed in terms of a monthly obligation, the order may be annualized and withheld on a weekly or biweekly basis, corresponding to the obligor's regular pay period. When an order is annualized and withheld on a weekly or biweekly basis under this section, the support withheld from the obligor may be retained by the obligee when it exceeds the obligor's monthly support obligation if the excess support is a result of annualized withholding.

(d) If an obligor is exempted from paying support through income withholding, the support order must include a requirement that whenever the case is receiving services under Title IV-D of the Social Security Act, support payments must be paid through the department of public health and human services as provided in [40-5-909](#).

(6)(a) Each district court judgment, decree, or order that establishes paternity or establishes or modifies a child support obligation must include a provision requiring the parties to promptly file with the court and to update, as necessary, information on:

(i) the party's identity, residential and mailing addresses, telephone number, [social security number,] and driver's license number;

(ii) the name, address, and telephone number of the party's employer; and

(iii) if the child is covered by a health or medical insurance plan, the name of the insurance carrier or health benefit plan, the policy identification number, the names of the persons covered, and any other pertinent information regarding coverage or, if the child is not covered, information as to the availability of coverage for the child through the party's employer.

(b) The court shall keep the information provided under subsection (6)(a) confidential except that the information may be provided to the department of public health and human services for use in administering Title IV-D of the Social Security Act.

(c) The order must also require that in any subsequent child support enforcement action, upon sufficient showing that diligent effort has been made to ascertain the location of the party, the district court or the department of public health and human services, if the department is providing services under Title IV-D of the Social Security Act, may consider due process requirements for notice and service of process met with respect to the party upon delivery of written notice by regular mail to the most recent address of the party or the party's employer's address reported to the court.

(7) A judgment, decree, or order establishing a child support obligation under this part may be modified or adjusted as provided in [40-4-208](#) or, if the department of public health and human services is providing services under Title IV-D of the Social Security Act, may be modified or adjusted by the department as provided for in [40-5-271](#) through [40-5-273](#), [40-5-277](#), and [40-5-278](#).

(8)(a) A district court judgment, decree, or order that establishes or modifies a child support obligation must include a provision requiring the child support obligation to be paid, without need for further court order:

(i) to the person with whom the child resides by legal order;

(ii) if the person with whom the child legally resides voluntarily or involuntarily relinquishes physical care and control of the child to another person, organization, or agency, to the person, organization, or agency to whom physical custody has been relinquished;

(iii) if any other person, organization, or agency is entitled by law, assignment, or similar reason to receive or collect the child support obligation, to the person, organization, or agency having the right to receive or collect the payment; or

(iv) to the court for the benefit of the minor child.

(b) When the department of public health and human services is providing services under Title IV-D of the Social Security Act, payment of support must be made through the department for distribution to the person, organization, or agency entitled to the payment.

(c) A judgment, decree, or order that omits the provision required by subsection (8)(a) is subject to the requirements of subsection (8)(a) without need for an amendment to the judgment, decree, or order or for any further action by the court.

(9) A judgment, decree, or order that establishes or modifies a child support obligation must include a provision that if a parent or guardian is the obligee under a child support order and is obligated to pay a contribution for the same child under [41-3-438](#), [41-5-1304](#), or [41-5-1512](#), the parent or guardian assigns and transfers to the department of public health and human services all rights that the parent or guardian may have to child support that are not otherwise assigned under [53-2-613](#).

Credits

Enacted 48-323 by Laws 1975, ch. 536, § 23; Revised Code of Montana 1947, 48-323. Amended by Laws 1983, ch. 590, § 1; amended by Laws 1985, ch. 727, § 1. (3) Enacted by Laws 1985, ch. 434, § 1. (4) Enacted by Laws 1985, ch. 651, § 1; amended by Laws 1989, ch. 702, § 1; amended by [Laws 1991, ch. 266, § 4](#); amended by [Laws 1991, ch. 635, § 1](#); amended by [Laws 1993, ch. 294, § 1](#); amended by [Laws 1993, ch. 631, § 7](#); amended by [Laws 1995, ch. 60, § 7](#); amended by [Laws 1995, ch. 504, § 27](#); amended by [Laws 1995, ch. 546, § 118](#); amended by [Laws 1997, ch. 343, § 12](#); amended by [Laws 1997, ch. 552, § 25](#); amended by [Laws 2001, ch. 542, § 1](#); amended by [Laws 2005, ch. 564, § 1](#).

Editors' Notes

CONTINGENT TERMINATION

<Laws 1997, ch. 552, § 104, as revised by Laws 1999, ch. 27, § 1, contained contingent termination provisions and order that the department of public health and human services seek federal exemptions. See the Historical and Statutory Notes to 37-1-307.>

COMMISSIONERS' NOTE

This section does not set forth the conditions under which a parent owes a duty of support to a child. Principles affecting duties of support occur elsewhere in the Act, as well as in the other statutes or the common law of the State. Rather, the intent is merely to indicate the factors which a court should consider in setting the amount of support to be paid by either the mother or the father or both. [See 1989 amendment note.] The provision authorizing an order requiring either or both parents to pay child support permits the court to order the custodial parent to contribute to the child's support as well, or to insure that property or payment set aside to the custodial parent for child support are used for that purpose. "Child" includes any child recognized by the laws of the state as "living" or "in being", and, also, a child by adoption. The Section authorizes the issue of child support to be raised in independent proceedings for dissolution of marriage or legal separation.

Notes of Decisions (402)

MCA 40-4-204, MT ST 40-4-204

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MCA 40-4-205

40-4-205. Guardian ad litem

Currentness

(1) The court may appoint a guardian ad litem to represent the interests of a minor dependent child with respect to the child's support, parenting, and parental contact. The guardian ad litem may be an attorney. The county attorney, a deputy county attorney, if any, or the department of public health and human services or any of its staff may not be appointed for this purpose.

(2) The guardian ad litem has the following general duties:

(a) to conduct investigations that the guardian ad litem considers necessary to ascertain the facts related to the child's support, parenting, and parental contact;

(b) to interview or observe the child who is the subject of the proceeding;

(c) to make written reports to the court concerning the child's support, parenting, and parental contact;

(d) to appear and participate in all proceedings to the degree necessary to adequately represent the child and make recommendations to the court concerning the child's support, parenting, and parental contact; and

(e) to perform other duties as directed by the court.

(3) The guardian ad litem has access to court, medical, psychological, law enforcement, social services, and school records pertaining to the child and the child's siblings and parents or caretakers.

(4) The court shall enter an order for costs and fees in favor of the child's guardian ad litem. The order must be made against either or both parents, except that if the responsible party is indigent, the costs must be waived.

Credits

Enacted 48-324 by Laws 1975, ch. 536, § 24; Revised Code of Montana 1947, 48-324. Amended by Laws 1979, ch. 93, § 1; amended by [Laws 1993, ch. 434, § 1](#); amended by [Laws 1995, ch. 394, § 4](#); amended by [Laws 1995, ch. 546, § 119](#); amended by [Laws 1997, ch. 343, § 13](#).

Editors' Notes

COMMISSIONERS' NOTE

This section authorizes the court to appoint an attorney to represent a minor or dependent child in a proceeding for the dissolution of marriage, legal separation, or any other proceeding which involves the child's support, custody, or visitation. The attorney is not a guardian ad litem for the child, but an advocate whose role is to represent the child's interests. The section intentionally does not authorize the child or his attorney to be heard on the issue of whether the marriage of his parent or parents has broken down irretrievably. The appointment may be made by the court on motion of either parent or by the court on its own motion. It is expected that the authority given the court by this section will be exercised primarily in contested cases, but rare or unusual circumstances may make the appointment appropriate in formally uncontested matters.

[Notes of Decisions \(40\)](#)

MCA 40-4-205, MT ST 40-4-205

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MCA 40-4-206

40-4-206. Payment of maintenance or support to court--handling fee of clerk

Currentness

(1) Except as provided in subsection (4), upon its own motion or upon motion of either party, the court may order at any time that maintenance or support payments be made to the clerk of the district court as trustee for remittance to the person entitled to receive the payments.

(2) The clerk of the district court shall maintain records of payments received by the clerk listing the amount of payments, the date payments are required to be made, and the names and addresses of the parties affected by the order. The clerk may charge the payor a handling fee of \$2 a payment, which must be in addition to the payment. Any handling fee collected by the clerk under this subsection must be paid into the county general fund unless the county has a district court fund. If the county has a district court fund, the amount must be paid into that fund.

(3) The parties affected by the order shall inform the clerk of the district court of any change of address or of other condition that may affect the administration of the order.

(4) When the department of public health and human services is providing services under Title IV-D of the Social Security Act or when income withholding is in effect in an order issued or modified after October 1, 1998, payment of support must be made through the department for distribution to the person, organization, or agency entitled to the payment.

Credits

Enacted 48-325 by Laws 1975, ch. 536, § 25; Revised Code of Montana 1947, 48-325. Amended by Laws 1985, ch. 532, § 1; amended by [Laws 1997, ch. 552, § 26](#).

Editors' Notes

COMMISSIONERS' NOTE

This section establishes a procedure for payment of support or maintenance orders through a court officer and for enforcement by the appropriate prosecuting attorney. The section is modeled on similar provisions in North Dakota, Wisconsin, and other states and is intended to make use of the state's remedy of civil contempt as an effective device for the enforcement of support and maintenance.

MCA 40-4-206, MT ST 40-4-206

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MCA 40-4-207

40-4-207. Assignments

Currentness

The court may order the person obligated to pay support or maintenance to make an assignment of a part of the person's periodic earnings or trust income to the person entitled to receive the payments. The assignment is binding on the employer, trustee, or other payor of the funds 2 weeks after service upon the payor of notice that the assignment has been made. The payor shall withhold from the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the person specified in the order. The payor may deduct from each payment a sum not exceeding \$1 as reimbursement for costs. An employer may not discharge or otherwise discipline an employee as a result of a wage or salary assignment authorized by this section.

