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NOT THE CLEAVERS ANYMORE: THIRD-PARTY PARENTAL INTERESTS IN MINOR CHILDREN AND THE EVOLVING AMERICAN FAMILY

P. Mars Scott*

I. INTRODUCTION

Two recent decisions by the Montana Supreme Court put Montana at the forefront of the expansion of third-party parental rights.¹ That expansion allows third parties to assume parental responsibilities over minor children under certain circumstances when it is in the child's best interests. In 2009, the Montana Supreme Court in *Kulstad v. Maniaci* granted Kulstad, a nonparent,² a parental interest in Maniaci's two children because Maniaci had acted contrary to her exclusive child-parent relationship with her children and because Kulstad had established a child-parent relationship with them. The Court also determined that maintaining the relationship with Kulstad was in the children's best interests.³ Less than two years later, in *In re the Parenting of A.P.P.*, the Court solidified this precedent by granting a stepfather a parental interest in his deceased wife's minor daughter based on the same principles.⁴

These decisions were firmly based upon Montana's statutory parenting scheme. In 1997, the Montana Legislature deleted the traditional terms "custody" and "visitation" from the statutes and adopted the requirement that all decrees of dissolution incorporate a final parenting plan based on a child's best interests.⁵ In 1999, the Montana Legislature expanded its statutory scheme for protecting the best interests of children by enacting a stat-

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1. *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009); *In re Parenting of A.P.P. v. Price*, 251 P.3d 127 (Mont. 2011).

2. This article uses the terms "nonparent" and "third parties" interchangeably to connote a person who is not a child's biological parent.

3. *Kulstad*, 220 P.3d at 606, 609.

4. *In re A.P.P.*, 251 P.3d at 130.

5. Mont. Code Ann. §§ 40-4-212 to 213 and 40-4-233 to 234 (1997).

ute allowing third parties a parental interest⁶ in a child when: (1) a parent has engaged in conduct contrary to the child-parent relationship; (2) a nonparent has established a child-parent relationship with the child; and (3) it is in the child's best interests to continue the nonparent relationship.⁷

With the new 1999 statutes, the Montana Legislature sought to recognize the constitutionally protected rights of parents and the integrity of the family unit, while balancing those rights with children's fundamental constitutional rights.⁸ The Legislature made specific findings that while it is generally in a child's best interest 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.⁹ Therefore, it is now the policy in Montana that a biological parent's constitutionally protected interest to control a child yields to the best interests of the child when, based on clear and convincing evidence, the parent's conduct is contrary to the child-parent relationship.¹⁰

This article explores some of the societal changes and legal rulings that have recognized and supported the need for nonparents to become involved in the care and protection of minor children in certain circumstances. The article further discusses why the law must continue to provide legal standing for nonparents to obtain responsibility for minor children to help provide children with the best opportunities to grow into productive adults.

II. CHANGING SOCIETAL MORES

The United States Supreme Court has emphasized that the liberty interests of parents in the caring, rearing, and controlling of their children "is perhaps the oldest of the fundamental liberty interests" recognized under the Due Process Clause.¹¹ In 1972, the Court opined that the "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children," including the "inculcation of moral standards, religious beliefs, and elements of good citizenship."¹²

6. "Parental interest" is not specifically defined in the statute but the term presumably grants legal standing to third parties to assert rights over a minor child in contravention to the rights of a biological parent.

7. Mont. Code Ann. § 40-4-228 (1999).

8. Mont. Code Ann. § 40-4-227 passed simultaneously with § 40-4-228; Mont. Const. art. II, § 15, which states that the rights of a person under 18 years of age shall include, but not be limited to, all adult fundamental rights set forth in Article II, the Declaration of Rights Article, unless specifically precluded by laws which enhance the protection of such persons.

9. Mont. Code Ann. § 40-4-227(2) (emphasis added).

10. *Id.*; see also *In re Parenting of L.F.A., D.F.A., D.F.A.*, 220 P.3d 391, 393 (Mont. 2011).

11. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Meyer v. Neb.*, 262 U.S. 390, 399 (1923)).

12. *Wis. v. Yoder*, 406 U.S. 205, 232-233 (1972).

Further, the Court stated that the “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”¹³

Society has evolved since that statement. Prior to the late 1960s, the traditional paradigm of the nuclear family in the United States consisted of a father, a mother, and their children living in the same household.¹⁴ The father was the head of the household and the breadwinner, while the mother stayed home keeping the house and caring for the children. Marriages were expected to be stable, though not necessarily happy. With social stigmas attached to divorce, divorces occurred only in about 25 percent of marriages.¹⁵ Women reported physical and verbal abuse, drinking, and financial problems as the most common reasons for divorce, while men frequently cited trouble with their in-laws and sexual incompatibility as reasons for divorcing their spouse.¹⁶

In the late 1960s, American society challenged the staid structure and oppressive rules of traditional American culture and began to focus on the individual’s right to self-expression and self-fulfillment as the means to pursue happiness, which valued autonomy and personal growth over conformity to social norms. During the 1960’s social and cultural upheaval, many Americans viewed traditional institutions like marriage suspiciously and harshly criticized those institutions as rigid, repressive, and exploitive. Marriages came to be founded more on ideals of equality and mutual growth, rather than on specific social obligations. Before long, entering into the institution of marriage decreased in importance as a cultural necessity, and marriage was no longer seen as an essential mark of adulthood and normalcy.¹⁷ Divorce became a socially acceptable choice for a person to pursue his or her path to personal happiness and self-fulfillment.¹⁸

13. *Id.* at 232.

14. The current concept of the nuclear family may be a 20th century, post-World War II creation since Victorian middle class families paid servants to care for children, antebellum southern families used free labor to help care for children, and immigrant families often had their extended families to help raise children. See e.g. Steven Ruggles, *The Transformation of American Family Structure*, 99 *Am. Historical Rev.* 103 (Feb. 1994) (available at www.hist.umn.edu/~ruggles/Articles/AHR.pdf); Herbert S. Klein, *The Changing American Family*, *Hoover Dig. No. 3* (July 30, 2004) (available at <http://www.hoover.org/publications/hoover-digest/article/6798>). Indeed, there is little documented history of a “traditional family unit” prior to World War II. Society’s current view of a traditional family may be based on what American television portrayed as traditional with *Leave It to Beaver* and *Father Knows Best* as examples.

