

FAMILY LAW OVERVIEW

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Office PC

- ▶ Montana has jurisdiction if you have resided in Montana for at least 90 days prior to filing dissolution
- ▶ Marriage is irretrievably broken (the parties have lived apart for more than 180 days preceding the commencement of the proceeding and there is serious marital discord that adversely affects the attitude of one or both of the parties toward the marriage)
- ▶ Summons and Automatic Economic Restraining Order
- ▶ Proposed Parenting Plan
- ▶ Preliminary Declaration of Disclosure of Assets, Debts, Income and Expenses within 60
- ▶ Serving the Respondent
- ▶ Montana is a no-fault state
- ▶ Parenting
 - ▶ Living arrangements for the children and what contact they can have with each parent
 - ▶ Child support and medical support for the children
 - ▶ Division of property and debts

PETITION FOR DISSOLUTION OF MARRIAGE

- ▶ Within 21 days after service of process
- ▶ Default Dissolution
- ▶ Joint Dissolution

RESPONSE TO PETITION FOR DISSOLUTION



- ▶ The court may grant a maintenance order for either spouse ONLY if it finds that the spouse seeking maintenance:
 - ▶ Lacks sufficient property to provide for the spouse's reasonable needs; and
 - ▶ 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 custody not be required to seek employment outside the home
- ▶ 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.

MAINTENANCE

- ▶ 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;
- ▶ The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- ▶ The standard of living established during the marriage;
- ▶ The duration of the marriage;
- ▶ The age and the physical and emotional condition of the spouse seeking maintenance; and
- ▶ 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.

RELEVANT FACTS FOR A MAINTENANCE ORDER

- ▶ Within court's discretion.
- ▶ Based upon the financial resources of the parties

PROFESSIONAL FEES

▶ Parenting Plan

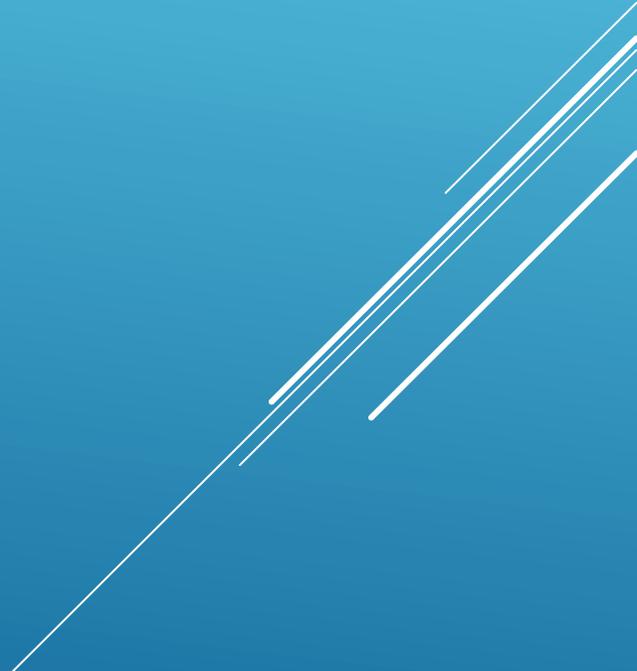
▶ Best interests of the Child Factors:

- ▶ Wishes of the child's parents;
- ▶ Wishes of the child;
- ▶ The interaction of the child with the parents, siblings, and other persons who may significantly impact the child;
- ▶ Child's adjustment to the home, school, and community;
- ▶ The mental and physical health of all individuals involved;
- ▶ Physical abuse or threat of physical abuse by one parent against the other parent or the child;
- ▶ Chemical dependency issues;
- ▶ Continuity and stability of care;
- ▶ Developmental needs of the child;
- ▶ Whether a parent has knowingly failed to pay birth-related costs;
- ▶ Whether a parent has knowingly failed to financially support a child that the parent is able to support; and
- ▶ Whether the child has frequent and continuing contact with both parties.