Credits

Enacted 48-326 by Laws 1975, ch. 536, § 26; Revised Code of Montana 1947, 48-326. Amended by [Laws 2009, ch. 56, § 1579](#), eff. Oct. 1, 2009.

Editors' Notes

COMMISSIONERS' NOTE

This section is modeled on similar provisions in Wisconsin and California and provides an additional method of assuring that obligations for support and maintenance will be met when due. The Section goes beyond existing law in authorizing an assignment of trust income as well as periodic earnings. In states which permit spendthrift trusts, for purposes of support and maintenance, to be attacked, this section will also apply to spendthrift trusts. Each state should insert in the bracket the sum it deems sufficient to meet the cost to the payor of deducting the sums due from each payment. The validity of the obligation imposed on the payor of funds is clearly supported by analogy to garnishment, and to cases such as [Day-Brite Lighting, Inc. v. Missouri](#), 72 S.Ct. 405, 342 U.S. 421, 96 L.Ed. 469 (1952).

[Notes of Decisions \(6\)](#)

MCA 40-4-207, MT ST 40-4-207

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MCA 40-4-208

40-4-208. Modification and termination of provisions for maintenance, support, and property disposition

Currentness

(1) Except as otherwise provided in [40-4-201\(6\)](#), a decree may be modified by a court as to maintenance or support only as to installments accruing subsequent to actual notice to the parties of the motion for modification.

(2)(a) Except as provided in [40-4-251](#) through [40-4-258](#), whenever the decree proposed for modification does not contain provisions relating to maintenance or support, modification under subsection (1) may only be made within 2 years of the date of the decree.

(b) Except as provided in [40-4-251](#) through [40-4-258](#), whenever the decree proposed for modification contains provisions relating to maintenance or support, modification under subsection (1) may only be made:

(i) upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable;

(ii) upon written consent of the parties; or

(iii) upon application by the department of public health and human services, whenever the department of public health and human services is providing services under Title IV-D of the federal Social Security Act. The support obligation must be modified, as appropriate, in accordance with the guidelines promulgated under [40-5-209](#). Except as provided in [40-4-251](#) through [40-4-258](#), a modification under this subsection may not be made within 12 months after the establishment of the order or the most recent modification.

(c) The nonexistence of a medical support order, as defined in [40-5-804](#), or a violation of a medical support order justifies an immediate modification of child support in order to:

(i) provide for the actual or anticipated costs of the child's medical care;

(ii) provide or maintain a health benefit plan or individual health insurance coverage for the child; or

(iii) eliminate any credit for a medical support obligation when it has been permitted or used as a credit in the determination of the child support obligation.

(3) The provisions as to property disposition may not be revoked or modified by a court except:

(a) upon written consent of the parties; or

(b) if the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(4) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

(5) Provisions for the support of a child are terminated by emancipation of the child or the child's graduation from high school if the child is enrolled in high school, whichever occurs later, but in no event later than the child's 19th birthday, unless the termination date is extended or knowingly waived by written agreement or by an express provision of the decree. Provisions for the support of a child do not terminate upon the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump-sum payment, to the extent just and appropriate in the circumstances.

(6) The decree may be modified, as provided in [40-4-251](#) through [40-4-258](#), for failure to disclose assets and liabilities.

Credits

Enacted 48-330 by Laws 1975, ch. 536, § 30; Revised Code of Montana 1947, 48-330. Amended by Laws 1979, ch. 464, § 1; amended by Laws 1987, ch. 212, § 1; amended by Laws 1989, ch. 549, § 27; amended by Laws 1989, ch. 702, § 28; amended by [Laws 1991, ch. 342, § 1](#); amended by [Laws 1995, ch. 504, § 28](#); amended by [Laws 1995, ch. 546, § 120](#); amended by [Laws 1997, ch. 326, § 10](#).

Editors' Notes

COMMISSIONERS' NOTE

Subsection (a) [(1)] makes each installment under an order for periodic support or maintenance final and non-modifiable when it falls due. The accrued installments cannot be modified retroactively, and future installments can be modified only as to those falling due after a motion for modification has been filed. The purpose of thus making each installment final and non-modifiable when it becomes due is to give each past due installment the status of a final judgment entitled to full faith and credit in other states pursuant to the decisions of the Supreme Court in [Lynde v. Lynde](#), 21 S.Ct. 555, 181 U.S. 183, 45 L.Ed. 810 (1901); [Sistare v. Sistare](#), 30 S.Ct. 682, 218 U.S. 1, 54 L.Ed. 905, 28 LRANS 1068, 20 Ann.Cas. 261 (1910); [Barber v. Barber](#), 65 S.Ct. 137, 323 U.S. 77, 89 L.Ed. 82, 157 A.L.R. 163 (1944); and [Griffin v. Griffin](#), 66 S.Ct. 556, 327 U.S. 220, 90 L.Ed. 635 (1945). The Supreme Court has not yet held that future installments are entitled to full faith and credit, but at least one state court has done so [[Light v. Light](#), 147 N.E.2d 34, 12 Ill.2d 502 (1958)] and another state has extended voluntary recognition to future installments [[Worthley v. Worthley](#), 283 P.2d 19, 44 Cal.2d 465 (1955)]. See the comment to Section 306(d) [40-4-201(4)] with respect to international enforcement.

Except where the decree, incorporating the agreement of the parties, provides to the contrary [see Section 306(f) [40-4-201(6)]], future installments may be modified, but the person seeking modification must show that circumstances have changed since the date of the original order so that the order is unconscionable at the time the motion is made and will continue to be unconscionable unless modified. This strict standard is intended to discourage repeated or insubstantial motions for modification. In accordance

with presently existing law, the provisions of the decree respecting property disposition may not be altered unless the judgment itself can be reopened for fraud or otherwise under the laws of the state. There is no intention to change this law. If the judgment was rendered by another state, normal full faith and credit law would allow it to be reopened in the forum state if it can be reopened under the laws of the rendering state.

Subsection (b) authorizes the parties to agree in writing or the court to provide in the decree that maintenance will continue beyond the death of the obligor or the remarriage of the obligee. In the absence of such an agreement or provision in the decree, this section sets the termination date for the obligation to pay future maintenance.

Subsection (c) [(3)] is designed to permit the parties to agree in writing or the court to provide in the decree that the obligation of each parent to support the child will extend beyond the child's emancipation and to permit parents, on occasion of a legal separation or dissolution of marriage, to agree that the child support provisions of the decree will terminate upon the death of a parent who has provided for the child in his will. In the absence of such an agreement or provision in the decree, this section terminates the obligation of a parent to support a child, only upon the child's emancipation. The parent's death does not terminate the child's right to support, and the court may make an appropriate order establishing the obligation of the deceased parent's estate to the child. Section 316(c) [40-4-208(3)], read in connection with Section 309 [40-4-204], authorizes a support order against the estate of a parent who had received property for the child's support if that property was not actually used for the child's support or did not accrue to the child's benefit by [virtue] of the parent's death.

To avoid indefinite delay in the settlement of estates, there may be modification or commutation to a lump sum payment "to the extent just and appropriate in the circumstances." Any person interested, including a creditor or an attorney for the child (Section 310 [40-4-205]), may move the court for the appropriate order.

[Notes of Decisions \(403\)](#)

MCA 40-4-208, MT ST 40-4-208

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MCA 40-4-209

40-4-209. Security or guaranty to secure support

Currentness

(1) Upon a verified application that is made by a person authorized to enforce or collect a child support obligation or by the department of public health and human services and that shows that a person obligated to pay child support or maintenance pursuant to court or administrative order is delinquent in an amount equal to the total of 6 months' support payments, the court may direct the obligated person to appear and show cause why an order should not be entered ordering that the obligated person post bond, give a mortgage, or provide other security or guaranty for the payment of the delinquency.

(2) If the court finds that a delinquency greater than the total of 6 months of support is owed and that the obligated person has the ability to post bond, give a mortgage, or provide security or other guaranty, the court may enter an order requiring the obligated person to post bond, give a mortgage, or provide security or guaranty for so long as there is a support delinquency.

(3) The bond or other security may be in an amount up to the total support due for a 2-year period and must be approved by the court. The bond must include the name and address of the issuer. Any person issuing a bond under this section must, if the bond is canceled, notify the court and the person or public agency entitled to receive payments under the support order.

(4) If the person obligated to pay child support or maintenance fails to make payments as required by the court or administrative order, the person or public agency entitled to receive payment may recover on the bond or other security. The amount recovered on the bond or other security must first be applied toward satisfaction of any support arrearages.

(5) The department of public health and human services shall adopt guidelines that take into account the payment record of the obligated person, the availability of other remedies, and other considerations which it determines relevant for determining whether the procedure provided in this section would carry out the purpose of enforcing payments of child support or would be appropriate in the circumstances. If after application of the guidelines the department of public health and human services determines an application for an order requiring security is not appropriate, it may not request the order.

Credits

Enacted by Laws 1985, ch. 521, § 1. Amended by Laws 1987, ch. 370, § 98; amended by Laws 1987, ch. 609, § 26; amended by Laws 1989, ch. 702, § 20; amended by [Laws 1995, ch. 546, § 121](#).

[Notes of Decisions \(1\)](#)

MCA 40-4-209, MT ST 40-4-209

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MCA 40-4-210

40-4-210. Child support jurisdiction--nonresident individual

Currentness

(1) In a proceeding to establish or modify a child support order, a district court may acquire personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(a) the individual is personally served with notice within this state in accordance with [Rule 4B, Montana Rules of Civil Procedure](#);

(b) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document that has the effect of waiving any contest to personal jurisdiction;

(c) the individual has resided with the child within this state;

(d) the child was adopted within this state when at least one parent was a resident;

(e) the individual resided in this state and provided prenatal expenses or support for the child;

(f) the child resides in this state as a result of the acts or directives of the individual;

(g) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse; or

(h) there is any other basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.

