

APPLICATION FOR
DISTRICT COURT JUDGESHIP
Eleventh Judicial District

A. PERSONAL INFORMATION

1. Full Name: Kay Lynn Lee
a. What name do you commonly go by? Kay Lynn
2. [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]

4. Office Address: 723 5th Ave E, Ste 100, Kalispell, MT 59901
Phone: 406-752-7122

5. Length of residence in Montana: 11 years as of August 1st
6. List your place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
2006 to present	Kalispell	Montana

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended, beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Degree</u>	<u>Date of Degree</u>
▶Oconee County High *left on Early Decision Plan to attend UGA	Watkinsville, GA	HS Diploma	1971*
▶University of Georgia	Athens, GA	n/a	
▶Virginia Polytechnic Institute	Blacksburg, VA	n/a	
▶University of Idaho	Moscow, ID	n/a	
▶Montana Tech	Butte, MT	n/a	
▶Montana State Univ	Bozeman, MT	n/a	
▶Anchorage Community College	Anchorage, AK	n/a	
▶University of Alaska	Anchorage, AK	BS Biology	1984
▶University of San Diego	San Diego, CA	JD	1987

8. List any scholarships, awards, honors and citations that you have received:

- ▶UGA scholarship in Elementary Education, 1970
- ▶USD, 1986--Moot Court Best Brief, Constitutional Law; First Place Oral Argument, Criminal Law; First Place, Law & Motion; 1987 Order of Barristers
- ▶F. Lee Bailey National Moot Court Competition, 1987, 3rd Place Best Brief
- ▶ NWMTBar Assn Pro Bono Attorney of the Year 2012

9. Were you a member of the Law Review? If so, please state the title and citation of any article that was published and the subject area of the article.

No

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

Court or Administrative Body	Date of Admission
▶State Bar of Montana	2005
▶District of Montana	2005
▶State Bar of California	1987
▶Southern District of California	1987
▶Central District of California	1998

11. Indicate your present employment (list professional partners or associates, if any).

Self-employed, of counsel to Henning, Keedy & Lee, PLLC (formerly a member until 1/1/15)

12. State the name, dates and addresses of all law firms with which you have been associated in practice, all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Henning, Keedy & Lee, PLLC 723 5th Ave E, Ste 100, Kalispell, MT 59901	Member	2006-2014
Holmes & Lee 735 Jackson Street, Glendale, CA	Partner	4/1/01-7/31/04
Gabriel & Horelly 735 N. Brand Blvd., 7th Floor, Glendale, CA	Associate	3/00-3/31/01
Richlin & Theofanis 16601 Ventura Blvd., 4th Floor, Encino, CA	Associate	94 or 95-3/00

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Evans, Cumming & Malter 21550 Oxnard Street, Ste. 920, Woodland Hills, CA	Associate	1/91-1994 or 1995
Liebman, Reiner & McNeil 401 West A Street, Ste. 203, San Diego, CA	Associate	late 88 thru 12/91
Mullen, Dofflemeyer & Frazier 450 B Street, San Diego CA	Law Clerk and associate	4/86 thru late 88

13. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

I took a sabbatical 8/1/04-6/15/05 after closing my LA practice, studied for the Montana bar exam, then started work again after I was sworn-in on 5/3/05.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

Currently primarily involved with family law (80%), bankruptcy (10%) , civil litigation (10%).

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

I practiced workers' compensation, subrogation law, personal injury, insurance defense and complex civil litigation including major construction defect cases in California for approximately 17 years. While in Los Angeles, I acted as Judge Pro Tem at the Workers' Compensation Board regularly after becoming a certified workers' comp specialist. Since moving to Montana, in addition to family law matters of all kinds (divorce, parenting, adoptions, guardianships, conservatorships, etc) and bankruptcy, I have also handled real estate, estate planning and probate matters, landlord-tenant and business transactions as well as minor issues in criminal matters. I also mediate family law cases.

16. If you specialize in any field of law, what is your specialty?

I was a certified specialist in workers' compensation law in CA from 1995 until moving to Montana in 2004; I currently focus my practice in family law: divorce, parenting, adoptions and associated matter as well as real property, bankruptcy and personal injury.