15. U.S. Census Bureau, *Statistical Abstract of the United States* 64, tbl 72 (125th ed. 2006) (available at <http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf>).

16. George Levinger, *Sources of Marital Dissatisfaction Among Applicants for Divorce*, 36 *Am. J. of Orthopsychiatry* 803, 803–807 (1966).

17. See generally Andrew J. Cherlin, *Marriage, Divorce, Remarriage* (Harvard U. Press 1992).

18. More parties report the failure of self-realization as a reason for frustration with their marriages. See generally Robert S. Weiss, *Marital Separation* (Basic Books, Inc. 1975).

With almost half of the marriages in the United States now ending in divorce,¹⁹ the institution of marriage is in flux. Still, 75 percent of those who divorce eventually remarry. Of those who remarry, 65 percent bring with them children from their first marriage.²⁰ Despite individuals' experience and willingness to try marriage a second time, all is not well in second marriages either, with 60 percent ending in divorce.²¹ Since 2005, married couples are the minority of American households.²²

Further, marriage is not necessarily the goal of long-term relationships in today's society. It has become more socially acceptable for individuals to be deeply committed in an exclusive dating partnership or a living arrangement.²³ It has also become more socially acceptable for women to bear children outside of marriage.²⁴ Even though birth rates among teenage girls dropped from 12 percent in 2000 to 10.5 percent in 2007,²⁵ non-marital births among all women increased from 36.4 percent in 2000 to 42 percent in 2007.²⁶ Moreover, an estimated 8 to 13 million children are raised in homosexual households with or without permanent partners.²⁷

19. U.S. Department of Health & Human Services, *National Vital Statistics Reports: Births, Marriages, Divorces, and Deaths: Provisional Data for 2009* vol. 58, no. 25, 1 (available at http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf) (in 2009, the marriage rate per 1000 persons was 6.8 and the divorce rate per 1000 persons was 3.4; however, despite the common notion of a 50 percent divorce rate, the number is misleading because the people who are divorcing in any given year are not the same people who marry in that year).

20. U.S. Dept. of Health & Human Services, *Remarriages and Subsequent Divorces (1989)*; Howard Wineberg, *Variations in Fertility by Marital Status and Marriage Order*, 22 *Family Planning Perspectives* 256 (Nov.–Dec. 1990) (discussing the need for more research on the number of children born during their parent's second marriages).

21. *Id.*

22. See Sam Roberts, *To Be Married Means to Be Outnumbered*, *The New York Times*, <http://www.nytimes.com/2006/10/15/us/15census.html?pagewanted=print> (Oct. 15, 2006).

23. Letha Scanzoni & John Scanzoni, *Men, Women, and Change: A Sociology of Marriage and Family* 153 (McGraw-Hill 1976).

24. Since 1970, out-of-wedlock birth rates have soared. In 1965, 24 percent of black infants and 3.1 percent of white infants were born to single mothers. By 1990, the rates had risen to 64 percent for black infants and 18 percent for whites infants. Every year about one million more children are born into fatherless families. George A. Akerlof & Janet L. Yellen, *An Analysis of Out-of-Wedlock Births in the United States*, *The Brookings Institute*, http://www.brookings.edu/papers/1996/08childrenfamilies_akerlof.aspx (Aug. 1996).

25. U.S. Census Bureau, *Statistical Abstract of the United States* 70, tbl 89 (131st ed. 2011) (available at <http://www.census.gov/compendia/statab/2011/tables/11s0089.pdf>).

26. *Id.*

27. Demian, *Partners Task Force for Gay and Lesbian Couples: Parenting Options for Same Sex Couples in the U.S.*, <http://buddybuddy.com/parent.html> (Apr. 7, 2011). The American Bar Association Family Law Section estimates between 8 and 10 million children live in homosexual households. *Id.* The American Civil Liberties Union estimates that 8 to 13 million children are being raised by gay or lesbian parents, and the Lambda Legal Defense & Education Fund estimates 6 to 14 million children live in homosexual households. *Id.* One of the reasons for the wide range of estimates is homosexual parents do not accurately report their sexual orientation because it could result in losing their children. *Id.*

In addition, children born today to unmarried mothers may grow up in single-parent families or spend significant portions of their lives with relatives or stepparents.²⁸ In 2009, 27 percent of children under the age of 18 lived with only one natural parent, and 4 percent lived with neither parent.²⁹ Among children living with neither parent, 59 percent lived with a grandparent.³⁰ Among children living with one parent, 77 percent lived with their mother (without a cohabiting partner).³¹ Mothers were much more likely to live with their own biological children, while fathers tended to live with stepchildren or adopted children.³² Twelve percent of children under age 18 lived with at least one half-sibling.³³ Ten percent of all children under the age of 18 lived with a parent who was cohabiting with a nonparent.³⁴

These statistics demonstrate that over a third of the children in the United States do not live within a traditional nuclear family structure.³⁵

Not only is the institution of marriage in flux in the United States, but it is apparent that a “normal” family standard against which to judge a child’s upbringing and home life no longer exists. At this rate, it appears that within the next couple of years, the traditional nuclear family model with minor children living with both biological parents will be the minority family structure.³⁶ Consequently, there is an ongoing societal need for the law to continue expanding so that third parties can assume parental duties and obligations over minor children when the circumstances demand such involvement and when such involvement is in the children’s best interests.

28. Rose M. Kreider & Renee Ellis, *Current Population Reports: Living Arrangements of Children: 2009 2–3* (June 2011) (available at <http://www.census.gov/prod/2011pubs/p70-126.pdf>).

29. *Id.* at 6.

30. *Id.*

31. *Id.* at 9.

32. *Id.* at 7.

33. *Id.* at 8.

34. Kreider & Ellis, *supra* n. 28, at 9.

35. Federal Interagency Forum on Child and Family Statistics, *America’s Children: Key National Indicators of Well-Being, 2011 2–3* (July 2011) (available at http://www.childstats.gov/pdf/ac2011/ac_11.pdf). However, there is some debate that these statistics underestimate the number of blended families in the United States because the Census Bureau only reports the households in which the child resides. Therefore, if the child lives with a divorced, single parent and the other non-resident parent has remarried, the child is not identified in the calculations as being member of a blended family. By using the more realistic standard, it is estimated that 37 percent of all children spend time in a blended family as a step-child.