(2) A district court shall recognize and, if petitioned to do so, enforce according to its terms a child support order issued by a court or administrative agency of another state if the order was made consistent with the full faith and credit provisions of [28 U.S.C. 1738B](#).

(3) A district court may not establish a subsequent child support order that conflicts with an existing order entitled to recognition under subsection (2) or, except as provided in subsection (6), modify an existing order entitled to recognition under subsection (2).

(4) In interpreting a child support order issued in another state, including the duration of current payments and other obligations of support, a district court shall apply the law of the issuing state.

(5) In an action to enforce arrears under a child support order issued in another state, a district court shall apply the statute of limitations of this state or of the issuing state, whichever provides the longer period of limitation.

(6) A district court has jurisdiction to modify a child support order issued by a court or administrative agency of another state only after meeting the requirements of [40-5-194](#) and the standards for modification of interstate support orders set out in [28 U.S.C. 1738B](#).

Credits

Enacted by Laws 1989, ch. 459, § 1. Amended by [Laws 1993, ch. 328, § 52](#); amended by [Laws 1999, ch. 579, § 1](#).

[Notes of Decisions \(4\)](#)

MCA 40-4-210, MT ST 40-4-210

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MCA 40-4-211

40-4-211. Jurisdiction--commencement of parenting proceedings

Currentness

(1) A court of this state competent to decide parenting matters has jurisdiction to make a parenting determination by initial or amended decree if:

(a) this state:

(i) is the home state of the child at the time of commencement of the proceedings; or

(ii) had been the child's home state within 6 months before commencement of the proceedings and the child is absent from this state because of the child's removal or retention by any person and a parent or person acting as parent continues to live in this state; or

(b) it is in the best interest of the child that a court of this state assume jurisdiction because:

(i) the child and the parents or the child and at least one contestant have a significant connection with this state; and

(ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(c) the child is physically present in this state and:

(i) has been abandoned, including being surrendered to an emergency services provider as provided in [40-6-405](#);

(ii) has been with a caretaker relative who has been awarded continuing custody pursuant to [40-6-602](#); or

(iii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is neglected or dependent; or

(d)(i) no other state has jurisdiction under prerequisites substantially in accordance with subsection (1)(a), (1)(b), or (1)(c) or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine parenting of the child; and

(ii) it is in the child's best interest that the court assume jurisdiction.

(2) Except under subsections (1)(c) and (1)(d), physical presence in this state of the child or of the child and one of the contestants is not alone sufficient to confer jurisdiction on a court of this state to make a parenting determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine parenting of the child.

(4) A parenting plan proceeding is commenced in the district court:

(a) by a parent, by filing a petition:

(i) for dissolution or legal separation;

(ii) for parenting in the county in which the child is permanently resident or found; or

(iii) for custody under [40-6-411](#); or

(b) by a person other than a parent if the person has established a child-parent relationship with the child, by filing a petition for parenting in the county in which the child resides or is found.

(5) Notice of a parenting proceeding must be given to the child's parent, guardian, caretaker, those persons with whom the child is physically residing, and all other contestants, who may appear, be heard, and file a responsive pleading. The court, upon a showing of good cause, may permit intervention of other interested parties.

(6) For purposes of subsection (4)(b), "child-parent relationship" means a relationship that:

(a) exists or did exist, in whole or in part, preceding the filing of an action under this section, in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education, and discipline;

(b) continues or existed on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child's psychological needs for a parent as well as the child's physical needs; and

(c) meets or met the child's need for continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home.

(7) A custody proceeding under [40-6-411](#) is commenced in the district court by a parent by filing in one of the following counties:

(a) the county where the newborn is located if the parent knows where the newborn is;

(b) the county where the emergency services provider to whom the newborn was surrendered is located if subsection (7)

(a) does not apply; or

(c) the county where the biological parent is located if neither subsection (7)(a) or (7)(b) applies.

Credits

Enacted 48-331 by Laws 1975, ch. 536, § 31. Amended by Laws 1977, ch. 33, § 11; amended by Laws 1977, ch. 537, § 27; Revised Code of Montana 1947, 48-331; amended by [Laws 1997, ch. 343, § 14](#); amended by [Laws 1999, ch. 414, § 1](#); amended by [Laws 2001, ch. 277, § 15](#); amended by [Laws 2009, ch. 210, § 1](#), eff. Oct. 1, 2009.

Editors' Notes

COMMISSIONERS' NOTE

The provisions of the Act concerning custody adjudication are integrated with the provisions of the Uniform Child Custody Jurisdiction Act, promulgated by the Conference in 1968. The latter Act deals with judicial jurisdiction to adjudicate a custody case when more than one state has an interest in the litigation. The Uniform Marriage and Divorce Act governs the substantive and procedural aspects of custody adjudication once the court has decided that it can and should hear the case on the merits. States considering the adoption of this Act should also consider adopting the Uniform Child Custody Jurisdiction Act. If that Act is adopted in the state, subsections (a) [(1)], (b), [(2)] and (c)[(3)], which are intended to track the interstate jurisdictional sections of that Act, should be omitted, and the remaining subsections should be relettered, accordingly.

The court authorized to hear custody cases has not been identified. In many states the legislature will want to consider the establishment of a Family Court for these purposes; in other states the trial court of general jurisdiction will be named.

Subsection (d) [(4)] makes an important distinction between custody disputes commenced by parents and those commenced by some other person interested in a particular child. A custody proceeding is commenced automatically whenever one of the parents files for a dissolution of legal separation under Part III [Chapter 4]. Also, a parent may commence a custody proceeding without filing a petition for dissolution or legal separation. On the other hand, subsection (d)(2) [(4)(b)] makes it clear that if one of the parents has physical custody of the child, a non-parent may not bring an action to contest that parent's right to continuing custody under the "best interest of the child" standard of Section 402 [40-4-212]. If a non-parent (a grandparent or an aunt or uncle, perhaps) wants to acquire custody, he must commence proceedings under the far more stringent standards for intervention provided in the typical Juvenile Court Act. In short, this subsection has been devised to protect the "parental rights" of custodial parents and to insure that intrusions upon those rights will occur only when the care the parent is providing the child falls short of the minimum standard imposed by the community at large--the standard incorporated in the neglect or delinquency definitions of the state's Juvenile Court Act. Once a custody proceeding is commenced, the court should be able to

hear the views of all interested persons; Subsection (d) [(4)] therefore authorizes the judge to permit intervention by relatives who would not have been allowed to commence an action.

[Notes of Decisions \(117\)](#)

MCA 40-4-211, MT ST 40-4-211

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MCA 40-4-212

40-4-212. Best interest of child

Currentness

(1) The court shall determine the parenting plan in accordance with the best interest of the child. The court shall consider all relevant parenting factors, which may include but are not limited to:

- (a) the wishes of the child's parent or parents;
- (b) the wishes of the child;
- (c) the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who significantly affects the child's best interest;
- (d) the child's adjustment to home, school, and community;
- (e) the mental and physical health of all individuals involved;
- (f) physical abuse or threat of physical abuse by one parent against the other parent or the child;
- (g) chemical dependency, as defined in [53-24-103](#), or chemical abuse on the part of either parent;
- (h) continuity and stability of care;
- (i) developmental needs of the child;
- (j) whether a parent has knowingly failed to pay birth-related costs that the parent is able to pay, which is considered to be not in the child's best interests;
- (k) whether a parent has knowingly failed to financially support a child that the parent is able to support, which is considered to be not in the child's best interests;

(l) whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests. In making that determination, the court shall consider evidence of physical abuse or threat of physical abuse by one parent against the other parent or the child, including but not limited to whether a parent or other person residing in that parent's household has been convicted of any of the crimes enumerated in [40-4-219\(8\)\(b\)](#).

(m) adverse effects on the child resulting from continuous and vexatious parenting plan amendment actions.

(2) When determining the best interest of the child of a parent in military service, the court shall consider all relevant parenting factors provided in subsection (1) and may not determine the best interest of the child based only upon the parent's military service.

(3) A de facto parenting arrangement, in the absence of a prior parenting decree, does not require the child's parent or parents to prove the factors set forth in [40-4-219](#).

(4) The following are rebuttable presumptions and apply unless contrary to the best interest of the child:

(a) A parenting plan action brought by a parent within 6 months after a child support action against that parent is vexatious.

(b) A motion to amend a final parenting plan pursuant to [40-4-219](#) is vexatious if a parent seeks to amend a final parenting plan without making a good faith effort to comply with the provisions of the parenting plan or with dispute resolution provisions of the final parenting plan.

Credits

Enacted 48-332 by Laws 1975, ch. 536, § 32; Revised Code of Montana 1947, 48-332. Amended by Laws 1987, ch. 379, § 1; amended by Laws 1989, ch. 303, § 1; amended by [Laws 1995, ch. 467, § 1](#); amended by [Laws 1997, ch. 343, § 15](#); amended by [Laws 2009, ch. 356, § 1](#), eff. Oct. 1, 2009.

Editors' Notes

COMMISSIONERS' NOTE

This section [except the last sentence] is designed to codify existing law in most jurisdictions. It simply states that the trial court must look to a variety of factors to determine what is the child's best interest. The five factors mentioned specifically are those most commonly relied upon in the appellate opinions; but the language of the section makes it clear that the judge need not be limited to the factors specified. Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interest of children-- and this section enjoins judges to decide custody cases according to that general standard. The same analysis is appropriate to the other common presumptions: a parent is usually preferred to a non-parent; the existing custodian is usually preferred to any new custodian because of the interest in assuring continuity for the child; preference is usually given to the custodian chosen by agreement of the parents. In the case of modification, there is also a specific provision designed to foster continuity of custodians and discourage change. See Section 409 [[40-4-219](#)].

