

VOLUME NO. 43

OPINION NO. 72

CLERKS - Authority of district court clerk to charge fees for post-dissolution proceedings;
COURTS - Authority of district court clerk to charge fees for post-dissolution proceedings;
COURTS, DISTRICT - Authority of district court clerk to charge fees for post-dissolution proceedings;
FEES - Authority of district court clerk to charge fees for post-dissolution proceedings;
MARRIAGE AND DIVORCE - Authority of district court clerk to charge fees for post-dissolution proceedings;
MONTANA CODE ANNOTATED - Sections 25-1-102(2), 25-1-201, 25-1-201(1)(a), 40-4-207, 40-5-303;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 56 (1988), 40 Op. Att'y Gen. No. 62 (1984), 37 Op. Att'y Gen. No. 128 (1978).

HELD: The district court clerk may not charge a commencement filing fee for post-dissolution proceedings initiated under the continuing jurisdiction of the district court.

September 12, 1990

Patrick L. Paul
Cascade County Attorney
Cascade County Courthouse
Great Falls MT 59401

Dear Mr. Paul:

You requested my opinion on the following question:

Is the district court clerk entitled to charge a commencement fee on a post-dissolution of marriage action, which is brought under the same cause number as the marital dissolution proceeding and remains under the continuing jurisdiction of the district court?

Following review of Montana case law and the statute authorizing the collection of fees by the district court clerks, I conclude that clerks are not entitled to charge commencement fees in such post-dissolution proceedings.

The controlling statute in relevant part reads as follows:

25-1-201. Fees of clerk of district court. (1) The clerk of the district court shall collect the following fees:

(a) at the commencement of each action or proceeding, except a petition for dissolution of marriage, from the plaintiff or petitioner, \$60; for filing a complaint in intervention, from the intervenor, \$60; for filing a petition for dissolution of marriage, a fee of \$100; and for filing a petition for legal separation, a fee of \$100[.]

This statute makes clear that the clerk shall collect \$100 upon the filing of a petition for dissolution. Your question concerns whether clerks may charge filing fees for petitions and motions that relate to the dissolution but arise after a final decree of dissolution is entered. In particular you question whether the standard commencement fee of \$60 set forth in section 25-1-201(1)(a), MCA, may be charged for: (1) a petition for modification of maintenance, child support, property disposition, or child custody; (2) a petition for modification of an order governing visitation rights; (3) a request for assignment of wages; and (4) a petition for income deduction for the payment of delinquent child support payments. Arguably all these proceedings are "actions" as that term is defined in section 25-1-102(2), MCA:

The word "action", as used in this section, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

If the enumerated post-dissolution proceedings are considered distinct actions, independent of the dissolution itself, the clerks of the district court would be entitled to charge \$60 upon the commencement of each action. It is obvious that the clerks of court expend time and overhead working on these post-dissolution proceedings which may exceed the time spent processing the dissolution action itself.

The attorney general has been requested to interpret section 25-1-201, MCA, and its statutory predecessor on three occasions. In 37 Op. Att'y Gen. No. 128 at 546 (1978) this office was asked whether clerks could collect a fee from both a "petitioner" and a "co-petitioner" listed on a petition for dissolution. The statute at that time, § 25-232, R.C.M. 1947, provided that the clerk should collect for each action from "the plaintiff or petitioner." The attorney general held that the statute's plain language established one filing fee for each action, as opposed to a fee from each petitioner or co-petitioner.

In 1984 this office was asked whether a "declaration of invalidity of a marriage" should be considered a petition for dissolution for purposes of charging a \$50 dissolution filing fee under section 25-1-201(1)(a), MCA (1983). The attorney general held that the \$50 fee for filing a petition for dissolution was inapplicable to a declaration of invalidity of marriage which represented a distinct proceeding not contemplated by the plain language of section 25-1-201(1)(a), MCA. 40 Op. Att'y Gen. No. 62 at 248 (1984). Finally, in an opinion most relevant to your present inquiry, this office held in 1988 that clerks may not charge a fee for filing a motion to convert a decree of legal separation to a decree of dissolution. 42 Op. Att'y Gen. No. 56 at 215 (1988). That opinion concluded that the procedure set forth in section 40-4-108(2), MCA (providing for a motion of conversion), does not entail "commencement" of a new action within the meaning of section 25-1-201(1)(a), MCA. In all three opinions the attorney general interpreted section 25-1-201(1)(a), MCA, or its precursor narrowly and refused to provide for payment of a filing fee where the Legislature did not so provide. See § 1-2-101, MCA. There is a general recognition that the language of a statute authorizing court fees strictly controls its interpretation:

Statutes authorizing the clerk to collect fees for his [or her] services are strictly construed and will not be extended beyond their letter.