17. Do you regularly appear in court? Yes
 What percentage of your appearance in the last five years was in:
 Federal court 5%
 State or local courts of record 95%
 Administrative bodies 0%
 Other 0%

18. During the last five years, what percentage of your practice has been trial practice?
20-30%
19. How frequently have you appeared in court? 3-7 times per month on average.
20. How frequently have you appeared at administrative hearings? 0 times per month on average.
21. What percentage of your practice involving litigation has been:

Civil	90%
Criminal	1%
Other	9%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

Yes. I represented Appellant in In re Marriage of Funk, 2012 MT 14; P. Mars Scott, PO Box 5988, Missoula, MT 59806, (406)327-0600; oral argument was ordered and took place in November, 2011. I represented the Appellant again in the second Funk appeal: 2013 MT 180N (opposing party was pro se in the second and final appeal).
I represented Appellee in In the matter of the Guardianship of CJB, DA12-0134; Mary Beth Sampsel, Measure Law Office, P.C., 24 1st Ave. East, STE C, Kalispell, MT 59901, 752-6373

23. State the number of jury trials that you have tried to conclusion in the last ten years.

1 (3 jury trials throughout my career)

24. State the number of non-jury trials that you have tried in the last ten years.

15+; while in CA I tried more than 250 bench trials.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

- ▶Johnson-Gilchrist Law Firm, 6330 Hwy 93 S., Whitefish, MT, 59937, 862-3920 numerous cases
- ▶Tiffany Lonnevik, PO Box 1784, Kalispell, MT, 59903, 257-3350, several cases, most recently tried: In Re Marriage of Barton, DR-13-426(B), 5/19-20/14; Judge Robert B. Allison, 758-5906
- ▶Best & Westover, PO Box 278, Kalispell, MT 59901, 752-8731, several cases

- ▶Katherine Maxwell, 226 3rd Ave E, Kalispell, MT 59901, 755-5408, several cases
- ▶Gary Crowe, PO Box 924, Kalispell, MT 59901, 752-7711, 2-3 cases, 1 now pending
- ▶Penni Chisholm, Chisholm & Chisholm, PC, 516 1st Ave, Columbia Falls, MT 59912, 892-4356, most recent: In Re Marriage of Martin, (settled July, 2015)
- ▶Valorie Vidulich, (now) Vidulich Law, 505 1st Ave E, Kalispell, MT 59901, 257-3350, In re Marriage of Bebee (pending)

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years. None

27. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, please state the date, topic and group to which you spoke.

Publications:

Law Clerking, A Handbook for the General Litigation Law Clerk, GEM Publishing, 1987 (now out of print)

Seminars:

NBI: Almost yearly seminars in family law from 2010 to present; Rambo Litigation 5/15
 NWMT Bar Association Pro Bono seminars, yearly since 2011
 6/20/14 State Bar Family Law CLE in Kalispell
 Beat the CLE in approximately 2008 (re collaborative family law)

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member and give the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

- ▶State Bar of California 1987 to present (inactive since 2005)
- ▶State Bar of Montana 2005 to present
- ▶Northwest Montana Bar Association: 2005 to present (currently still serving as chair of the pro bono committee)

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. Please state the title and date of any office that you have held in each organization. If you held any offices, please describe briefly your activities in the organization.

I served on the Glacier Symphony & Chorale Board as a member until 2012; currently serving as president of 2 homeowners associations (for the last 4+ years)

30. Have you ever run for or held public office? If so, please give the details. No

31. Please explain your philosophy of public involvement and practice of giving your time to community service.

I believe it is critical to give back to the community and have willingly performed legal services without remuneration for local organizations (particularly the non-profit Glacier Symphony & Chorale--"GSC") on numerous occasions. I served on the GSC Board for 7 years and currently serve as president of two local homeowners' association boards and devote a fair amount of time to various committees for one board. I also am a Master Gardener (level 2 and working on level 3) which involved 20 hours of volunteer time with local organizations for the 1st level, 30 hours for the second and will involve 40 hours for the 3rd level. I have for the past 4+ years volunteered almost weekly at the Self-Help Law Center running child support calculations for self-represented parents. I participate in pro bono and Modest Means direct representation, typically taking on several pro bono and several more Modest Means clients per year and I mentor other pro bono/modest means attorneys (within and outside my firm). I have participated in the NWMTBar's Pro Bono Committee for the past several years and have chaired the committee for over a year. I have also either have participated in the past or continue to be actively involved in various state-wide committees or sub-committees in various legal areas: Child Support guidelines update about 3 years ago; local District 11 Exhibit A (parenting) guidelines revision Committee 2 years ago; the Local District 11 Rules Revision Committee up until last year and currently serve on the SCSRL Education and Training Working Group, as well as other access to justice or self-representation committees.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars. No