36. One group is reporting that blended families may already be the predominate family form in the United States. Winning Stepfamilies, *Blended Families Statistics*, <http://www.winningstepfamilies.com/BlendedFamilyStatistics.html> (accessed Mar. 7, 2012).

III. NATIONAL TRENDS ON THIRD-PARTY PARENTAL RIGHTS

At common law, third parties generally did not have any rights to children that superseded the rights of natural parents.³⁷ In 1923, the United States Supreme Court upheld this common-law principle in *Meyer v. Nebraska*,³⁸ where the Court first recognized that parents have a constitutionally protected liberty interest under the Fourteenth Amendment to raise their children without undue state interference.³⁹ Even though the Court has made clear that this right is not absolute,⁴⁰ the basic tenet is that parents have the right to make decisions regarding their children's upbringing.⁴¹ The *Meyer* Court held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" interest under the Fourteenth Amendment's Due Process Clause also protects the right of parents to direct the education and upbringing of their children.⁴²

Historically, parental rights did not extend to any relationships beyond the natural child-parent relationship. In the 1960s, states began eroding small parts of this parental right by passing statutes granting grandparents the right to petition for visitation.⁴³ By 1993, every state had passed legislation granting grandparents this right—even over the objections of parents.⁴⁴ A minority of states also granted other third parties, such as siblings, stepparents and great-grandparents, standing to seek visitation.⁴⁵ This trend was short-lived. In 2000, the Supreme Court held in *Troxel v. Granville*⁴⁶ that a Washington State statute was unconstitutional because it permitted *any person* to petition for an award of visitation of another person's child, based on the child's best interest.⁴⁷ The Court's opinion de-

37. See Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 Iowa L. Rev. 865 (2003); see also Homer H. Clark, Jr., *The Law of Domestic Relations in the United States*, § 20.1, 851 (2d ed., West 1988) (noting that the common law also did not recognize adoption).

38. *Meyer*, 262 U.S. 390.

39. *Id.* at 399, 403 (holding that state law prohibiting schools from teaching certain foreign languages to elementary school children violated parents' liberty interest under the Fourteenth Amendment's Due Process Clause to "bring up children").

40. *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (holding that as *parens patriae*, a state may require school attendance, prohibit child labor, and regulate a parent's control in many other ways).

41. See *Yoder*, 406 U.S. at 232–234 (holding that the First and Fourteenth Amendments prevented Wisconsin from compelling Amish parents to keep their children in formal high school until age 16, because the statute would interfere with the parents' fundamental interest in guiding their children's religious future and education).

42. *Wash. v. Glucksberg*, 521 U.S. 702, 719–720 (1997).

43. Maldonado, *supra* n. 37, at 867.

44. *Id.*

45. *Id.*

46. *Troxel*, 530 U.S. 57.

47. *Id.* at 67, 73.

scribed the statute as “breathtakingly broad.”⁴⁸ The Court was critical of the Washington State statute because the statute gave no special weight to a natural parent’s input or decision-making regarding the children.⁴⁹ After the *Troxel* decision, it became more difficult for third parties to obtain visitation rights and a number of state courts struck down third-party visitation statutes.⁵⁰

However, *Troxel* did not rule that all third parties would never be able to care for children under any circumstance. The State of Washington’s visitation statute at issue in *Troxel* allowed *anyone* to be awarded visitation rights.⁵¹ The *Troxel* Court held only that Washington’s visitation statute violated a fit parent’s constitutional right to make decisions concerning his or her children.⁵² The Supreme Court did not address the constitutional question as to whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.⁵³ The Court recognized that state courts make visitation decisions based upon the facts and circumstances of each case.⁵⁴ As a result, the Court announced that it “would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.”⁵⁵

Still, *Troxel* does require courts to give at least some special weight to fit parents’ decisions restricting or denying a third party’s visitation with their children.⁵⁶ Although the opinion never defines “special weight,” it appears that a parent’s decision concerning visitation is entitled to a presumption that the parent is acting in the child’s best interests, even with evidence that the visitation rights of a third party are in the child’s best interests.⁵⁷

Prior to *Troxel*, a third party who established standing generally obtained visitation, provided it was in the child’s best interests.⁵⁸ Since *Troxel*, “many third parties never get the opportunity to show that visitation may be in the child’s best interests.”⁵⁹ Clear standards must be developed so that parents, and others who are involved in the care of children, and as

48. *Id.* at 67.

49. *Id.* at 58. Ultimately, the Court affirmed a judgment denying a grandparent’s visitation rights with their granddaughters. *Id.* at 68.

50. Maldonado, *supra* n. 37, at 868–869.

51. *Troxel*, 530 U.S. at 61.

52. *Id.* at 69–70.

53. *Id.* at 73.

54. *Id.*

55. *Id.*

56. *Id.* at 70.

57. *Troxel*, 530 U.S. at 58; *see also* Maldonado, *supra* n. 37, at 870.

58. Maldonado, *supra* n. 37, at 886.

59. *Id.* at 870.

the courts can easily determine when third parties appropriately have rights to care for minor children, and when they do not. These standards must give sufficient weight to parental judgment and, at the same time, balance the child's best interests and constitutional rights. Part of any review should include how a parent has exercised parenting judgment in the past and whether that parent has made a timely commitment to the responsibilities of parenthood. An important factor should be whether a parent has placed the child in the care of another adult and has granted that adult authority over the child, thereby allowing the third party to act as a functioning parent.

Recent decisions by the Montana Supreme Court have allowed Montana to make substantial progress in establishing these standards.

IV. MONTANA'S PARENTING LAW

The Montana Supreme Court has recognized that "a natural parent's right to the care and custody of a child is a fundamental liberty interest"⁶⁰ and "the constitutional rights of a natural parent to parent his or her child requires 'careful protection.'"⁶¹ On the other hand, Article II, § 15 of the Montana Constitution,⁶² along with *Kulstad* and *In re A.P.P.*, gives Montana children key resources in a contest between adults regarding who should be given contact and control over them.