[Notes of Decisions \(290\)](#)

MCA 40-4-212, MT ST 40-4-212

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MCA 40-4-213

40-4-213. Interim parenting plan

Currentness

(1) A party to a parenting proceeding may move for an interim parenting plan. The motion must be supported by an affidavit as provided in [40-4-220\(1\)](#). The court may adopt an interim parenting plan under the standards of [40-4-212](#) after a hearing or under the standards of [40-4-212](#) and [40-4-220\(2\)](#) before a hearing. If there is no objection, the court may act solely on the basis of the affidavits.

(2) If a proceeding for dissolution of marriage or legal separation is dismissed, any interim parenting plan is vacated unless a parent moves that the proceeding continue as a parenting proceeding and the court finds, after a hearing, that the circumstances of the parents and the best interests of the child require that a parenting plan be adopted. A child support delinquency existing at the time that an interim parenting plan is vacated remains a judgment subject to collection.

(3) If a parenting proceeding commenced in the absence of a petition for dissolution of marriage or legal separation is dismissed, any interim parenting plan is vacated. A child support delinquency existing at the time that an interim parenting plan is vacated remains a judgment subject to collection.

(4) Adoption of a final parenting plan under [40-4-234](#) vacates any interim parenting plan adopted under this section. A child support delinquency existing at the time that an interim parenting plan is vacated remains a judgment subject to collection.

Credits

Enacted 48-333 by Laws 1975, ch. 536, § 33. Amended by Laws 1977, ch. 33, § 12; Revised Code of Montana 1947, 48-333; amended by Laws 1979, ch. 410, § 1; amended by [Laws 1997, ch. 343, § 16](#).

Editors' Notes

COMMISSIONERS' NOTE

Subsection (a) [(1)] encourages trial courts to issue temporary custody orders without formal hearing whenever possible. Since the hearing itself may be a traumatic event for both parents (and therefore for their children, indirectly), the trial court is authorized to make temporary orders on the basis of affidavits alone unless one of the parties files formal objection to that procedure. In most cases, it is expected that trial judges will award temporary custody to the existing custodian so as to minimize disruption for the child.

Subsection (b) [(2)] states an important principle designed to foster values supporting family privacy. If a petition for dissolution or legal separation is dismissed voluntarily, there is no reason for the court to hold a special hearing and make a special (and extraordinary) finding before making any substantive custody decision. In most cases, then, if the dissolution petition is

dismissed, the parties, whether or not they reconcile, will determine for themselves who should be the child's custodian. If the child's circumstances warrant concern for his physical or emotional security, the standard for community intervention expressed in the state's Juvenile Court Act should be the measure applied to the family. The divorce court can always alert juvenile court or welfare department staff informally that a problem may exist.

[Notes of Decisions \(2\)](#)

MCA 40-4-213, MT ST 40-4-213

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MCA 40-4-214

40-4-214. Interviews

Currentness

(1) The court may interview the child in chambers to ascertain the child's wishes as to residence and parental contact. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

(2) The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given must be in writing and made available by the court to counsel upon request. Counsel may examine as a witness any professional personnel consulted by the court.

Credits

Enacted 48-334 by Laws 1975, ch. 536, § 34; Revised Code of Montana 1947, 48-334. Amended by [Laws 1997, ch. 343, § 17](#).

Editors' Notes

COMMISSIONERS' NOTE

This section, and the two which follow, are designed to permit the court to make custodial and visitation decisions as informally and non-contentiously as possible, based on as much relevant information as can be secured, while preserving a fair hearing for all interested parties.

The general rule is that the judge may interview the child in chambers. It is often important for the judge to discover the attitudes and wishes of the child, and there is no reason to subject the child to the formality of the courtroom and the unpleasantness of cross-examination. This provision does not require the judge to permit counsel to be present at the interview, but he must make some kind of record of the interview (using a court reporter or a tape recorder) so that counsel for all parties will have access to the substance of the interview. Similarly, the judge may call informally on experts in a variety of disciplines without subjecting them, in the first instance, to the formal hearing process. But the experts' advice should be available to counsel for the parties so that the judge's decision will not be based on secret information; and the parties should be able to examine the expert as to the substance of his advice to the judge.

[Notes of Decisions \(26\)](#)

MCA 40-4-214, MT ST 40-4-214

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MCA 40-4-215

40-4-215. Investigations and reports

Currentness

(1) If a parent or a court-appointed third party requests, or if the court finds that a parenting proceeding is contested, the court may order an investigation and report concerning parenting arrangements for the child. The investigator may be the child's guardian ad litem or other professional considered appropriate by the court. The department of public health and human services may not be ordered to conduct the investigation or draft a report unless the person requesting the investigation is a recipient of financial assistance, as defined in [53-4-201](#), or a participant in the food stamp program, as defined in [53-2-902](#), and all reasonable options for payment of the investigation, if conducted by a person not employed by the department, are exhausted. The department may consult with any investigator and share information relevant to the child's best interests. The cost of the investigation and report must be paid according to the final order. The cost of the educational evaluation under subsection (2)(a) must be paid by the state as provided in [3-5-901](#).

(2) The court shall determine, if appropriate, the level of evaluation necessary for adequate investigation and preparation of the report, which may include one or more of the following:

(a) parenting education;

(b) mediation pursuant to [40-4-301](#);

(c) factfinding by the investigator; and

(d) psychological evaluation of the parties.

(3) In preparing a report concerning a child, the investigator may consult any person who has information about the child and the child's potential parenting arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. Except as required for children 16 years of age or older, the investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the persons or entities authorized by law to grant or withhold access to the records. The child's consent must be obtained if the child is 16 years of age or older unless the court finds that the child lacks mental capacity to consent. If the requirements of subsection (4) are fulfilled, the investigator's report may be received in evidence at the hearing.

(4) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. When consistent with state and federal law, the investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the

investigator pursuant to the provisions of subsection (3), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person the investigator has consulted for cross-examination. A party may not waive the right of cross-examination prior to the hearing. The results of the investigation must be included in the court record and may, without objection, be sealed.

Credits

Enacted 48-335 by Laws 1975, ch. 536, § 35; Revised Code of Montana 1947, 48-335. Amended by Laws 1981, ch. 277, § 1; amended by Laws 1987, ch. 624, § 1; amended by [Laws 1993, ch. 434, § 2](#); amended by [Laws 1993, ch. 561, § 7](#); amended by [Laws 1995, ch. 18, § 48](#); amended by [Laws 1995, ch. 546, § 122](#); amended by [Laws 1997, ch. 343, § 18](#); amended by [Laws 1997, ch. 486, § 3](#); amended by [Laws 2001, ch. 465, § 5](#); amended by [Laws 2001, ch. 585, § 32](#).

Editors' Notes

COMMISSIONERS' NOTE

The Act steers a middle course between those courts which prohibit a custody investigation unless both parties stipulate to it and those statutes which permit the judge to order an investigation in every case. It is obvious that custody investigations, whether made by a member of the court's staff or by a public or private agency employed for that purpose, can be useful aids to the court. But most custody dispositions are consensual decisions of the parents, and there is no reason to permit the judge to order an investigation in such cases unless one of the spouses, although agreeing to the disposition, wants some further inquiry made. Under these circumstances, the court can order an investigation even if the other spouse opposes it. Similarly, in contested cases, where the judge's need for independent investigation is greatest, a custody study can be ordered even if both spouses are opposed.

The provisions of subsections (b) [(2)] and (c) [(3)] detail the procedural aspects of custody investigations and reports. They assure that investigations will be conducted with due regard to fair hearing values, while encouraging investigators to provide accurate information to the court.

[Notes of Decisions \(29\)](#)

MCA 40-4-215, MT ST 40-4-215

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MCA 40-4-216

40-4-216. Hearings

Currentness

- (1) Parenting plan proceedings must receive priority in being set for hearing.

- (2) Upon motion of a parent who has received military service orders, the court shall, for good cause shown, hold an expedited hearing in parenting or visitation matters instituted under [40-4-228\(6\)](#) if the military service, as defined in 10-1-1003, of the parent has a material effect on the parent's ability or anticipated ability to appear in person at a hearing scheduled in an unexpedited manner.

- (3) The court may tax as costs the payment of necessary travel and other expenses incurred by any person whose presence at the hearing the court considers necessary to determine the best interest of the child.

- (4) The court, without a jury, shall determine questions of law and fact. If it finds that a public hearing may be detrimental to the child's best interest, the court may exclude the public from a parenting hearing but may admit any person who has a direct and legitimate interest in the particular case or a legitimate educational or research interest in the work of the court.

- (5) If the court finds it necessary that the record of any interview, report, investigation, or testimony in a parenting proceeding be kept secret to protect the child's welfare, the court may make an appropriate order sealing the record.

Credits

Enacted 48-336 by Laws 1975, ch. 536, § 36; Revised Code of Montana 1947, 48-336. Amended by [Laws 1997, ch. 343, § 21](#); amended by [Laws 2009, ch. 356, § 2](#), eff. Oct. 1, 2009.

Editors' Notes

COMMISSIONERS' NOTE

This section further details procedural aspects of custody hearings. Subsection (c) [(3)] changes the law in those states which now permit a jury to determine child custody. Subsection (d) [(4)] authorizes the court to protect the child by preventing unnecessary publicity if it finds that sealing the record is necessary for the child's welfare. Although this authority restricts access to public records, the evil of limitation is clearly outweighed by the public interest in the protection of children.

[Notes of Decisions \(8\)](#)

MCA 40-4-216, MT ST 40-4-216

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MCA 40-4-217

40-4-217. Notice of intent to move

Currentness

(1) A parent who intends to change residence shall, unless precluded under [40-4-234](#), provide written notice to the other parent.

(2) If a parent's change in residence will significantly affect the child's contact with the other parent, notice must be served personally or given by certified mail not less than 30 days before the proposed change in residence and must include a proposed revised residential schedule. Proof of service must be filed with the court that adopted the parenting plan. Failure of the parent who receives notice to respond to the written notice or to seek amendment of the residential schedule pursuant to [40-4-219](#) within the 30-day period constitutes acceptance of the proposed revised residential schedule.