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, please explain. No

34. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations unless they also included a jail sentence. No

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, please give details. No

36. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain. None

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates. No other than several ownership and rental of 3 properties (one in FL, one in Whitefish and one vacation rental property in Big Arm)

38. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

Not currently an officer, director or manager of any business.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, please identify the source and the approximate percentage of your total income it constituted over the last five years.

No except for rental income from the 3 properties—all of which goes toward the mortgages, taxes, insurance or other expenses particular to those properties

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or which in any manner or for any reason might embarrass you? If so, please explain. No

41. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? X Yes No

If not, please explain.

42. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

Yes No

If yes, please explain.

43. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, please give details. No

G. WRITING SKILLS

44. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

I generally have almost always done my own research and writing including drafting pleadings, briefs, motions, etc.

45. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., please explain the type and extent of writing that you have done.

I draft almost everything in my practice, including petitions, parenting plans of varying types, adoption, guardianship and conservatorship paperwork, wills, living wills, powers of attorneys, trusts, motions, briefs, affidavits, contracts, complaints, discovery, etc.

46. Please attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable. See enclosed.

47. What percentage of your practice for the last five years has involved research and legal writing?

100 %

48. Are you competent in the use of Westlaw and/or Lexis? Yes

H. MISCELLANEOUS

49. Briefly describe your hobbies and other interests and activities.

My spare time—what there is of it—is packed with hobbies: reading, singing (local groups as well as 10 seasons with the GSC) I also enjoy watercolor painting, swimming, scuba diving, travel, hiking, biking, cross-country and alpine skiing, hunting and fishing. I am a certified Master Gardener and enjoy producing my own fruit and vegetables which I also can, freeze or turn into jams, jellies and other tasty treats. I also enjoy sewing, knitting, crocheting, crewel/embroidery and other crafts. I play several musical instruments --piano, guitar, autoharp, banjo--and I have done a fair amount

of acting and singing with local theatre companies. My golf game is a constant struggle to keep my handicap under 100. I also have 2 grandsons and 2 dogs I enjoy spending time with.

50. Describe the jobs that you have held during your lifetime.

- ▶Assistant lab tech with USDA Agricultural Experiment Station in Watkinsville, GA
- ▶Bank/vault teller in several banks in Richmond and Blacksburg, VA and Kalamazoo, MI
- ▶Insurance adjustor/hearing rep in Anchorage, Alaska
- ▶Certified law clerk in San Diego, CA

51. Please identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I generally provide direct, full representation or limited scope representation to a minimum of 4-5 pro bono clients per year. For more info, please see Paragraph 31 above.

52. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

One of my earliest legal mentors, John Distel, was a thalidomide victim (with a foreshortened arm) who was not only an accomplished attorney, but also an overachiever in sports and community activities. He enjoyed life to the fullest despite his disability. He taught me the fundamentals of litigation and I second-chaired my first civil jury trial with him (in which we won a \$2.5 million verdict). Not only did he demonstrate the highest degree of professionalism and ethics at all times, he, although primarily a civil litigator in the insurance defense field, took on a number of plaintiff clients who needed help even though their cases were not particularly remunerative (e.g., that first civil trial of mine never did result in collecting that \$2.5 million although I did have an enjoyable time following the defendant through his attempt to discharge the debt in bankruptcy which I had a role in preventing). I have tried to emulate Mr. Distel both as a lawyer and a humanitarian.

53. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

I believe the most important quality is making a reasonable decision in a timely manner: justice delayed is justice denied. I also believe that if you make a decision, you may be wrong some of the time, but if you don't you will be wrong all of the time.

Another important quality is the ability to listen to the parties and witnesses, especially in a bench trial—there is only so much time a judge can spend on each individual case, of course (I tell my clients the Judge will only get to see a tiny piece of the tapestry that makes up the case and/or their lives)--so listening to everything that the participants can articulate and carefully weighing the evidence presented is extremely important to making the correct decision in that case.