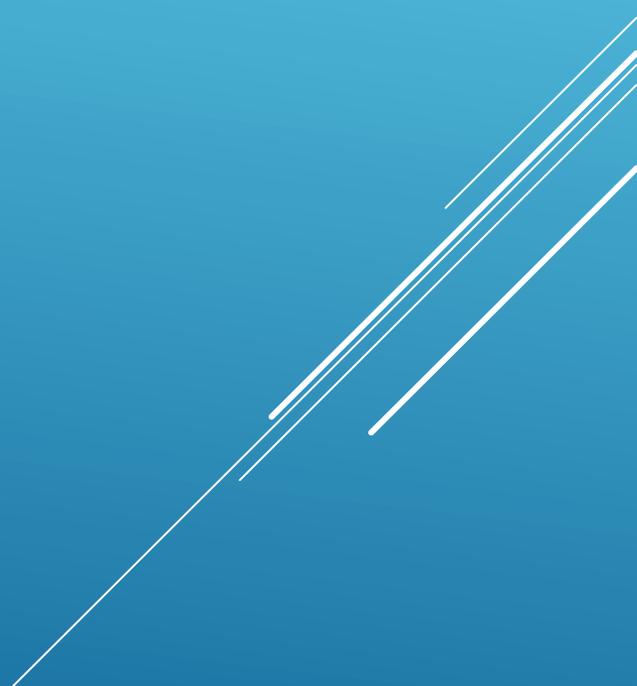
PARENTING

- ▶ Decision making
- ▶ Residential schedule and holiday schedules
- ▶ Violation of Parenting Plan
 - ▶ Contempt of court
 - ▶ Subject to arrest and fine

PARENTING CONTINUED



MEDIATION



- ▶ The financial resources available to the child;
- ▶ The financial resources available to each parent;
- ▶ The standard of living the child would have had if the parents were still together;
- ▶ The child's emotional, educational and medical needs;
- ▶ The age of the child;
- ▶ The cost of day care; and
- ▶ The needs of any person, other than the child, whom either parent is legally obligated to support.
 - ▶ Child support ends after the child turns 18 or 19 if the child is still in high school

CHILD SUPPORT FACTORS

- ▶ General rule is that a parent who has medical insurance available through his or her employment must cover the children, if the insurance is available at a reasonable cost.

MEDICAL SUPPORT

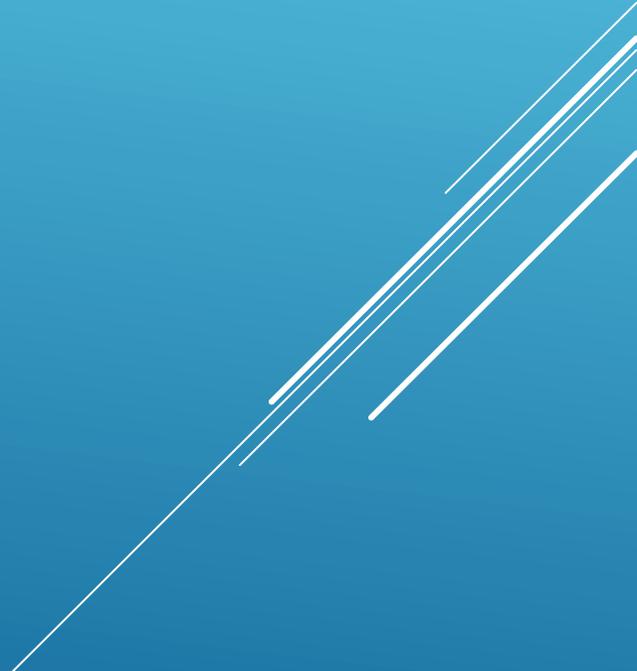
- ▶ Equitable distribution of the property
 - ▶ The duration of the marriage;
 - ▶ The age, health, occupation, income, vocational skills, estate, liabilities, and need of both parties;
 - ▶ The parenting arrangements, if children are involved;
 - ▶ Whether maintenance has been granted;
 - ▶ The opportunity for both parties to acquire income and assets in the future; and
 - ▶ The contribution of a spouse as a homemaker to the family.

- ▶ Real property
- ▶ Personal property
- ▶ Pensions or retirement accounts

PROPERTY

- ▶ Pre-marital debt vs. marital debt (joint).

DEBTS (LIABILITIES)



- ▶ Temporary Order of Protection (TOP)
- ▶ Interim Parenting Plan (Ex Parte)
- ▶ Temporary Maintenance
- ▶ Temporary Child Support

TEMPORARY ORDERS

- ▶ Tax issues
- ▶ Following the Final Decree of Dissolution (dividing up the marital estate)
- ▶ Changing titles
- ▶ Deeds
- ▶ Name change

POST-DISSOLUTION ISSUES

- ▶ Change has occurred that could affect the best interests of the child.
- ▶ Notice of intent to move.