The foundation for Montana courts to expand the rights of third parties in a minor child's life is solidly set in Montana's revamped statutory laws on caring for children. In 1997, the Montana Legislature eliminated the terms "custody" and "visitation" from the law and replaced both terms with "parenting."⁶³ The testimony before the 1997 Legislature indicated that divorcing parents were more concerned about arguing for the legal designation of "custodial parent"—or some variation of that designation—and were less concerned with how their children might be faring during the ongoing custody battle or how either parent might continue caring for their children

60. *In re E.W.*, 959 P.2d 951, 954 (Mont. 1998) (quoting *In re R.B.*, 703 P.2d 846, 848 (Mont. 1985)).

61. *In re A.R.A.*, 919 P.2d 388, 391 (Mont. 1996) (quoting *In re Doney*, 570 P.2d 575, 577 (Mont. 1977)).

62. Montana Constitution Article II, § 15 states that the rights of person under 18 years of age shall include, but not be limited to, all adult fundamental rights set forth in Article II, the Declaration of Rights Article, unless specifically precluded by laws which enhance the protection of such persons.

63. Compare Mont. Code Ann. § 40-4-212(1) (1997) with § 40-4-212(1) (1995); compare also § 40-4-213(1) (1997) with § 40-4-213(1) (1995); see also § 40-4-212(1)(h)-(m) (1997); Mont. H. 231, 55th Legis. 43 (Apr. 22, 1997).

after the divorce.⁶⁴ These battles were the product of Montana law, which required district courts to designate one parent as the custodial parent.⁶⁵

Prior to 1997, Montana recognized no fewer than nine separate classifications for the custody and care of children, including: sole custodian,⁶⁶ exclusive custodian,⁶⁷ primary custodian,⁶⁸ primary physical custodian,⁶⁹ primary residential custodian,⁷⁰ joint custodian,⁷¹ secondary custodian,⁷² non-custodian,⁷³ and visiting parent.⁷⁴ However, the cases that created these classifications did not clearly define the rights, duties, and obligations that should accompany them. The Court itself struggled with reconciling the statutory requirements with the caselaw. In *In re Marriage of Syverson*, Chief Justice Karla Gray and Justice James Nelson expressed discontent with how to apply caselaw and public policies to the inadequacies and absurdities of some of the custody statutes.⁷⁵ Justice Nelson specifically asked in his dissent that the 1997 Legislature deal with the problem.⁷⁶

With little guidance from the statutes or the courts, parents often sought the services of private investigators, psychological experts, and hostile witnesses to present negative facts about the other parent in an effort to “win” custody of the children. In other words, the statutory language forced parents to fight for a legal designation that would determine their relationship with their children for the rest of their children’s minority, and maybe for the entirety of their lives. Barring some specific fact that was fatal to

64. Mont. H. 231, 55th Legis. 41–42, 89–91 (Apr. 22, 1997); Mont. H. Jud. Comm., *Hearing on H. 231, Oral Testimony*, 55th Legis. Tape 1, Side 2 (Apr. 22, 1997) (audiotape available at the Montana Historical Society, Helena, Montana).

65. See Clark, *supra* n. 37, at 787 (noting that in early times, the father was the presumed custodian of the child, while in the latter part of the nineteenth century the preference, at least as to children of tender years, went to the mother); Mont. H. 231, 55th Legis. at 90; Mont. H. Jud. Comm., *Hearings on H. 231* at Tape 1, Side 2.

66. See *In re Marriage of Syljuberget*, 763 P.2d 323, 325 (Mont. 1988).

67. See *Paslov v. Cox*, 104 P.3d 1025, 1028 (Mont. 2004).

68. See *Mooney v. Brennan*, 848 P.2d 1020, 1021 (Mont. 1993).

69. See *In re Marriage of Oehlke*, 46 P.3d 49, 52 (Mont. 2002); see also *In re Custody of D.M.G.*, 951 P.2d 1377, 1383 (Mont. 1998).

70. See *Kovarik v. Kovarik*, 954 P.2d 1147, 1154 (Mont. 1998); see also *In re Marriage of Anderson*, 859 P.2d 451, 452 (Mont. 1993).

71. See *In re Marriage of Hunt*, 870 P.2d 720, 721 (Mont. 1994); see also *In re Custody of D.M.G.*, 951 P.2d at 1382.

72. See *In re Marriage of Syverson*, 931 P.2d 691, 701 (Mont. 1997) (used in the same sentence with “primary custodian”).

73. See *In re Custody of Maycelle D.*, 691 P.2d 410, 412 (Mont. 1984); see also *Korol v. Korol*, 613 P.2d 1016, 1018 (Mont. 1980).

74. See *Romo v. Hickok*, 871 P.2d 894, 895–897 (Mont. 1994) (wherein the Court enforced a statute providing reasonable visitation rights to a parent not granted custody of the child); see also *In re Marriage of Reininghaus*, 817 P.2d 1159, 1162 (Mont. 1991) (wherein if one parent is granted sole custody, the other parent is entitled to reasonable visitation rights).

75. *In re Syverson*, 931 P.2d at 704–705 (Mont. 1997) (Gray & Nelson, JJ., dissenting).

76. *Id.* at 705 (Nelson, J., dissenting).

one parent's case, parties generally had to find as many faults with the other parent as possible so that the court could weigh the relative deficiencies of each party in determining the "winning" custodial parent, even if the deficiencies had relatively little to do with parenting skills. Because the stakes were high, parties spent considerable amounts of money hiring experts, including psychologists or psychiatrists, to administer batteries of tests in an effort to assess which parents should be eliminated from "winning" custody because their psychological profile was less favorable than their spouse's.⁷⁷ More often than not, however, the mental health exams indicated that both parents were psychologically healthy people and fully capable of adequately parenting their children, despite sometimes finding personality quirks in one or both parents.⁷⁸ Results of psychological assessments were also not much help for actually determining the relative abilities of the parents to care for their children because the tests were not designed to determine a parenting scheme based upon a child's best interests.⁷⁹

The Montana Legislature determined in 1997 that the legal paradigm for deciding custody issues needed to change because it was essentially designed to answer the question, "Which parent is the worse parent?" It was based on a win/loss notion rather than a consideration of the dynamic process of caring for a minor child. The legal terminology caused the parents to argue for a custody designation because the parent "awarded" custody was considered the "winner" and therefore the better parent. Thus, they were given control of nearly all issues regarding the children.⁸⁰ The parent not awarded custody was "allowed" visitation rights, perceived as the "loser," and generally relegated to a subservient role in child rearing. Many times this led the subservient parent to not spend time with the children or to not make child-support payments.⁸¹ There was never an articulated, sound, legal, moral, or biological basis for giving one parent more rights over a child's life than the other parent.