Credits

Enacted 48-337 by Laws 1975, ch. 536, § 37; Revised Code of Montana 1947, 48-337. Amended by Laws 1979, ch. 17, § 3; amended by Laws 1987, ch. 509, § 1; amended by Laws 1989, ch. 405, § 1; amended by [Laws 1995, ch. 350, § 8](#); amended by [Laws 1995, ch. 467, § 2](#); amended by [Laws 1997, ch. 343, § 22](#).

Editors' Notes

COMMISSIONERS' NOTE

With two important exceptions, this section [prior to 1997 amendment] states [stated] the traditional rule for visitation rights. The general rule implies a “best interest of the child” standard. Although the judge should never compel the noncustodial parent to visit the child, visitation rights should be arranged to an extent and in a fashion which suits the child's interest rather than the interest of either the custodial or noncustodial parent. The empirical data on post-divorce living arrangements suggests that, if the judge can arrange visitation with a minimum of contest, most parties will eventually reach an accommodation and the bitterness accompanying the divorce will gradually fade. The section does make clear, however, that the judge must hold a hearing and make an extraordinary finding to deprive the noncustodial parent of all visitation rights. To preclude visitation completely, the judge must find that visitation would endanger “seriously the child's physical, mental, moral, or emotional health.” These words are intended to mesh with other uniform legislation. See Uniform Juvenile Court Act, Section 47. Although the standard is necessarily somewhat vague, it was deliberately chosen to indicate its stringency when compared to the “best interest” standard traditionally applied to this problem. The special standard was chosen to prevent the denial of visitation to noncustodial parent on the basis of moral judgments about parental behavior which have no relevance to the parent's interest in or capacity to maintain a close and benign relationship to the child. The same onerous standard is applicable when the custodial parent tries to have the noncustodial parent's visitation privileges restricted or eliminated.

[Notes of Decisions \(19\)](#)

MCA 40-4-217, MT ST 40-4-217

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MCA 40-4-218

40-4-218. Judicial supervision

Currentness

(1) Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including the child's education, health care, and religious training, unless the court after hearing finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or the child's emotional development significantly impaired.

(2) If both parents or all contestants agree to the order or if the court finds that in the absence of the order the child's physical health would be endangered or the child's emotional development significantly impaired, the court may order supervised visitation by the noncustodial parent. The court may not order the department of public health and human services to supervise the visitation.

Credits

Enacted 48-338 by Laws 1975, ch. 536, § 38; Revised Code of Montana 1947, 48-338. Amended by Laws 1987, ch. 609, § 12; amended by [Laws 1995, ch. 546, § 123](#); amended by [Laws 1997, ch. 514, § 1](#).

Editors' Notes**COMMISSIONERS' NOTE**

This section states an important rule designed to promote family privacy and to prevent intrusions upon the prerogatives of the custodial parent at the request of the noncustodial parent. In general, the custodial parent should be, and in this section is designated as, the person responsible for post-divorce decisions concerning the upbringing of the child. If the parents agree in writing about a particular problem such as the child's religious upbringing, the court may enforce the agreement subject to constitutional constraints, [Lynch v. Uhlenhopp, 78 N.W.2d 491, 248 Iowa 68 \(1956\)](#). But in the absence of parental agreement, the court should not intervene solely because a choice made by the custodial parent is thought by the noncustodial parent (or by the judge) to be contrary to the child's best interest. To justify such an intervention, the judge must find that the custodial parent's decision would "endanger the child's physical health or significantly impair his emotional development"--a standard patently more onerous than the "best interest" test. The standard would leave to the custodial parent such decisions as whether the child should go to private or public school, whether the child should have music lessons, what church the child should attend. The court could intervene in the decision of grave behavioral or social problems such as refusal by a custodian to provide medical care for a sick child. [Annotator's note: See 1997 parenting plan provisions in 40-4-233 and 40-4-234.]

Subsection (b) [(2)] pursues the family privacy theme by significantly limiting the judge's authority to order supervision of the child and the custodial parent. To be sure, there are situations in which an objective umpire is needed to facilitate post-divorce adjustment to the custody and visitation decree. But in these situations both parents will usually recognize the need and agree to supervision. If the parents cannot agree to supervision, however, it should not be ordered unless the judge finds some extraordinary need for it. Thus, the provision adopts a more stringent standard than the normal "best interest" standard.

[Notes of Decisions \(5\)](#)

MCA 40-4-218, MT ST 40-4-218

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MCA 40-4-219

40-4-219. Amendment of parenting plan--mediation

Currentness

(1) The court may in its discretion amend a prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interest of the child. In determining the child's best interest under this section, the court may, in addition to the criteria in [40-4-212](#), also consider whether:

(a) the parents agree to the amendment;

(b) the child has been integrated into the family of the petitioner with consent of the parents;

(c) the child is 14 years of age or older and desires the amendment;

(d) one parent has willfully and consistently:

(i) refused to allow the child to have any contact with the other parent; or

(ii) attempted to frustrate or deny contact with the child by the other parent; or

(e) one parent has changed or intends to change the child's residence in a manner that significantly affects the child's contact with the other parent.

(2) A court may modify a de facto parenting arrangement in accordance with the factors set forth in [40-4-212](#).

(3) The court shall presume a parent is not acting in the child's best interest if the parent does any of the acts specified in subsection (1)(d) or (8).

(4) The court may amend the prior parenting plan based on subsection (1)(e) to provide a new residential schedule for parental contact with the child and to apportion transportation costs between the parents.

(5) Attorney fees and costs must be assessed against a party seeking frivolous or repeated amendment if the court finds that the amendment action is vexatious and constitutes harassment.

(6) A parenting plan may be amended upon the death of one parent pursuant to [40-4-221](#).

(7) As used in this section, “prior parenting plan” means a parenting determination contained in a judicial decree or order made in a parenting proceeding. In proceedings for amendment under this section, a proposed amended parenting plan must be filed and served with the motion for amendment and with the response to the motion for amendment. Preference must be given to carrying out the parenting plan.

(8)(a) If a parent or other person residing in that parent's household has been convicted of any of the crimes listed in subsection (8)(b), the other parent or any other person who has been granted rights to the child pursuant to court order may file an objection to the current parenting order with the court. The parent or other person having rights to the child pursuant to court order shall give notice to the other parent of the objection as provided by the Montana Rules of Civil Procedure, and the other parent has 20 days from the notice to respond. If the parent who receives notice of objection fails to respond within 20 days, the parenting rights of that parent are suspended until further order of the court. If that parent responds and objects, a hearing must be held within 30 days of the response.

(b) This subsection (8) applies to the following crimes:

(i) deliberate homicide, as described in [45-5-102](#);

(ii) mitigated deliberate homicide, as described in [45-5-103](#);

(iii) sexual assault, as described in [45-5-502](#);

(iv) sexual intercourse without consent, as described in [45-5-503](#);

(v) deviate sexual conduct with an animal, as described in [45-2-101](#) and prohibited under [45-5-505](#);

(vi) incest, as described in [45-5-507](#);

(vii) aggravated promotion of prostitution of a child, as described in [45-5-603\(1\)\(b\)](#);

(viii) endangering the welfare of children, as described in [45-5-622](#);

(ix) partner or family member assault of the type described in [45-5-206\(1\)\(a\)](#);

(x) sexual abuse of children, as described in [45-5-625](#).

(9) Except in cases of physical abuse or threat of physical abuse by one parent against the other parent or the child, or when a parent has been convicted of a crime enumerated in subsection (8)(b), the court may, in its discretion, order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding amendment of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency, and court action.

(10)(a) Except as provided in subsection (10)(b), a court-ordered or de facto modification of a parenting plan based in whole or in part on military service orders of a parent is temporary and reverts to the previous parenting plan at the end of the military service. If a motion for an amendment of a parenting plan is filed after a parent returns from military service, the court may not consider a parent's absence due to that military service in its determination of the best interest of the child.

(b) A parent who has performed or is performing military service, as defined in [10-1-1003](#), may consent to a temporary or permanent modification of a parenting plan:

(i) for the duration of the military service; or

(ii) that continues past the end of the military service.

Credits

Enacted 48-339 by Laws 1975, ch. 536, § 39; Revised Code of Montana 1947, 48-339. Amended by Laws 1979, ch. 127, § 4; amended by Laws 1979, ch. 410, § 2; amended by Laws 1983, ch. 449, § 1; amended by Laws 1987, ch. 509, § 2; amended by Laws 1989, ch. 303, § 2; amended by Laws 1989, ch. 405, § 2; amended by [Laws 1995, ch. 350, § 9](#); amended by [Laws 1995, ch. 467, § 3](#); amended by [Laws 1997, ch. 343, § 23](#); amended by [Laws 2009, ch. 356, § 3](#), eff. Oct. 1, 2009.

Editors' Notes

COMMISSIONERS' NOTE

Most experts who have spoken to the problems of post-divorce adjustment of children believe that insuring the decree's finality is more important than determining which parent should be the custodian. See Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 *Syracuse L.Rev.* 55 (1969). This section is designed to maximize finality (and thus assure continuity for the child) without jeopardizing the child's interest. Because any emergency which poses an immediate threat to the child's physical safety usually can be handled by the juvenile court, subsection (a) [(omitted in Montana)] prohibits modification petitions until at least two years have passed following the initial decree, with a "safety valve" for emergency situations. To discourage the noncustodial parent who tries to punish a former spouse by frequent motions to modify, the subsection includes a two-year waiting period following each modification decree. During that two-year period, a contestant can get a hearing only if he can make an initial showing, by affidavit only, that there is some greater urgency for the change than that the child's "best interest" requires it. During the two-year period the judge should deny a motion to modify, without a hearing, unless the moving party carries the onerous burden of showing that the child's present environment may endanger his physical, mental, moral, or emotional health.