MODIFYING A PARENTING PLAN

PRE- AND POST-MARITAL AGREEMENTS

The background is a blue gradient, transitioning from a lighter blue at the top to a darker blue at the bottom. On the right side, there are several white, parallel diagonal lines that create a sense of motion and depth, extending from the bottom left towards the top right.

- ▶ Governed by Uniform Premarital Agreement Act, Mont. Code Ann. §§ 40-2-601 et seq.
- ▶ As a uniform law, the Act “must be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this part among the states enacting it.” Mont. Code Ann. § 40-2-602. Commissioners’ Notes (the “Notes”) and cases from other jurisdictions that have adopted the Act can aid interpretation where Montana Supreme Court has not ruled on an issue.
- ▶ “Premarital agreement” means “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.” Mont. Code Ann. § 40-2-603(1). The Notes to this section state that the Act does not apply to “[a]greements between persons living together but not contemplating marriage and postnuptial or separation agreements.”

PREMARITAL AGREEMENTS

- ▶ “A premarital agreement becomes effective upon marriage.”
Mont. Code Ann. § 40-2-606. According to the Notes, the Act does not provide for a situation where persons live together without marrying. In that situation, the parties must look to the other law of the jurisdiction.”

PREMARITAL AGREEMENTS CONTINUED

- ▶ Would the Act apply if parties to entered into an agreement contemplating common law marriage as recognized in Montana?

QUESTION

- ▶ The agreement must be in writing and signed by both parties. No consideration required. Mont. Code Ann. § 40-2-604. Agreement may be amended or revoked only with the same formalities. Mont. Code Ann. § 40-2-607.
- ▶ Content of the agreement is governed by Mont. Code Ann. § 40-2-605(1).

REQUIREMENTS FOR A PREMARITAL AGREEMENT

- ▶ the rights and obligations of each of the parties in any of the property of either or both of them, whenever and wherever acquired or located;
- ▶ the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of,
- ▶ or otherwise manage and control property;
- ▶ the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event; the modification or elimination of spousal support;
- ▶ the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
- ▶ the ownership rights in and disposition of the death benefit from a life insurance policy;
- ▶ the choice of law governing the construction of the agreement; and
- ▶ any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
- ▶ The agreement may not “adversely affect” the “right of a child to support.” Mont. Code Ann. § 40-2-605(2).

WHAT A PREMARITAL AGREEMENT CAN ADDRESS

- ▶ *Hutchins v. Hutchins*, 2018 MT 275, ¶¶ 1-13, 393 Mont. 283, 430 P.3d 502.
 - ▶ Court upheld choice-of-law provision in premarital agreement (Nevada law), but only respecting enforceability of the agreement. Montana law would govern other issues in the dissolution proceeding.
- ▶ *In re Marriage of Weiss*, 2010 MT 188, ¶ 16, 357 Mont. 320, 239 P.3d 123.
 - ▶ Court enforces terms of premarital agreement in dissolution proceeding.

MONTANA CASE LAW ON ENFORCEMENT OF PREMARITAL AGREEMENTS

- ▶ A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
 - ▶ that party did not execute the agreement voluntarily; or
 - ▶ the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
 - ▶ was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
 - ▶ did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
 - ▶ did not have or reasonably could not have had an adequate knowledge of the property or financial obligations of the other party.
- ▶ If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.
- ▶ An issue of unconscionability of a premarital agreement must be decided by the court as a matter of law.

BARRIERS TO ENFORCEMENT OF PREMARITAL AGREEMENTS— MONT. CODE ANN. § 40-2-608

- ▶ *Wilkes v. Est. of Wilkes*, 2001 MT 118, ¶ 23, 305 Mont. 335, 27 P.3d 433:
 - ▶ There exists no set definition of unconscionability; rather, determinations of unconscionability are made on a case-by-case scrutiny of the underlying facts. Because a district court's determinations regarding changed circumstances and unconscionability are discretionary, we review these determinations for abuse of discretion.