In redesigning the Montana custody and parenting statutes, the 1997 Montana Legislature considered testimony of psychologists that children of divorce generally fare better when both parents are significantly involved in

77. Mont H. Jud. Comm., *Hearings on H. 231*, at Tape 1 Side 2.

78. Unfortunately, some of the 1997 Montana legislative history records have been lost and some of the tapes have been corrupted. The author has personal records supporting this testimony and his personal recollection of the testimony.

79. *Id.*

80. Mont. H. 231, 55th Legis. at 43.

81. Mont H. Jud. Comm., *Hearings on H. 231* at Tape 1, Side 2. According to the testimony, fathers were only 60 percent compliant with child support orders if they were restricted to minimal visitation rights, but when they had close to equal parenting time, they were over 80 percent compliant with child support orders. *Id.*

their lives and when there is little or no parental conflict over them.⁸² Studies show that children can have a significant drop in their personal self-esteem—which can last for a lifetime—if parents argue over them.⁸³ This finding is not hard to understand. From children’s perspective, the two most important people in the world are mom and dad. If mom and dad are arguing over them, the children must conclude that, but for them, mom and dad would not hate each other. As a result, children may come to think they are bad people simply because they are the focus of their parents’ conflict. In the past, parents, lawyers, and judges gave little thought to the emotional and psychological effect that legal battles had on children.

The 1997 Montana Legislature decided that Montana law should presume that both parents are fully capable of nurturing and caring for their children and that children fare better if their parents, though no longer married, continue to fulfill their roles as mothers and fathers. Further, the 1997 Legislature presumed that a divorce action did not change a parent’s basic parenting abilities and instincts. Based on these presumptions, the Legislature eliminated the term “custody” from Montana’s statutes and replaced it with “parenting.” Within five years of those changes, the number of child-custody/parenting appeals to the Montana Supreme Court dropped by almost 90 percent.⁸⁴

The resulting standard—based upon Montana caselaw and legislation—now focuses on the best interests of children in nontraditional family arrangements. The Montana model considers, “What is the best parenting arrangement from the child’s perspective given the child’s circumstances?” Children need to know where they will live, whether they will have food, clothing, and someone to pick them up and drop them off at appointed times, and that the involved parents or adults will love and care for them.⁸⁵ When responsible adults meet these needs, children have the security they need to grow and mature. From a statutory perspective, fashioning these

82. Mont. H. 231, 55th Legis. at 43, 94; Mont H. Jud. Comm., *Hearings on H. 231* at Tape 1, Side 2.

83. See generally Carla B. Garrity & Mitchell A. Baris, *Caught in the Middle: Protecting the Children of High-Conflict Divorce* (Lexington Books 1994); see also Janet R. Johnston, *The Future of Children* (Princeton U. Press 1994); see also Paul R. Amato, Laura S. Loomis & Alan Booth, *Parental Divorce, Marital Conflict, and Offspring Well-being During Early Adulthood* 73(3) *Social Forces* 895 (1995); see also Mont H. Jud. Comm., *Hearings on H. 231*, at Tape 1, Side 2.

84. State Bar of Montana, *The Montana Lawyer: Child and Family Law Section Roundup* vol. 28, no. 3 (Nov. 2002) (from 1998 to 2002, the Montana Supreme Court reviewed approximately 23 parenting cases; in a comparable time period from 1993 through 1997, the Montana Supreme Court reviewed approximately 175 “child custody” cases).

85. James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. Toledo L. Rev. 805, 808 (1995) (stating that “from a child’s point of view, a parent is properly defined as a person who provides care, sustenance, and support to the child”).

types of parenting arrangements to meet a child's best interests should not be difficult.⁸⁶

V. MONTANA'S EXPANSION OF NONPARENTAL RIGHTS TO MINOR CHILDREN

Montana has taken the principles developed in its parenting laws that focus solely on the best interests of the children and has expanded the rights of children to be properly cared for by third parties when certain conditions are met. Four cases and two statutes set the foundation for Montana's expansion of nonparent rights to minor children. In direct response to the Montana Supreme Court's holding in *Girard v. Williams* that a natural father's constitutional right to custody of his children outweighed the best interests of children to be cared for by third parties, the 1999 Montana Legislature passed laws granting third parties a parental interest in children when the biological parent acted contrary to the child-parent relationship and it was in the best interests of the child. The Court then held in *Kulstad* that these statutes were constitutional, upholding a district court's decision to grant a nonparent a parental interest in her partner's children based on the children's best interests. The *Kulstad* principles were affirmed in *In re A.P.P.*, where the district court granted a stepfather of only two months a parental interest in his deceased wife's child over the objection of the biological father. These principles were further affirmed in *Snyder v. Spaulding* where the Court stated that there is a distinction between standards for grandparent contact and standards for third parties who have exercised parenting functions as defined by Montana law, thus further delineating third-party parental contact as a separate area of analysis. No longer are Montana's children's rights lost in the various statutory schemes that are weighted heavily in favor of this biologically based right to custody. Montana's children today enjoy the right to be cared for by the person who best provides for their needs when their biological parents act contrary to the child-parent relationship.

A. *Girard v. Williams*

Only a year after the 1997 parenting legislation was enacted, the Montana Supreme Court examined nonparental interests in minor children in *Girard*.⁸⁷ The case involved a custody battle between a child's natural

86. Montana Code Annotated § 40-4-219(1)(a)-(e) (2009) indicates that a child's circumstances may change and that amendment of the parenting plan may be necessary to serve the best interest of the child; Mont. Code Ann. § 40-4-212(1)(m) (2009) states that a court shall consider the "adverse effects on the child resulting from continuous and vexatious parenting plan amendment actions" in its analysis.