Subsection (b) [(1)] in effect asserts a presumption that the present custodian is entitled to continue as the child's custodian. It does authorize modifications which serve the child's "best interest;" but this standard is to be applied under the principle that modification should be made only in three situations: where the custodian agrees to the change; where the child, although formally in the custody of one parent, has in fact been integrated into the family of the petitioning parent (to avoid encouraging noncustodial kidnapping, this ground requires the consent of the custodial parent); or where the noncustodial parent can prove both that the child's present environment is dangerous to physical, mental, moral, or emotional health and that the risks of harm from change of environment are outweighed by the advantage of such a change to the child. The last phrase of subsection (b) (3) [(1) (c), now deleted] is especially important because it compels attention to the real issue in modification cases. Any change in the child's environment may have an adverse effect, even if the noncustodial parent would better serve the child's interest. Subsection (b) (3) [(1) (c), now deleted] focuses the issue clearly and demands the presentation of evidence relevant to the resolution of that issue.

Subsection (c) [(5)] provides an additional sanction against vexatious and harassing attempts to relitigate custody.

[Notes of Decisions \(188\)](#)

MCA 40-4-219, MT ST 40-4-219

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MCA 40-4-220

40-4-220. Affidavit practice

Currentness

(1) Unless the parties agree to an interim parenting plan or an amended parenting plan, the moving party seeking an interim parenting plan or amendment of a final parenting plan shall submit, together with the moving papers, an affidavit setting forth facts supporting the requested plan or amendment and shall give notice, together with a copy of the affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, based on the best interests of the child, in which case it shall set a date for hearing on an order to show cause why the requested plan or amendment should not be granted.

(2)(a) A party seeking an interim parenting plan may request that the court grant a temporary order providing for living arrangements for the child ex parte. The party shall make the request in the moving papers and shall submit an affidavit showing that:

(i) no previous parenting plan has been ordered by a court and it would be in the child's best interest under the standards of [40-4-212](#) if temporary living arrangements for the child were as proposed by the moving party; or

(ii) although a previous parenting plan has been ordered, an emergency situation has arisen in the child's present environment that endangers the child's physical, mental, or emotional health and an immediate change in the parenting plan is necessary to protect the child.

(b) If the court finds from the affidavits submitted by the moving party that the interim parenting plan proposed by the moving party would be in the child's best interest under the standards of [40-4-212](#) and that the child's present environment endangers the child's physical, mental, or emotional health and the child would be protected by the interim parenting plan, the court shall make an order implementing the interim parenting plan proposed by the moving party. The court shall require all parties to appear and show cause within 20 days from the execution of the interim parenting plan why the interim parenting plan should not remain in effect until further order of court.

Credits

Enacted 48-340 by Laws 1975, ch. 536, § 40; Revised Code of Montana 1947, 48-340. Amended by Laws 1979, ch. 410, § 3; amended by [Laws 1997, ch. 343, § 24](#); amended by [Laws 1999, ch. 541, § 1](#).

Editors' Notes

COMMISSIONERS' NOTE

This section establishes a procedure for seeking temporary custody or a modification of a custody decree by motion supported with affidavits. The procedure is designed to result in denial of the motion without a hearing unless the court finds that the affidavits establish adequate cause for holding a hearing. The procedure will thus tend to discourage contests over temporary custody and prevent repeated or insubstantial motions for modification.

[Notes of Decisions \(26\)](#)

MCA 40-4-220, MT ST 40-4-220

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MCA 40-4-221

40-4-221. Determination of child's care upon death of parent

Currentness

(1) Upon the death of a parent, one or more parties named in subsection (2) may request a parenting plan hearing. The surviving parent must be a party in any proceeding brought under this section.

(2) Upon the death of a parent, any of the following parties may request a parenting plan hearing:

(a) the natural parent;

(b) the surviving spouse of the deceased parent;

(c) a person nominated by the will of the deceased parent;

(d) any person nominated by the child if the child is at least 12 years old;

(e) any other person if that person has actual physical control over the child;

(f) a person who has established with the child a child-parent relationship, as defined in [40-4-211](#);

(g) any other party whom, upon showing of good cause, the court permits to intervene as an interested party.

(3) The hearing and determination of a parenting plan is governed by this part.

Credits

Enacted by Laws 1979, ch. 127, §§ 1, 2, 3. Amended by [Laws 1997, ch. 343, § 25](#); amended by [Laws 1999, ch. 414, § 2](#).

[Notes of Decisions \(9\)](#)

MCA 40-4-221, MT ST 40-4-221

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MCA 40-4-222

40-4-222. Repealed by Laws 1997, ch. 343, § 39

Currentness

MCA 40-4-222, MT ST 40-4-222

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MCA 40-4-223

40-4-223. Repealed by Laws 1997, ch. 343, § 39

Currentness

MCA 40-4-223, MT ST 40-4-223

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MCA 40-4-224

40-4-224. Repealed by Laws 1997, ch. 343, § 39

Currentness

MCA 40-4-224, MT ST 40-4-224

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MCA 40-4-225

40-4-225. Access to records by parent

[Currentness](#)

Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, law enforcement, and school records, may not be denied to a parent who is a party to a parenting plan.

Credits

Enacted by Laws 1981, ch. 416, § 4. Amended by [Laws 1997, ch. 343, § 26](#).

[Notes of Decisions \(1\)](#)

MCA 40-4-225, MT ST 40-4-225

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MCA 40-4-226

40-4-226. Court-sanctioned educational program on effects of dissolution of marriage on children

Currentness

(1) In a proceeding for dissolution of marriage involving a minor child or in a parenting plan proceeding involving a minor child, a court shall inform the parties, excluding the minor child, of available educational programs concerning the effects of dissolution of marriage on children and, if the court finds that it would be in the best interest of the minor child, shall order the parties to attend a court-sanctioned program. The program may be divided into sessions. The program must be educational in nature and may not be designed for individual therapy.

(2) The cost of implementing the court-sanctioned educational program for each district court, provided for in subsection (1), must be paid by the state as provided in [3-5-901](#). Costs may include parenting evaluation and guardian ad litem services.

Credits

Enacted by [Laws 1995, ch. 201, § 1](#). Amended by [Laws 1997, ch. 343, § 27](#); amended by [Laws 2001, ch. 585, § 33](#).

[Notes of Decisions \(1\)](#)

MCA 40-4-226, MT ST 40-4-226

Statutes are current through chapters effective July 1, 2013, and the 2012 general election. Statutory changes are subject to classification and revision by the Code Commissioner.

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MCA 40-4-227

40-4-227. Rights of parents and children--policy--findings

Currentness

(1) It is the policy of the state of Montana:

(a) to recognize the constitutionally protected rights of parents and the integrity of the family unit;

(b) to recognize a child's constitutionally protected rights, including all fundamental rights unless those rights are specifically precluded by laws that enhance their protection; and

(c) to ensure that the best interests of the child are met in parenting proceedings.

(2) The legislature finds:

(a) that while it is in the best interests of a child to maintain a relationship with a natural parent, a natural parent's inchoate interest in the child requires constitutional protection only when the parent has demonstrated a timely commitment to the responsibilities of parenthood; and

(b) that a parent's constitutionally protected interest in the parental control of a child should yield to the best interests of the child when the parent's conduct is contrary to the child-parent relationship.

Credits

Enacted by [Laws 1999, ch. 414, § 3.](#)

MCA 40-4-227, MT ST 40-4-227

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MCA 40-4-228

40-4-228. Parenting and visitation matters between natural parent and third party

Currentness

- (1) In cases when a nonparent seeks a parental interest in a child under [40-4-211](#) or visitation with a child, the provisions of this chapter apply unless a separate action is pending under Title 41, chapter 3.
- (2) A court may award a parental interest to a person other than a natural parent when it is shown by clear and convincing evidence that:
 - (a) the natural parent has engaged in conduct that is contrary to the child-parent relationship; and
 - (b) the nonparent has established with the child a child-parent relationship, as defined in [40-4-211](#), and it is in the best interests of the child to continue that relationship.
- (3) For purposes of an award of visitation rights under this section, a court may order visitation based on the best interests of the child.
- (4) For purposes of this section, voluntarily permitting a child to remain continuously in the care of others for a significant period of time so that the others stand in loco parentis to the child is conduct that is contrary to the parent-child relationship.
- (5) It is not necessary for the court to find a natural parent unfit before awarding a parental interest to a third party under this section.
- (6) If the parent receives military service orders that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to parent the child for the period the parent is called to military service, as defined in [10-1-1003](#), the court may grant visitation rights to a family member of the parent with a close and substantial relationship to the minor child during the parent's absence if granting visitation rights is in the best interests of the child as determined by [40-4-212](#).

Credits

Enacted by [Laws 1999, ch. 414, § 4](#). Amended by [Laws 2009, ch. 356, § 4](#), eff. Oct. 1, 2009.

[Notes of Decisions \(14\)](#)

MCA 40-4-228, MT ST 40-4-228

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MCA 40-4-229

40-4-229 to 40-4-232. Reserved

Currentness

MCA 40-4-229, MT ST 40-4-229

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MCA 40-4-232

40-4-229 to 40-4-232. Reserved

Currentness

MCA 40-4-232, MT ST 40-4-232

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MCA 40-4-233

40-4-233. Final parenting plan--purpose and objectives

Currentness

The objectives of a final parenting plan are to:

- (1) protect the best interest of the child, consistent with [40-4-212](#);
- (2) provide for the physical care of the child;
- (3) maintain the child's emotional stability and minimize the child's exposure to parental conflict;
- (4) provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future amendment to the final parenting plan;
- (5) set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in [40-4-234](#); and
- (6) encourage the parents, when appropriate under [40-4-234](#), to meet their responsibilities to their minor children through agreements in the parenting plan rather than through judicial intervention.

Credits

Enacted by [Laws 1997, ch. 343, § 19](#).

[Notes of Decisions \(3\)](#)

MCA 40-4-233, MT ST 40-4-233

Statutes are current through chapters effective July 1, 2013, and the 2012 general election. Statutory changes are subject to classification and revision by the Code Commissioner.