14 C.J.S. Clerks of Court § 10.

As this office recognized in 42 Op. Att'y Gen. No. 56 at 215 (1988), section 25-1-201, MCA, is prefaced with the language "at the commencement of each action or proceeding" [the clerk shall collect a fee]. The question of whether a petition for modification of a dissolution decree may be considered a "commencement" of an action was squarely addressed in Billings v. Billings, 189 Mont. 520, 616 P.2d 1104 (1980). The wife in that appeal argued that she had an absolute right to a change of venue based on section 25-2-108, MCA, the general venue statute. The statute provides that actions shall be tried in the county where the defendant resides at the commencement of the action. The wife moved from Missoula County (where the marriage was dissolved) to Lincoln County. The husband then petitioned in Missoula County for modification of child custody; the wife argued that the post-dissolution petition was the commencement of a new action and she was therefore entitled to have venue changed to Lincoln County, her place of residence. The Montana Supreme Court emphatically rejected this contention noting that a trial court has "continuing jurisdiction" over a dissolution after a decree has been entered in matters of "maintenance, support, property disposition, and child custody." See In re the Marriage of Ensign, 227 Mont. 357, 361, 739 P.2d 479, 482 (1987); Libra v. Libra, 154 Mont. 222, 462 P.2d 178 (1969).

Other jurisdictions have reached similar results. In re Marriage of Kozloff, 463 N.E.2d 719 (Ill. 1984) (post-decree petitions do not constitute new actions, but merely continuations of the dissolution proceeding); Campbell v. Campbell, 357 So. 2d 129 (Miss. 1978) (chancery courts have continuing jurisdiction to modify final decrees concerning alimony, custody, and child support); Nimmer v. Nimmer, 279 N.W.2d 156 (Neb. 1979) (action seeking modification of custody of children is a proceeding ancillary to the original divorce and the court has continuing jurisdiction and authority to exercise its discretion); contra State v. Supreme Court, 271 P.2d 435 (Wash. 1954) (proceeding to modify the child custody provisions of a decree is a new proceeding, not ancillary to the divorce decree; petitioner entitled to invoke statutes authorizing the disqualification of judges in the modification proceeding). Support for the majority view that was enunciated by the Montana Supreme Court in Billings comes from the general principle that an action is deemed to commence when the trial court has in some manner acquired jurisdiction over the person of the plaintiff or the subject matter of the action. 1A C.J.S. Actions § 240.

The guidance of the Billings decision for purposes of your opinion request is that all post-dissolution actions concerning matters in which the trial court has continuing jurisdiction may not be considered new actions distinct from the original dissolution. While the Billings decision is specifically applicable to actions for modification (including requests for visitation, § 40-7-103(2), MCA), it also controls resolution of your question of whether district court clerks may charge a separate filing fee for a request for assignment of wages under section 40-4-207, MCA, or a petition for income deduction for the payment of delinquent child support payments under section 40-5-303, MCA. These statutory remedies are designed to fulfill the objectives of child support and maintenance provisions within a decree of dissolution. They may be considered matters within the continuing jurisdiction of the district court in accordance with the dictates of In re the Marriage of Ensign, supra. For purposes of filing fees, such continuing proceedings of the dissolution may not be assessed a commencement fee under the language of section 25-1-201, MCA.

The foregoing discussion is premised upon the assumption that the ancillary proceeding has been filed in the jurisdiction in which the dissolution was initiated and the dissolution decree entered. By contrast, certain petitions may be filed before or in place of a petition for dissolution or may be filed in a different jurisdiction than the dissolution itself. For example, a petition for child custody may be commenced in the absence of a petition for dissolution of marriage. §§ 40-4-211(4)(a), 40-4-213(3), MCA. Similarly, a foreign jurisdiction's dissolution decree may be later modified in the courts of this state. This opinion does not limit the authority of district court clerks to charge fees for the commencement of actions in such instances where the court's jurisdiction is invoked for the first time.

THEREFORE, IT IS MY OPINION:

The district court clerk may not charge a commencement filing fee for post-dissolution proceedings initiated under the continuing jurisdiction of the district court.

Sincerely,

MARC RACICOTT
Attorney General