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# CHILD CUSTODY AND THE ALCOHOLIC PARENT

Sharon Glisson Bradley

## I. INTRODUCTION

The courts traditionally have directed little specific attention to the relationship between alcohol and child custody matters. Alcohol dependency or habitual use by a parent seeking custody is but one factor the courts consider when awarding custody. It carries no more weight than other factors; the paramount consideration is the welfare of the child.<sup>1</sup> Alcohol dependency or habitual use can affect child custody decisions in three general situations: (1) custody upon marriage dissolution; (2) termination of the parent-child relationship; and (3) modification of a custody decree. In all custody situations, courts give primary consideration to the "physical, mental, and emotional conditions and needs of the child."<sup>2</sup>

## II. CUSTODY UPON MARRIAGE DISSOLUTION

In custody determinations arising out of marriage dissolutions, the courts are to base their decisions on their perceptions of the best interest of the child.<sup>3</sup> The Montana Uniform Marriage and Divorce Act [hereinafter UMDA]<sup>4</sup> lists the relevant factors that courts are to consider when determining the best interest of the child:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.<sup>5</sup>

Alcohol use by a parent comes within the scope of the fifth factor, the mental and physical health of the parties.

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1. *Trudgen v. Trudgen*, 134 Mont. 174, 179-80, 329 P.2d 225, 228 (1958).

2. MONT. CODE ANN. § 41-3-609(3) (1983).

3. MONT. CODE ANN. § 40-4-212 (1983).

4. MONT. CODE ANN. §§ 40-1-101 to -404, 40-4-101 to -221 (1983).

5. MONT. CODE ANN. § 40-4-212 (1983).

The language of section 40-4-212<sup>6</sup> of the Montana Code Annotated indicates that a judge is not limited to the factors listed above, but may use them as guidelines in making a custody determination. The district court must make reference to the statutory factors or any other factors considered in its decision<sup>7</sup> but need not make specific findings on each of the factors.<sup>8</sup>

Unlike Montana, some jurisdictions follow the "tender years doctrine" when awarding custody, thereby avoiding the difficult determination of the best interest of the child. The tender years doctrine, a development of twentieth century common law, rests upon a presumption that mothers should care for young children because mothers are best equipped to provide for their children's physical, emotional, and psychological needs.<sup>9</sup> Prior common law treated children as chattels to which fathers had unquestioned legal right.<sup>10</sup> In *Markegard v. Markegard*<sup>11</sup> the Montana Supreme Court rejected the tender years doctrine, finding it to be outdated in light of the adoption of the UMDA.<sup>12</sup>

### III. TERMINATION OF PARENT-CHILD RELATIONSHIP

Section 41-3-609 of the Montana Code Annotated specifically enumerates excessive use of alcohol as a factor that courts should consider when deciding whether to terminate a parent-child relationship.<sup>13</sup> The Montana Legislature has recognized that a child's needs are best met in a family environment;<sup>14</sup> but when a parent's acts or omissions jeopardize a child's right to an adequate physical and emotional environment, then the best interest of the child is superior to parental rights or family unity.<sup>15</sup> When a court decides to terminate parental rights and place the child with a third party, the court is still guided by the best interest of the child, but apparently there also must be a showing of the natural parent's unfitness.<sup>16</sup>

6. *Id.*

7. *Hammeren v. Hammeren*, \_\_\_ Mont. \_\_\_, 663 P.2d 1152, 1153 (1982).

8. *Speer v. Speer*, \_\_\_ Mont. \_\_\_, 654 P.2d 1001, 1003 (1983).

9. Jones, *The Tender Years Doctrine: Survey and Analysis*, 16 J. FAM. L. 695 (1977).

10. Note, *Gilmore v. Gilmore: Modifying Child Custody Awards*, 37 MONT. L. REV. 411, 411 (1976).

11. \_\_\_ Mont. \_\_\_, 616 P.2d 323 (1980).

12. *Id.* at \_\_\_, 616 P.2d at 325.

13. MONT. CODE ANN. § 41-3-609(2)(d) (1983).

14. MONT. CODE ANN. § 41-3-101(1)(c) (1983).

15. *In re C.A.R. & P.J.R.*, \_\_\_ Mont. \_\_\_, 693 P.2d 1214, 1218-19 (1984).