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MCA 40-4-234

40-4-234. Final parenting plan criteria

Currentness

(1) In every dissolution proceeding, proceeding for declaration of invalidity of marriage, parenting plan proceeding, or legal separation proceeding that involves a child, each parent or both parents jointly shall submit to the court, in good faith, a proposed final plan for parenting the child, which may include the allocation of parenting functions. A final parenting plan must be incorporated into any final decree or amended decree, including cases of dissolution by default. As used in this section, parenting functions means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child, which may include:

(a) maintaining a loving, stable, consistent, and nurturing relationship with the child;

(b) attending to the daily needs of the child, such as feeding, physical care, development, and grooming, supervision, spiritual growth and development, health care, day care, and engaging in other activities that are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;

(c) attending to adequate education for the child, including remedial or other education essential to the best interest of the child;

(d) ensuring the interactions and interrelationship of the child with the child's parents and siblings and with any other person who significantly affects the child's best interest; and

(e) exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances.

(2) Based on the best interest of the child, a final parenting plan may include, at a minimum, provisions for:

(a) designation of a parent as custodian of the child, solely for the purposes of all other state and federal statutes that require a designation or determination of custody, but the designation may not affect either parent's rights and responsibilities under the parenting plan;

(b) designation of the legal residence of both parents and the child, except as provided in [40-4-217](#);

(c) a residential schedule specifying the periods of time during which the child will reside with each parent, including provisions for holidays, birthdays of family members, vacations, and other special occasions;

(d) finances to provide for the child's needs;

(e) any other factors affecting the physical and emotional health and well-being of the child;

(f) periodic review of the parenting plan when requested by either parent or the child or when circumstances arise that are foreseen by the parents as triggering a need for review, such as attainment by the child of a certain age or if a change in the child's residence is necessitated;

(g) sanctions that will apply if a parent fails to follow the terms of the parenting plan, including contempt of court;

(h) allocation of parental decisionmaking authority regarding the child's:

(i) education;

(ii) spiritual development; and

(iii) health care and physical growth;

(i) the method by which future disputes concerning the child will be resolved between the parents, other than court action; and

(j) the unique circumstances of the child or the family situation that the parents agree will facilitate a meaningful, ongoing relationship between the child and parents.

(3) In approving a final parenting plan for a child of a parent in military service, the court may not disapprove the plan only because of the parent's military service.

(4) The court may in its discretion order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding adoption of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency or court action.

(5) Each parent may make decisions regarding the day-to-day care and control of the child while the child is residing with that parent, and either parent may make emergency decisions affecting the child's safety or health. When mutual decisionmaking is designated in the parenting plan but cannot be achieved regarding a particular issue, the parents shall make a good faith effort to resolve the issue through any dispute resolution process provided for in the final parenting plan.

(6) If a parent fails to comply with a provision of the parenting plan, the other parent's obligations under the parenting plan are not affected.

(7) At the request of either parent or appropriate party, the court shall order that the parenting plan be sealed except for access by the parents, guardian, or other person having custody of the child.

Credits

Enacted by [Laws 1997, ch. 343, § 20](#). Amended by [Laws 1999, ch. 545, § 5](#); amended by [Laws 2009, ch. 356, § 5](#), eff. Oct. 1, 2009.

[Notes of Decisions \(45\)](#)

MCA 40-4-234, MT ST 40-4-234

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MCA 40-4-235

40-4-235 to 40-4-250. Reserved

Currentness

MCA 40-4-235, MT ST 40-4-235

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MCA 40-4-250

40-4-235 to 40-4-250. Reserved

Currentness

MCA 40-4-250, MT ST 40-4-250

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MCA 40-4-251

40-4-251. Definitions

Currentness

As used in 40-4-251 through 40-4-258, the following definitions apply:

- (1) "Asset" includes but is not limited to any real or personal property of any nature however and whenever acquired, whether the property is tangible or intangible, whether the property is currently existing or contingent, and whether the title is in the name of the husband or wife, or both.
- (2) "Default judgment" does not include a stipulated judgment or any judgment pursuant to a marital settlement agreement.
- (3) "Earnings and accumulations" includes income from any source.
- (4) "Expenses" includes but is not limited to all personal living expenses, but does not include business-related expenses.
- (5) "Liability" includes but is not limited to any debt or obligation, however and whenever acquired, whether the debt or obligation is currently existing or contingent or is in the name of the husband or wife, or both.
- (6) "Marital estate" includes all assets and liabilities.

Credits

Enacted by [Laws 1997, ch. 326, § 1](#).

MCA 40-4-251, MT ST 40-4-251

Statutes are current through chapters effective July 1, 2013, and the 2012 general election. Statutory changes are subject to classification and revision by the Code Commissioner.

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MCA 40-4-252

40-4-252. Preliminary declaration of disclosure--penalty

Currentness

- (1) Within 60 days of service of a petition for dissolution or nullity of marriage or for legal separation of the parties, each party shall serve on the other party a preliminary declaration of disclosure, executed under penalty of perjury. The parties may, by written stipulation or by oral stipulation made in open court, agree to waive the exchange of or change the time for exchange of preliminary declarations of disclosure.
- (2) The preliminary declaration of disclosure may not be filed with the court, except on the court's order.
- (3) The preliminary declaration of disclosure must set forth with sufficient particularity, which a person of reasonable and ordinary intelligence can ascertain, all of the following:
 - (a) the identity of all assets in which the declarant has or may have an interest and all liabilities for which the declarant is or may be liable, regardless of the characterization of an asset or liability; and
 - (b) the declarant's percentage of ownership in each asset and percentage of obligation for each liability when property is not solely owned by one or both of the parties. The preliminary declaration may also set forth the declarant's characterization of each asset or liability.
- (4) A declarant may amend the declarant's preliminary declaration of disclosure without permission of the court.
- (5) Along with the preliminary declaration of disclosure, each party shall provide the other party with a completed income and expense declaration unless an income and expense declaration has already been provided and is current and valid.
- (6) In addition to any other civil or criminal remedy available under law for the commission of perjury, the court may set aside the judgment, or part of the judgment, if the court discovers that a party has committed perjury in the preliminary declaration of disclosure.

Credits

Enacted by [Laws 1997, ch. 326, § 2](#). Amended by [Laws 1999, ch. 545, § 6](#).

MCA 40-4-252, MT ST 40-4-252

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MCA 40-4-253

40-4-253. Final declaration of disclosure--failure to disclose current income and expense declaration--penalty

Currentness

(1)(a) Each party shall serve on the other party a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury:

(i) before or at the time that the parties enter into an agreement for the resolution of property or support issues, other than pendente lite support; or

(ii) in the event that the case goes to trial, no later than 45 days before the first assigned trial date.

(b) The parties may, by written stipulation or by oral stipulation made in open court, agree to change the time for exchange of final declarations of disclosure.

(2) The final declaration of disclosure must include all material facts and information regarding the:

(a) characterization of all assets and liabilities;

(b) valuation of all assets that are contended to be marital or for which it is contended that the marital estate has an interest;

(c) amounts of all obligations that are contended to be marital obligations or for which it is contended that the marital estate has liability; and

(d) expenses and earnings and accumulations of each party that have been set forth in the income and expense declaration.

(3) Along with the final declaration of disclosure, each party shall serve on the other party an updated income and expense declaration unless a current income and expense declaration is on file.

(4) The failure of a party to disclose an asset or liability on the final declaration of disclosure is presumed to be grounds for the court, without taking into account the equitable division of the marital estate, to award the undisclosed asset to the opposing party or the undisclosed liability to the noncomplying party.

(5) In addition to any other civil or criminal remedy available under law for the commission of perjury, the court may set aside the judgment, or part of the judgment, if the court discovers, within 5 years from the date of entry of judgment, that a party has committed perjury in the final declaration of disclosure.

Credits

Enacted by [Laws 1997, ch. 326, § 3](#).

[Notes of Decisions \(5\)](#)

MCA 40-4-253, MT ST 40-4-253

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MCA 40-4-254

40-4-254. Execution and service of final declaration of disclosure and current income and expense declaration

Currentness

Absent good cause, the court may not enter a judgment with respect to the parties' property rights unless each party has executed and served a copy of the final declaration of disclosure and current income and expense declaration. Each party shall execute and file with the court a declaration signed under penalty of perjury stating that service of the final declaration of disclosure and current income and expense declaration was made on the other party.

Credits

Enacted by [Laws 1997, ch. 326, § 4.](#)

[Notes of Decisions \(2\)](#)

MCA 40-4-254, MT ST 40-4-254

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MCA 40-4-255

40-4-255. Noncomplying disclosure declarations--requests to comply--remedies

Currentness

(1) A party who has served on the other party a preliminary declaration of disclosure under [40-4-252](#) or a final declaration of disclosure under [40-4-253](#) and who has provided the information required in the declarations with sufficient particularity may, within a reasonable time, request from a noncomplying party preparation of the appropriate declaration of disclosure or further particularity in a declaration.

(2) If a noncomplying party fails to comply with a request under subsection (1), the complying party may file either or both of the following:

(a) a motion to compel a further response;

(b) a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure.

(3) If a party fails to comply with any provision of [40-4-251](#) through [40-4-258](#), the court shall, in addition to any other remedy provided by law, order the noncomplying party to pay to the complying party any reasonable attorney fees or costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

Credits

Enacted by [Laws 1997, ch. 326, § 5](#).

[Notes of Decisions \(3\)](#)

MCA 40-4-255, MT ST 40-4-255

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MCA 40-4-256

40-4-256. Liquidation--transfer of marital estate assets to avoid encumbrance, devaluation, or market or investment risk--authority of court

Currentness

(1) Except as provided in subsection (2), at any time during the proceedings, the court may, upon application of a party and for good cause and after consideration of the relative nature, scope, and extent of the marital estate, order the liquidation or transfer of title of marital estate assets to avoid unreasonable encumbrance, devaluation, or market or investment risk.