Last, but not least, I also believe a Judge needs to be compassionate. A Judge is not

determining the case in a vacuum; these are some of the most stressful and potentially devastating events in the parties' lives, so it is important that he or she retain their humanity.

54. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

I had the rare experience of actually orally arguing a family law case before the MT Supreme Court in 2011 (Funk, see above) which dealt with 27 or so years and almost the same number of cases of established precedent in property distribution—and those cases were overturned because the statute as enacted clearly required inclusion of gifted, premarital and inherited property in the marital estate rather than some judicially-created exceptions. I know one must look to the basis for such precedent, i.e., the statutes and case law, to determine whether a particular precedent is truly carved in stone. On the other hand, while judicial discretion is key to flexibility in given situations, particularly parenting issues, judicial activism has to be avoided. Thus, I feel a District Court Judge should be bound by precedent unless there is a clear and unequivocal reason to go a different direction.

55. In the space provided, state the reasons why you are seeking office as a district court judge.

I truly feel I am well qualified to be a judge—I have the necessary background, skills, temperament and, most important, energy and enthusiasm for the position.

56. What items or events in your career have distinguished you or of which you are most proud?

My reputation as a fair, honest and ethical litigator continues to be the most important asset I have. At the same time, I am equally proud of my participation in pro bono work, including participation in various local and state committees, sub-committees, task forces and the like, to try to improve access to justice for those who need legal help but can't afford it.

57. State any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

I can think of no negative information and I believe my application reflects the myriad attributes necessary for a successful, competent, compassionate judge.

58. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge candidate?

As you can see by my career, avocations, hobbies and interests, I have a great deal of enthusiasm as well as energy to bring to the table.

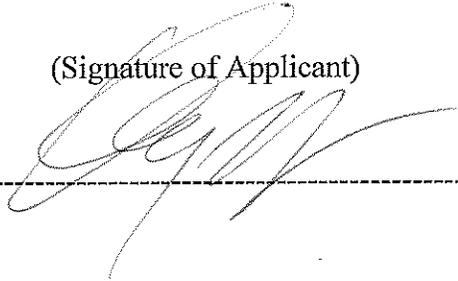
CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 11th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

(Date)

8/10/15

(Signature of Applicant)



A signed original and an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Wednesday, August 12, 2015.

Mail the signed original to:

Lois Menzies
Office of Court Administrator
P.O. Box 203005
Helena, MT 59620-3005

Send the electronic copy to: mtsupremecourt@mt.gov

Application form approved 7/10/93
Revised 9/15/2009

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 11-0209

KEVIN B. FUNK,

Respondent and Appellant,

and

BERNITA J. FUNK,

Petitioner and Appellee.

APPELLEE'S BRIEF

Appeal from the Twentieth Judicial District Court, Lake County,
Cause DR-09-45
The Honorable Deborah Kim Christopher, presiding Judge.

APPEARANCES

Kay Lynn Lee
HENNING, KEEDY & LEE, P.L.L.C.
723 Fifth Avenue East, Suite 100
Kalispell, MT 59901
(406) 752-7122
(406) 752-3367 Fax
kaylynn@henning-keedy.com
Attorneys for Appellee,
Bernita J. Funk

P. Mars Scott
SCOTT LAW OFFICES
PO Box 5988
Missoula, MT 59806
(406) 327-0600
(406) 728-0984 Fax
pleadings@pmarscott.com
Attorneys for Appellant,
Kevin B. Funk

Marriage of Doolittle (1994), 265 Mont. 168, 176-77, 875 P.2d 331, 337.

SUMMARY OF ARGUMENT

Kevin argues the District Court erred in a number of ways: that it included inherited property in the marital estate, that even if inherited property were to be included, the Court should not have awarded a percentage of the current value to June, that the valuation process was erroneous and that a vehicle supposedly traceable to inherited funds should have remained his.

June contends the District Court had ample cause and evidence upon which to base its award of marital assets. Kevin's credibility, or lack thereof, the appalling circumstances of the marriage, his defiance of the District Court's interim Orders and his failure to meet his own burdens in the case provided a firm foundation for the Findings and the ultimate Decree.