16. *R.L.S. v. Barkhoff*, \_\_\_ Mont. \_\_\_, 674 P.2d 1082, 1086-87 (1983); *Simmons v. Simmons*, 223 Kan. 639, 642, 576 P.2d 589, 592 (1978); *In re Adoption of Dobbs*, 12 Wash. App. 676, 680-81, 531 P.2d 303, 305 (1975).

Statutes control the termination of parental rights, and the state must prove by clear and convincing evidence that the statutory criteria have been met.<sup>17</sup> Courts may terminate the parent-child relationship in the following situations: (1) when the parents relinquish the child; (2) when the parents abandon the child; or (3) when the child is judged a youth in need of care.<sup>18</sup>

If a child is found to be a youth in need of care, the court will order the development of a treatment plan, pursuant to section 41-3-609 of the Montana Code Annotated.<sup>19</sup> The treatment plan should allow the parents to take advantage of any community resources which may aid them in improving their parenting skills.<sup>20</sup> The statute requires that the treatment plan be developed between the parent and the Department of Social and Rehabilitation Services.<sup>21</sup> The parent's entry into an alcohol rehabilitation program apparently may be a condition of the treatment plan. In order for a court to terminate the parent-child relationship, it must find that the treatment plan has not been completed or that the plan was completed but unsuccessful,<sup>22</sup> and that the condition which renders the parent unfit is not likely to change in the near future.<sup>23</sup> In deciding if the condition which renders a parent unfit will change, the court also must determine whether a continued parent-child relationship will result in continued abuse or neglect.<sup>24</sup>

Alcohol abuse and dependency therefore become factors relevant to judicial evaluation of both the initial treatment plan and any asserted status changes regarding the parent's fitness. When judging parental fitness, the court may consider any reasonable efforts which have failed or succeeded in bringing about rehabilitation.<sup>25</sup> Completion of an alcohol program or apparent alcoholism recovery do not, however, necessarily make a parent legally fit if the parent is otherwise unable to provide minimally adequate child

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17. MONT. CODE ANN. §§ 41-3-406, -607, -609 (1983).

18. MONT. CODE ANN. § 41-3-609 (1983).

19. *Id.* at § 41-3-609(1)(c). "Treatment plan' means a written agreement between the department [of social and rehabilitation services] or court and the parents that includes action that must be taken to resolve the condition or conduct of the parents that resulted in the need for protective services for the child." MONT. CODE ANN. § 41-3-603(4) (1983).

20. *In re C.A.R.*, \_\_\_ Mont. at \_\_\_, 693 P.2d at 1221.

21. MONT. CODE ANN. § 41-3-603(4) (1983).

22. MONT. CODE ANN. § 41-3-609(1)(c)(i) (1983).

23. *In re C.A.R.*, \_\_\_ Mont. at \_\_\_, 693 P.2d at 1221. *See also* MONT. CODE ANN. § 41-3-609(1)(c)(ii) (1983).

24. MONT. CODE ANN. § 41-3-609(2) (1983).

25. *In re C.A.R.*, \_\_\_ Mont. at \_\_\_, 693 P.2d at 1221. *See also* MONT. CODE ANN. § 41-3-609(2)(g) (1983).

care.<sup>26</sup>

#### IV. MODIFICATION OF A CUSTODY DECREE

Montana statutory law authorizes modification of a custody decree only when there is a change of circumstances regarding the child or custodian and the best interest of the child will be served by a modification.<sup>27</sup> Generally, the moving parent must prove that the child's current environment may cause physical, mental, or emotional harm and that the possible harm outweighs the advantages of the custody.<sup>28</sup> An improvement in the noncustodial parent's situation, such as a recovery from alcohol abuse, standing alone probably will not be sufficient grounds on which to justify a decree modification.<sup>29</sup>

#### V. CONCLUSION

Alcohol use in and of itself may not be determinative of a custody matter but can be used effectively to demonstrate a parent's unfitness. Proof of excessive alcohol use, however, must be augmented by evidence of possible detriment to the child in order to prove unfitness of an alcoholic parent.

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26. *In re C.A.R.*, \_\_\_ Mont. at \_\_\_, 693 P.2d at 1221.

27. MONT. CODE ANN. § 40-4-219 (1983).

28. *Id.*

29. *See, e.g., Foss v. Leifer*, 170 Mont. 97, 101, 550 P.2d 1309, 1311 (1977).