87. *Girard v. Williams*, 966 P.2d 1155 (Mont. 1998).

father and the natural mother's deceased husband's brother and sister-in-law. Although the facts are extreme, as is the conclusion reached by the Court, *Girard* led to the passage of Montana Code Annotated §§ 40-4-227 and 40-4-228 in 1999 and the expansion of the rights of minor children to be properly cared for according to their circumstances.

In 1987, while married to James Girard ("Jim"), Bonnie Girard ("Bonnie") gave birth to a son, Frank David Litke III ("David"), who was fathered by Frank Litke ("Frank"). Frank was arrested on January 3, 1988, and incarcerated in an Arizona state prison.⁸⁸ While Frank was in prison, Bonnie gave birth to another son, Frank Thomas Litke Girard ("Michael"), on June 3, 1988. While Michael was given Frank's last name, Jim was listed as the father on Michael's birth certificate.⁸⁹ After Michael's birth, Jim was also arrested and incarcerated in a federal penitentiary in Arizona.⁹⁰ The two infants remained with Bonnie.⁹¹

On December 21, 1990, Bonnie was murdered in her home.⁹² The two children were alone with Bonnie's body for approximately 24 hours before they were found.⁹³ They likely witnessed the murder.⁹⁴ Both children experienced emotional and psychological problems resulting from the traumatic event.⁹⁵ The children were sent to Montana to live with Jim's brother and sister-in-law, Don and Jan (no last names were given by the Court).⁹⁶ Upon learning that the children were in Montana, Frank, while still in prison, sought custody.⁹⁷ In 1993, Frank was released from prison.⁹⁸ In October 1994, Jim died.⁹⁹

In January 1995, the district court permitted Don and Jan to intervene in the custody action brought by Frank.¹⁰⁰ In 1996, the district court granted Don and Jan "full and permanent legal custody" of the children and granted Frank visitation rights.¹⁰¹ Frank appealed. The Montana Supreme Court reversed and gave the children to their biological father, a person with whom they had no meaningful relationship.¹⁰²

88. *Id.* at 1156.

89. *Id.*

90. *Id.* at 1157.

91. *Id.*

92. *Id.*

93. *Girard*, 966 P.2d at 1157.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1164.

98. *Id.* at 1157.

99. *Girard*, 996 P.2d at 1158.

100. *Id.*

101. *Id.*

102. *Id.* at 1165-1166. The Montana Supreme Court did find that Frank had corresponded with Bonnie and the children through letters and cards and telephone them several times each month. Frank

The Court noted that it was well established that natural parents had a legal right to the custody of their children that prevailed over the interests of third parties, and that that right continued absent a showing that the natural parent abandoned it.¹⁰³ The Court determined that not only was a natural parent's right to the custody of his or her children a matter of legislative enactment, it was also a fundamental, constitutionally protected right.¹⁰⁴

The Court stated that the applicable statutory framework depended on the underlying proceeding.¹⁰⁵ The Court reviewed Montana's several statutory schemes that had been enacted regarding the custody of children and the termination of parental rights and concluded that none of the schemes prevented Frank from obtaining custody of his children.¹⁰⁶ Moreover, none of these schemes gave third parties the right to care for the children.¹⁰⁷ A summary of the Supreme Court's analysis of each of these schemes is discussed below.¹⁰⁸

1. *Child Abuse and Neglect*

The custody of a child could only be transferred from a natural parent to the State or other third party upon a court order entered after a finding that the child was in need of care.¹⁰⁹ Additionally, Title 41 of the Montana Code Annotated set forth the criteria for the termination of the child-parent legal relationship and required the district court to make a specific finding that existing circumstances warranted the termination of parental rights.¹¹⁰

also attempted to provide clothing, food, and toys to Bonnie and the children with help from his mother and from a charity organization. As soon as Frank learned that Bonnie had been killed and that the children had been moved to Montana, he, through his mother, initiated the paternity action. Prior to the final custody decree, Frank had requested visitation from the children on four occasions. *Id.* at 1164.

103. *Id.* at 1158.

104. *Girard*, 966 P.2d at 1158–1159.

105. *Id.* at 1160.

106. *Id.* at 1159–1160.

107. *Id.* at 1160.

108. Other Montana statutory schemes pertaining to nonparent rights to children not addressed by the *Girard* Court include: Grandparent-Grandchild Contact, Mont. Code Ann. Tit. 40, ch. 9; Guardians of Minors, Tit. 72, ch. 5, pt. 2; Montana Safe Haven Newborn Protection Act, Tit. 40, ch. 6, pt. 4 (authorities may take temporary custody of an abandoned infant); Caretaker Relative—Child Custody Rights, Tit. 40, ch. 6, pt. 6 (after a child has been voluntarily placed with a caretaker relative for over six months, the caretaker relative may file an affidavit which allows the caretaker to maintain custody of the child until a custody petition is filed); Remedy for Parental Abuse, § 40–6–233 (a parenting action can be brought by relative in third degree or by county commissioners); Determination of Child's Care Upon Death of Parent, § 40–4–221; and Parenting, Services, and Earnings of Child, § 40–6–221 (determines parenting arrangements in the event of the death of a parent).

109. Mont. Code Ann. § 41–3–406(1)(c) (1995) (cited by the *Girard* Court, § 21–3–406(1)(c) has been renumbered and is now Montana Code Annotated § 41–3–438 (2011)). A youth in need of care is a youth who has been adjudicated to be abused, neglected, or abandoned. Mont. Code Ann. § 41–3–102(34) (2011).

110. Mont. Code Ann. § 41–3–445 (2011).

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Regarding the claim of dependency, abuse, and neglect, the Court noted that only a county attorney or the state attorney general could initiate such a proceeding.¹¹¹ No such petition was filed in this case, and therefore, the district court erred in determining that Don and Jan had standing under this statutory scheme.¹¹²

2. *Adoption*

Third parties could also gain rights to children through adoption proceedings in which the natural parent's rights were terminated.¹¹³ No such petition was filed in this case.