ARGUMENT

As a preliminary, applicable to each issue, it should be borne in mind that the trial Judge was the trier of fact charged to evaluate the evidence in the same manner as a jury, *i.e.*, in conformance with §26-1-303, M.C.A.:

1. The Judge was not "bound to decide in conformity with the declarations of any number of witnesses that do not produce conviction in [her mind], against a less number or against a presumption or other evidence satisfying [her mind]."

2. The Judge was allowed to conclude "a witness false in one part of the witness's testimony is to be distrusted in others."
3. The Judge was allowed to conclude "if weaker and less satisfactory evidence is offered and it appears that it is within the power of the party to offer stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

Further as provided in §26-1-302 M.C.A., the District Court was the exclusive judge of witnesses' credibility, which could be evaluated by:

1. The demeanor or manner of the witness while testifying;
2. The character of the witness's testimony;
3. Bias of the witness for or against any party involved in the case;
4. Interest of the witness in the outcome of the litigation or other motive to testify falsely;
5. The witness's character for truth, honesty, or integrity;
6. The extent of the witness's capacity and opportunity to perceive or capacity to recollect or to communicate any matter about which the witness testifies;
7. Inconsistent statements of the witness;
8. An admission of untruthfulness by the witness; and
9. Other evidence contradicting the witness's testimony.

The mere fact that the Judge may have chosen to believe one party or witness, as opposed to another, does not establish the Judge's Findings were clearly erroneous.

Judgments of the trial court regarding the credibility of witnesses or the weight to be given to their testimony should not be set aside. *In re Marriage of Meeks, supra.*

1. Did the District Court Err in Distributing Inherited Real Property?

Montana adopted the Uniform Marriage and Divorce Act ("UMDA") in 1976. Section 40-4-202, M.C.A., "Division of Property" concerning equitable distribution of property at dissolution, was based on UMDA §307 Alternative A. *See*, Uniform Laws Annotated, UMDA §307A. Also the Legislature adopted the specific purposes and method of statutory construction specified in the UMDA, §40-4-101, M.C.A.:

40-4-101. Purposes. This chapter shall be liberally construed and applied to promote its underlying purposes, which are to:

- (1) strengthen and preserve the integrity of marriage and safeguard family relationships;
- (2) promote the amicable settlement of disputes . . . ;
- (3) mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage;
- (4) make reasonable provision for spouse and minor children during and after litigation . . .

The clear intent of UMDA §307 Alt. A is set forth in the Commissioners' Notes for the uniform law (*See*, Uniform Laws Annotated, UMDA §307 Alt. A), and also appear as the Commissioners' Comments under the annotations to §40-4-202 M.C.A.:

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

The principle that *all* property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution, is embodied in §40-4-202, M.C.A.

The statute in a redacted form, that addresses only elements relating to inherited property, provides:

... The court ... shall ... 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 by gift, bequest, devise, or descent ... 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.

The structure and plain meaning of the statute are obvious:

1. The court must “finally and equitably apportion between the parties the property belonging to either or both;
2. In making any apportionment, the court shall consider the general factors of the duration of the marriage, and so on, as specified above; and
3. In dividing inherited property, the court shall consider those contributions of the other spouse to the marriage, including the three factors (a, b and c) listed above.

Kevin’s blanket contention that it is error for a District Court to ever include inherited property in a marital distribution misconstrues the actual language of the statute, the express intent of the statute reflected in the Commissioners’ comments, and the liberality with which the statute should be construed to effect its purposes, §40-4-101(3)-(4), M.C.A., *supra*. Inherited property is not somehow sacrosanct, as is obvious from one of the first interpretations of the statute. *See, Morse v. Morse*

(1977), 174 Mont. 541, 545, 571 P.2d 1147, 1150:

It is clear . . . , 'Property and assets belonging to either or both however and whenever acquired,' that [a \$200,000] inheritance was properly an asset of the marital estate at the time of dissolution.

See also, *In re Marriage of Bartsch*, 2007 MT 136, ¶20, 337 Mont. 386, 162 P.3d 72

Section 40-4-202, M.C.A. is based on §307 of the Uniform Marriage and Divorce Act. It embraces the theory that all property is to be distributed equitably, considering all the circumstances in the particular marriage.