(2) The court may not grant an application under subsection (1) unless the appropriate declaration of disclosure has been served on the opposing party by the moving party as provided in [40-4-252](#) through [40-4-254](#).

Credits

Enacted by [Laws 1997, ch. 326, § 6](#).

MCA 40-4-256, MT ST 40-4-256

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MCA 40-4-257

40-4-257. Default judgments--disclosures

Currentness

In the case of a default judgment, a petitioner may waive the final disclosure requirements of 40-4-253 and 40-4-254. However, the petitioner shall comply with the preliminary declaration of disclosure requirements of 40-4-252.

Credits

Enacted by [Laws 1997, ch. 326, § 7](#).

MCA 40-4-257, MT ST 40-4-257

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MCA 40-4-258

40-4-258. Disclosures--attorney work product privilege--protective orders--Montana Rules of Civil Procedure

Currentness

A disclosure required by 40-4-252 through 40-4-254 does not abrogate the attorney work product privilege or the formal discovery procedures provided by the Montana Rules of Civil Procedure or does not impede the power of the court to issue protective orders.

Credits

Enacted by [Laws 1997, ch. 326, § 8.](#)

MCA 40-4-258, MT ST 40-4-258

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West's Montana Code Annotated
Title 40. Family Law
Chapter 6. Parent and Child
Part 6. Caretaker Relative--Child Custody Rights

MCA 40-6-601

40-6-601. Legislative finding and purpose--definitions

Currentness

(1) The legislature recognizes that the right of parents to the custody and control of their children is based upon the liberties secured by the United States and Montana constitutions and that a parent's right to that custody and control is therefore normally supreme to the interests of other persons. The legislature also recognizes a growing phenomenon in which absent or otherwise unavailable parents have temporarily surrendered the custody and care of a child to a grandparent or other caretaker relative for a lengthy period of time. The legislature finds that a caretaker relative frequently offers continuity of care by providing a child a loving, stable, and secure environment in which to live, make friends, and attend school, which is an environment not provided by a parent who temporarily abandons a child. However, a child is deprived of that caring and safe environment, and the related continuity of care it may provide, when a parent returns to claim the child with little or no notice to the caretaker relative. This situation, which in some instances has occurred multiple times with the same child, is disruptive to the more stable life offered by the caretaker relative and may violate the child's rights ensured by [Article II, section 15, of the Montana constitution](#), such as the right under [Article II, section 3, of the Montana constitution](#) of seeking safety, health, and happiness. For these reasons, it is the purpose of the legislature in enacting [40-6-602](#) and this section to exercise its police powers for the health and welfare of children who have been abandoned by their parents to the care of relatives and to create a procedure, applicable in limited situations caused by the voluntary surrender of a child by a parent, under circumstances indicating abandonment, whereby a child in the care of a relative may remain with that relative while the issue of abandonment by the parent is reviewed and determined by a court of law. The legislature believes that this temporary infringement on the right of a parent to the custody and control of a minor child is justified by the possibility of abandonment by the parent, because the welfare of the child is at stake, and because of the likely violation of the child's rights ensured by [Article II, section 15, of the Montana constitution](#).

(2) As used in [40-6-602](#) and this section, the following definitions apply:

(a) "Caretaker relative" or "relative" means an individual related to a child by blood, marriage, or adoption by another individual, who has care and custody of a child but who is not a parent, foster parent, stepparent, or legal guardian of the child.

(b) "Parent" means a biological or adoptive parent or other legal guardian of a child.

Credits

Enacted by [Laws 2007, ch. 496, § 1](#). Amended by [Laws 2009, ch. 210, § 2](#), eff. Oct. 1, 2009.

MCA 40-6-601, MT ST 40-6-601

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Title 40. Family Law
Chapter 6. Parent and Child
Part 6. Caretaker Relative--Child Custody Rights

MCA 40-6-602

40-6-602. Caretaker relative rights upon return of parent--continuing custody affidavit--
review, finding, and order by district court--limited reconsideration--immunity

Currentness

(1) If custody of a child has been voluntarily given to a relative of the child by a parent of the child and the child has remained with that relative for at least 6 months under circumstances in which it is unclear whether or when the parent will return and retake custody of the child, the provisions of this section apply unless, during that 6-month period, the parent expresses to the relative a firm intention and a date on which the parent will return and resume custody of the child and subsequently adheres to that schedule.

(2) Upon a return of the parent and an expression by the parent of an intent by that parent to reassert the parent's right of custody and control over the child, the caretaker relative may file, without payment of a filing fee, with the district court in the county of the relative's residence a detailed affidavit as provided in this section. The affidavit must contain the following matters, the exclusion of any of which makes the affidavit void:

(a) the identification of:

(i) the caretaker relative, including the relative's address;

(ii) the child in the custody of the relative; and

(iii) the parent demanding custody of the child, including the parent's address, if known;

(b) a statement of the facts, as nearly as can be determined, of:

(i) the date, time, and circumstances surrounding the voluntary surrender of the custody of the child to the caretaker relative, including any conversation between the relative and the parent concerning the purpose of the parent's absence and when the parent would return and resume custody of the child;

(ii) the reason for the surrender of the child to the relative, as far as is known by the relative;

(iii) the efforts made by the relative to care for the child, including:

(A) facts explaining the nature and permanency or stability of the home provided by the relative for the child;

(B) the schooling of the child while in the relative's custody; and

(C) the socialization of the child with other children and adults, both inside and outside the family of the caretaker relative; and

(iv) whether any contact was made by the child's parent with the relative, the child, or both, during the absence of the parent and if so, the date, time, and circumstances of that contact, including any conversation between the relative and the parent concerning when the parent would return and resume custody of the child;

(c) a statement by the caretaker relative as to:

(i) why the relative wishes to maintain custody of the child; and

(ii) how the relative has offered and will continue to offer continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home;

(d) a warning, in at least 14-point type, to the caretaker relative in the following language: "WARNING: DO NOT SIGN THE FOREGOING AFFIDAVIT IF ANY OF THE ABOVE STATEMENTS ARE INCORRECT OR YOU WILL BE COMMITTING AN OFFENSE PUNISHABLE BY FINE, IMPRISONMENT, OR BOTH"; and

(e) a notarized signature of the caretaker relative following a written declaration that the affidavit is made under oath and under penalty of the laws of Montana governing the giving of false sworn testimony and that the information stated by the caretaker relative in the affidavit is true and correct.

(3) A copy of the affidavit filed with the district court must be provided by the caretaker relative to the child's parent, if the address or location of the parent is known to the relative, and may be provided to the department of public health and human services. A caretaker relative may maintain temporary custody of the child for 5 days following the return of the parent and the demand by the parent for custody of the child pending completion of the affidavit and the order of the district court. During that 5-day period, the caretaker relative may not be deprived of the custody of the child by a peace officer or by the order of a court unless a court finds, upon petition by the child's parent and after a hearing and upon notice to the caretaker relative as the court shall require, that:

(a) the child has not been in the custody of the caretaker relative for at least 6 months;

(b) the caretaker relative has committed child abuse or neglect with regard to the child in the custody of the relative; or

(c) the action by the caretaker relative to make and file the affidavit with the district court in accordance with this section was not made in good faith.

(4) Upon receipt of the caretaker relative's affidavit pursuant to subsection (3), the department may proceed pursuant to [41-3-202](#) as if a report of abandonment of the child had been received.

(5)(a) Within 48 hours of the filing of the affidavit, the district court shall review the affidavit and determine ex parte whether the affidavit contains prima facie evidence that the child was abandoned by the child's parent. If the court determines that there is prima facie evidence that the child was abandoned by the child's parent, the court shall within 3 business days of its determination of prima facie evidence enter appropriate findings of fact concerning the abandonment and enter an ex parte order approving and ordering continued custody and control of the child by the caretaker relative. An order of the district court pursuant to this subsection approving and ordering continued custody by the caretaker relative is effective for 14 days following entry of the order.

(b) If the court determines that the affidavit does not provide prima facie evidence of abandonment by the parent, the court shall within 3 business days of its determination make appropriate findings of fact and order the child returned to the parent. Upon receipt of the written findings and order of the court, the caretaker relative shall surrender the custody and control of the child to the child's parent.

(c) During or after the 14-day period established under subsection (5)(a), the caretaker relative may commence a parenting plan proceeding under [40-4-211](#) or petition the court to be appointed the guardian of the minor under [72-5-225](#).

(6) Upon entry of an order by the district court pursuant to subsection (5)(a), a copy of the order must be sent to the child's parent, if the address of the parent is known.

(7) The child's parent may, after receipt of the court's findings and order ordering continued custody of a child by a caretaker relative, apply to the court, upon notice to the caretaker relative as the court shall provide, for a reconsideration of the court's order approving continued custody of the child by the relative. The court shall reconsider its order and may reverse its order based upon presentation of evidence of nonabandonment. Pending a reconsideration pursuant to this subsection, custody of the child must remain with the relative unless the order of the district court approving that custody expires or a court has ordered a change of custody pursuant to subsection (3).

(8)(a) A caretaker relative refusing to surrender custody of a child while acting in good faith and in accordance with this section is immune from civil or criminal action brought because of that refusal.

(b) A peace officer acting in good faith and taking or refusing to take custody of a child from a relative in accordance with this section and the entity employing the officer is immune from civil or criminal action or professional discipline brought because of the taking of or refusal to take custody of the child.

(9) Subject to availability of appropriations, the attorney general shall prepare a form for the affidavit provided for in this section and shall distribute the form as the attorney general determines appropriate.

Credits

Enacted by [Laws 2007, ch. 496, § 2](#). Amended by [Laws 2009, ch. 210, § 3](#), eff. Oct. 1, 2009.

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Statutes are current through chapters effective July 1, 2013, and the 2012 general election. Statutory changes are subject to classification and revision by the Code Commissioner.

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