3. *Uniform Parentage Act*

The Uniform Parentage Act ("UPA") provided for the ability to establish a legal child-parent relationship between either a father and child or a mother and child regardless of the marital status of the parents.¹¹⁴ The UPA set forth instances which raised a rebuttable presumption that a person was the natural father of a child.¹¹⁵ Once a paternity action was brought under the UPA, a district court could determine whether a judicial declaration of a father-child relationship would be in the child's best interests.¹¹⁶

The Court determined that the underlying action in this matter was one of custody and not paternity because Don and Jan based their requests for intervention solely on custody theories.¹¹⁷

4. *Physical Custody Definition*

At the time of *Girard*, the controlling law regarding nonparent standing in child-custody proceedings was set forth in § 40-4-211. The Court had previously ruled that, under this statute, the commencement of a child-custody proceeding by a person other than the parent may only occur if the child is not in the physical custody of one of his parents.¹¹⁸ However, here the Court stated that simply because Frank was incarcerated and the children lived with Don and Jan did not mean that Don and Jan had physical custody of them.¹¹⁹ Rather, "physical custody" under § 40-4-211 "[re-

111. See *Girard*, 966 P.2d at 1165.

112. *Id.*

113. Mont. Code Ann. Tit. 40, ch. 8 (repealed 1997).

114. Mont. Code Ann. § 40-6-103.

115. Mont. Code Ann. § 40-6-105.

116. Mont. Code Ann. § 40-6-114.

117. *Girard*, 966 P.2d at 1161-1162.

118. *In re Custody of R.R.K.*, 859 P.2d 998, 1002 (Mont. 1993).

119. *Girard*, 966 P.2d at 1162.

lated] to the custodial rights involved in the care and control of the child.’”¹²⁰ Therefore, to establish standing, a nonparent needed to demonstrate that the child’s parent had voluntarily relinquished his or her right to physical custody.¹²¹ The Court found that Frank had not voluntarily relinquished his rights.¹²² Thus, custody over the children was awarded to him.¹²³

5. Justice Leaphart’s Foreshadowing Dissent

Justice Leaphart dissented from the Court’s opinion in *Girard*, and his opinion foreshadowed the subsequent changes in Montana law that allowed third parties to care for children. Justice Leaphart’s dissent focused on the needs and rights of the *Girard* children. He also provided another reason for the expansion of nonparental interests in minor children when the circumstances justify doing so: the rights of children must also be taken into account when two or more people are asserting claims to them.¹²⁴ In support of his argument that stable families and familial relationships are more important than biological ties, Justice Leaphart cited United States Supreme Court caselaw and law review articles.¹²⁵ He asserted that a child’s right to “maintain healthy nurturing family attachments” is no less important than the rights of biological parents to have custody of their children. He argued that previous decisions to the contrary should be overruled to the extent those cases deny surrogate parents in the children’s established family standing to petition for custody absent a showing that the parental rights of the natural parent had been terminated.¹²⁶

120. *In re K.M.*, 929 P.2d 870, 872 (Mont. 1996) (quoting *Henderson v. Henderson*, 568 P.2d 177, 179 (Mont. 1977)).

121. *Girard*, 966 P.2d at 1165–1166.

122. *Id.* at 1164.

123. The Montana Supreme Court noted that the experts who testified cautioned that a sudden change in custody and removal of the children from their current home would be detrimental to the children’s well-being. Despite this finding, the Court reversed the district court’s decision and remanded the case for entry of an order awarding custody of the children to Frank, a person who never demonstrated a timely commitment to the responsibilities of parenthood. *Girard*, 966 P.2d at 1166–1167.

124. *Id.* at 1169 (Leaphart, J., dissenting).

125. *Id.* at 1168 (citing *Lehr v. Robertson*, 463 U.S. 248, 261 (1983)); see also Heather M. Lationo, Erger v. Askern: *Protecting the Biological Parent’s Rights at the Child’s Expense*, 58 Mont. L. Rev. 599 (1997); see also James B. Boskey: *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. Toledo L. Rev. 805 (1995).

126. *Girard*, 966 P.2d at 1169 (citing *In re A.R.A.*, 919 P.2d 388). *In re A.R.A.* relied on *In re Aschenbrenner*, 597 P.2d 1156 (Mont. 1979), for the proposition that a court cannot, in a custody dispute between a biological parent and a third person, employ a “best interest of the child” test absent a termination of parenting rights due to a finding of abuse and neglect or dependency. *In re A.R.A.*, 919 P.2d at 392 (citing *In re Aschenbrenner*, 597 P.2d at 1162).

While Justice Nelson agreed with the majority's decision based upon "the record, the state of the law, and the arguments made on appeal," he voiced concern that the "cold letter of the law" had not served the best interests of the children:

More often than not (and this case is an excellent example) the children's fundamental constitutional rights are simply ground up in the machinery of various statutory schemes weighted heavily in favor of this biologically-based right to custody and to parent and which exclude or marginalize other relationships that actually might be more in the children's (as opposed to the natural parent's) best interest.¹²⁷

Justice Nelson recognized that children must have exercisable rights to be cared for by third parties who develop child-parent relationships with them when their biological parents do not fulfill their fundamental parental obligations.¹²⁸

*B. The 1999 Passage of Montana Code Annotated
§§ 40-4-227 and 40-4-228*

In direct response to the *Girard* Court's decision, within a year, the Montana Legislature passed Montana Code Annotated §§ 40-4-227 and 40-4-228, stating that it is the policy of the State of Montana to recognize the constitutionally protected rights of parents and the integrity of the family unit, while also recognizing the constitutionally protected rights of children.¹²⁹ In balancing these competing interests, Montana now has three criteria for third parties to have standing to acquire rights to children.¹³⁰ First, the natural parent must engage in conduct contrary to the child-parent relationship.¹³¹ Second, the nonparent must have established with the child a child-parent relationship prior to instituting legal proceedings.¹³² Third, it must be in the best interest of the child for the nonparent to continue the relationship with the child.¹³³ Evidence of these factors must be clear and convincing.¹³⁴ It is not necessary for the court to find a natural parent unfit before awarding a parental interest to a third party.¹³⁵

It has taken over ten years for these standards to develop, but in *Kulstad v. Maniaci*, the Montana Supreme Court upheld the constitutionality of

127. *Girard*, 966 P.2d at 1171 (Nelson, J., specially concurring).