UNCONSCIONABILITY OF PREMARITAL AGREEMENTS

- ▶ In re Marriage of Bliss, 2016 MT 51, ¶ 20, 382 Mont. 370, 367 P.3d 395 (entry voluntary in absence of lack of capacity, duress, or undue influence).
- ▶ In re Marriage of Shirilla, 2004 MT 28, ¶ 13, 319 Mont. 385, 89 P.3d 1
 - ▶ “[E]vidence of lack of capacity, duress, fraud, and undue influence, as demonstrated by a number of factors uniquely probative of coercion in the premarital context, would be relevant in establishing the involuntariness of the agreement.”

VOLUNTARINESS OF PREMARITAL AGREEMENTS

- ▶ “If a marriage is declared invalid, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.” Mont. Code Ann. § 40-2-609.

EFFECT OF VALIDITY OF MARRIAGE ON PREMARITAL AGREEMENTS

- ▶ Mont. Code Ann. § 40-4-202, which governs property settlement agreements in dissolution, provides that “(5) Premarital agreements must be enforced as provided in Title 40, chapter 2, part 6.”

EFFECT OF SUBSEQUENT PROPERTY SETTLEMENT AGREEMENT

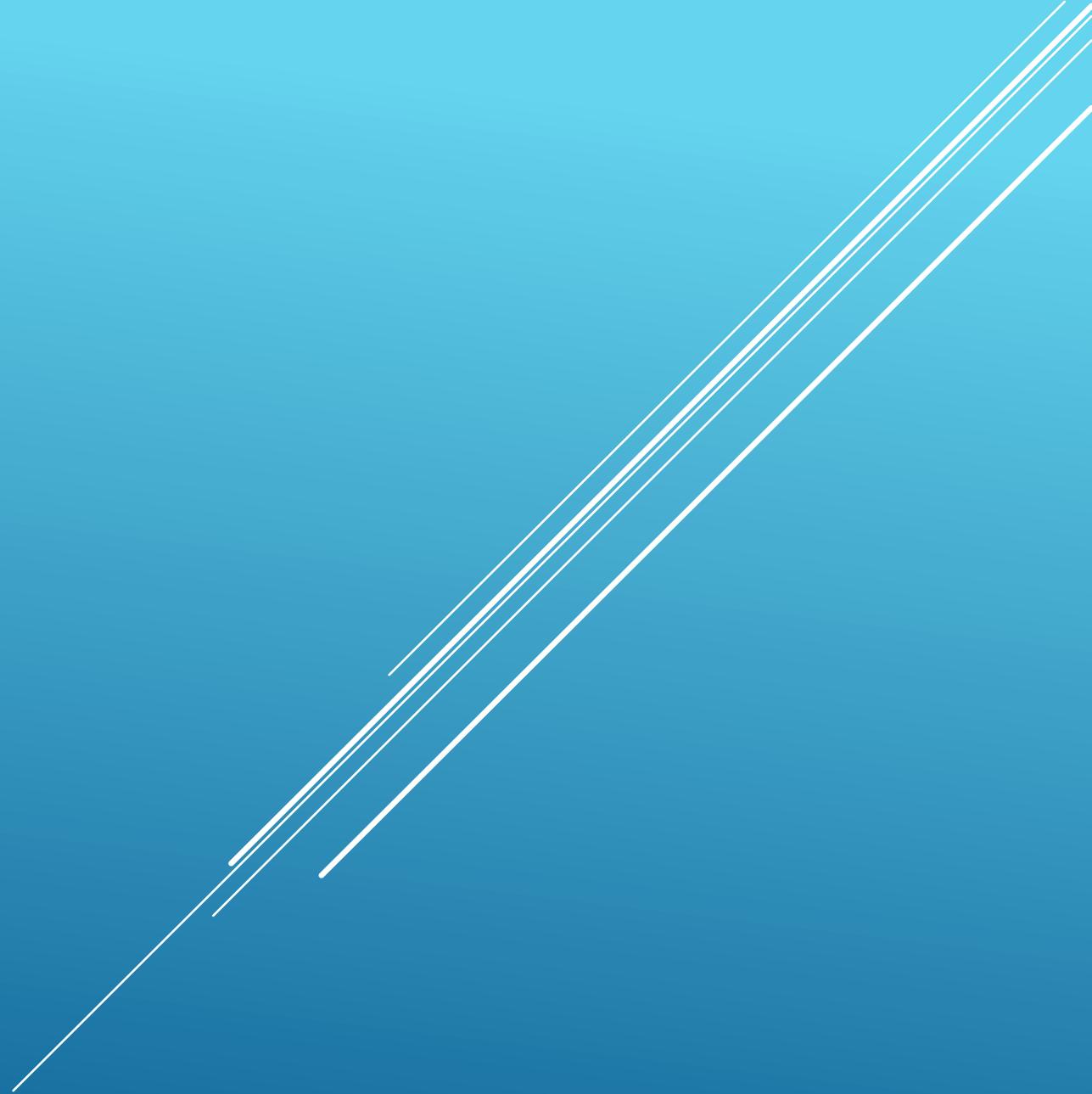
- ▶ Mont. Code Ann. § 40-2-610.
 - ▶ Claims under a premarital agreement are tolled during the marriage. Equitable defenses like laches are available.