This Court has repeatedly emphasized that:

“[i]n determining the exact distribution of an asset acquired by gift or bequest during the marriage, no set formula can be established as to how the assets should be equitably distributed.’ *In re Marriage of Herrera*, 2004 MT 40, ¶32, 320 Mont. 71, 85 P.3d 781 (citing *Herron*, 186 Mont. at 402, 608 P. at 100)(See also, *Morse v. Morse*, 174 Mont. 541, 546, 571 P.2d 1147, 1150 (1977); *Biegalke v. Biegalke*, 172 Mont. 311, 315, 564 P.2d 987, 989 (1977) (holding that a court’s exercise of its discretion in adjusting marital rights between husband and wife must be reasonable under the circumstances of the case and there is no fixed formula or ratio to be applied in each instance). Each case has to be decided on its own merits. *Herron*, 186 Mont. at 401-02, 608 P.2d at 100 (citations omitted) . . . the District Court is charged with determining what is a fair distribution, and unless it is clearly erroneous, its decision must be affirmed.” *In re Marriage of Bartsch*, 2007 MT 136, ¶22, 337 Mont. 386, 162 P.3d 72.

June is not unmindful that this Court has on occasion spoken of inherited property as not within a marital estate or as excluded from the marital estate. However, this judicial gloss is not in line with the intent of the statute or the analysis

the drafters originally intended, *i.e.*, all assets are “available for distribution among them, upon consideration of various factors enumerated.” Such findings are merely a kind of short hand for the concepts that the proper factors were not considered in those particular cases or that under the circumstances of those particular cases distribution or division of inherited property was inequitable as determined by the underlying court.

As is apparent from the extensive opinion of this underlying Court, all of the general factors set out in the statute were considered, all of the special factors as to the distribution of inherited property were considered and that this District Court – after hearing the parties, judging their demeanor and credibility, and considering the evidence – applied common sense and judgment to reach a distribution that is equitable in this case.

As to the special factors, the District Court clearly considered:

“those contributions of the other spouse [June] to the marriage, including:

- (a) the nonmonetary contribution of a homemaker; (App.A. F.F. 10, 13, 22, Order 2D; *See also*, the Judge’s comments, Tr. 297, ln 11-23),
- (b) the extent to which such contributions have facilitated the maintenance of this property; (App.A. F.F. 10, 13, 22, Order 2D; Tr. 297, ln 11-23) and
- (c) whether or not the property division serves as an

alternative to maintenance arrangements.” (App.A., Order 2G).

With respect to (c) the Court should note that the District Court was concerned that June obtain sufficient property to meet her needs and ordered maintenance to be paid until June was paid the amounts specified with respect to the distribution (App.A, Order 2G). The District Court thus linked property distribution and maintenance, providing property as a substitute for maintenance, and requiring maintenance to be paid until the property amounts are received.

Given that the District Court considered all the factors required by the statute and tried to achieve a balance of all the factors, the real consideration is not that inherited property can't be included in this distribution, as Kevin argues, but whether it was equitable to do so in this case.

The District Court was faced with a case in which June, age 60, has a very limited work life, is employed at a low wage, has no special training and is unlikely to be effectively and profitably retrained prior to becoming eligible for Social Security. June has virtually no assets and remains tasked with the difficult job of shepherding a teenager, age 13, to adulthood. Yet June, at the behest of Kevin, had to forego employment for 17 years, was on call 24/7 with respect to TCF, and maintained and kept up the marital home which Kevin ultimately inherited, albeit not

until some 6 to 7 years after the parties were married.

In contrast Kevin has significant tangible and intangible assets: not only real and personal property, but at age 47, his potential work life is considerably greater than June's; he has work experience and training; and he is presently employable in railroad work. Also he has the capability of acquiring capital assets much more readily than does June.

Kevin kept a stranglehold on the marital finances; dissipated substantial marital funds in the course of his inept day trading efforts; refused to comply with the District Court's various interim Orders involving not only parenting issues (not appealed by either party), but also significant financial matters giving rise to the district Judge's finding him in contempt for various actions or lack thereof. He effectively stymied the judicial process by refusing to provide any documentation relating to the accounting or tracing of allegedly inherited funds, as well as the original or present values of various properties. He himself created and perpetuated the deplorable conditions of marriage which June could no longer tolerate as they were beginning to negatively impact their child. The District Court was well within the law when it found a portion of the real property could and should be equitably distributed to June.