STATUTE OF LIMITATIONS

- ▶ Introduced in the 2021 Montana Legislature, would have repealed the Act and replaced it with the Uniform Premarital and Marital Agreements Act (the “Act”).
- ▶ The bill was passed by the House but died in the Senate. It would have codified provisions respecting post-marital agreements.
- ▶ However, these agreements are governed by common law.

HB 368

POST-MARITAL AGREEMENTS



- ▶ Mont. Code Ann. § 40-2-601 *et seq.* only governs premarital agreements.
- ▶ Post-marital agreements are largely governed by contract law and other statutes.

INTRODUCTION TO POST-MARITAL AGREEMENTS

- ▶ *In re Marriage of Parker*, 2013 MT 194, 371 Mont. 74, 305 P.3d 81.
 - ▶ Court appeared to accept the concept of an agreement between spouses as to division of property but did not determine whether such an agreement existed because the alleged agreement was contingent upon a future event that had not occurred.
 - ▶ Court cited Mont. Code Ann. § 40-2-30.

MONTANA CASE LAW ON POST-MARITAL AGREEMENTS

- ▶ “Either husband or wife may enter into any engagement or transaction with the other or with any other person respecting property which either might, if unmarried, subject in transactions between themselves to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the provisions of this code relative to trusts.”
- ▶ In re Marriage of Myers, 210 Mont. 173, 682 P.2d 718 (1984).
 - ▶ The parties had entered into an agreement for the division of property acquired when they were separated.
 - ▶ The wife argued that she had agreed only because the husband conditioned the parties’ reconciliation on execution of the agreement.
 - ▶ Without deciding whether the agreement was a separation agreement governed, as the wife argued, or a prenuptial agreement under section, as the husband argued, the Court found that the district court’s refusal to enforce the agreement was proper “whether the agreement was a separation agreement or a postnuptial agreement.”

MONT. CODE ANN. § 40-2-301

- ▶ A husband and wife cannot by any contract with each other alter their legal relation, except as to property and except that they may agree, in writing, to an immediate separation and may make provision for the support of either of them and of their children during such separation. Mont. Code Ann. § 40-2-303.
- ▶ The mutual consent of the parties is a sufficient consideration for such an agreement as mentioned in 40-2-303. Mont. Code Ann. § 40-2-304.
- ▶ Except as provided in part 6 of this chapter, all contracts for marriage settlements must be in writing and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved. Mont. Code Ann. § 40-2-312.

STATUTES PERTINENT TO POST-MARITAL AGREEMENTS

- ▶ In contrast to Mont. Code Ann. § 40-4-202(5), there is no provision in these statutes requiring enforcement of property division agreements made during a marriage, as opposed to premarital agreements.
- ▶ In upholding the district court's decision, the Court noted that, while "the application of these statutes to married couples is undeniable, ... there is no intimation that they are at all controlling upon dissolution of the marriage by divorce." *In re Marriage of Dalley*, 232 Mont. 235, 240, 746 P.2d 1131, 1134 quoting *Cook v. Cook*, 159 Mont. 98, 102, 495 P. 2d 591, 593 (1972).
- ▶ Both *Dalley* and *Cook* were appeals of court-ordered property division in dissolution proceedings and did not concern postnuptial agreements.

CAVEATS

▶ Thanks for your time!

QUESTIONS?