128. *Id.* at 1171.

129. Mont. Code Ann. § 40-4-227(1).

130. *Id.* at § 40-4-228(2).

131. *Id.* at § 40-4-228(2)(a).

132. *Id.* at § 40-4-228(2)(b).

133. *Id.*

134. *Id.* at § 40-4-228(2).

135. Mont. Code Ann. § 40-4-228(5).

this statutory scheme and set the parameters for nonparents to acquire a parental interest in a child.

C. *Kulstad v. Maniaci*¹³⁶

In 2009, the Montana Supreme Court decided *Kulstad v. Maniaci* using the statutory scheme set forth in §§ 40–4–227 and 40–4–228. *Kulstad* involved same-sex partners and two children adopted by one of the partners during the relationship.¹³⁷ The partners had agreed that Maniaci would serve as the adoptive parent, but Maniaci and Kulstad would “function equally as parents.”¹³⁸

In January 2007, Kulstad filed a petition for dissolution of marriage.¹³⁹ She moved for three orders: an order of support of the minor children, an order granting her a parental interest in the children, and an order implementing her proposed parenting plan.¹⁴⁰ The district court determined that, by clear and convincing evidence, a child-parent relationship existed between Kulstad and both children in accordance with § 40–4–211(4)(b) and (6), the statute that defines a “child-parent relationship.”¹⁴¹ Because Maniaci appealed the district court’s ruling asserting that the Court’s decisions in *In re Parenting of J.N.P.*¹⁴² and *In re Parenting of A.R.A.*¹⁴³ prohibited Kulstad from obtaining a parental interest in Maniaci’s children, a short discussion of those cases is warranted.

In *In re J.N.P.*, the Court struck down a statute similar to § 40–4–228 as unconstitutional because it allowed a natural parent to be denied custody of his or her child without a showing of abuse or neglect pursuant to Title 41, Chapter 3 of the Montana Code.¹⁴⁴ In *In re J.N.P.*, Tammy, the natural mother, left her child temporarily with Tammy’s aunt and uncle so she could seek employment and a place to live.¹⁴⁵ Tammy signed a document entitled “temporary guardianship,” which purported to authorize the aunt

136. *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009).

137. *Id.* at 597.

138. *Id.*

139. *Id.* at 599. Ultimately, the district court struck down the petition for dissolution because Montana does not recognize same-sex marriages. *Id.*

140. *Id.*

141. *Id.* at 599–600.

142. *In re Parenting of J.N.P.*, 27 P.3d 953 (Mont. 2001).

143. *In re A.R.A.*, 919 P.2d 388, 392 (Mont. 1996).

144. *In re J.N.P.*, 27 P.3d at 956 (holding § 40–4–221 (1997) unconstitutional); *see also* § 40–4–228(1) (1999) (providing that “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”); § 40–4–211(4)(b) (1999) (allowing a nonparent to seek a parenting interest in a minor child if the person has established a child-parent relationship with the child).

145. *In re J.N.P.*, 27 P.3d at 954.

and uncle to seek medical attention for J.N.P. if it became necessary.¹⁴⁶ After caring for the child for slightly more than two months, the aunt and uncle filed a petition to designate them as custodial parents, and the district court granted their request.¹⁴⁷

Tammy moved to terminate the guardianship and restore her parental rights.¹⁴⁸ She argued that her parental rights could not be terminated absent a showing of abuse or neglect pursuant to a Title 41, Chapter 3 proceeding.¹⁴⁹ The Court determined that the aunt and uncle relied upon the “best interest” standard in § 40–4–212 in seeking custody of J.N.P., as opposed to a parental interest.¹⁵⁰ The Court concluded that the law did not permit the termination of a natural parent’s fundamental right to custody of her child based solely upon the child’s best interest.¹⁵¹

In *In re A.R.A.*, the Court struck down part of Montana Code Annotated § 40–4–221 as unconstitutional because it allowed a third party to obtain custody of a child over a natural parent based on the child’s best interests before the termination of the natural parent’s rights to the child.¹⁵² In *In re A.R.A.*, the child’s parents divorced in 1989.¹⁵³ After the divorce, the father moved out of state and did not exercise his court-ordered visitation rights to their full extent, but he did keep in touch by telephone and saw A.R.A. once a year.¹⁵⁴ In 1990, A.R.A.’s mother remarried.¹⁵⁵ Two years later, she died in an airplane crash.¹⁵⁶ In her will, she named her husband as guardian of A.R.A.¹⁵⁷ The natural father moved for exclusive control of A.R.A.¹⁵⁸ The district court found that it was in the child’s best interest for the stepfather to be awarded custody of A.R.A. over the natural father’s objections.¹⁵⁹

On appeal, the Court determined that, despite the language in the statute that allowed a person nominated by the will of the deceased custodial parent to seek custody if that person proved that having custody of the child was in the child’s best interests, the father’s constitutional right to his daughter superseded the mother’s designation of a guardian in her will.¹⁶⁰

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 957–958.

151. *In re J.N.P.*, 27 P.3d at 956–957.

152. *In re A.R.A.*, 919 P.2d at 392.

153. *Id.* at 389.

154. *Id.*

155. *Id.*

156. *Id.* at 390.

157. *Id.*

158. *In re A.R.A.*, 919 P.2d at 390.

159. *Id.*

160. *Id.* at 391; Mont. Code Ann. § 40–4–221(2)(c) (1995).

The Court noted that the careful protection of parental rights is not merely a matter of legislative grace, but is constitutionally required.¹⁶¹ As such, the Court found Montana Code Annotated § 40–4–221 unconstitutional to the extent that it allowed the granting of a petition for custody prior to the termination of the natural parent’s constitutional rights.¹⁶²

Returning to the *Kulstad* decision, Maniaci argued that *In re J.N.P.* stood for the proposition that the “contrary conduct” that allowed courts to modify parental rights under § 40–4–228(2)(a) could only be terminated in “instances of abuse and neglect.”¹⁶³ Maniaci also argued that *In re J.N.P.* implicitly rejected the constitutionality of § 40–4–228.¹⁶⁴ Further she argued that *In re A.R.A.* required the district court to terminate her parental rights before *Kulstad* could obtain third-party parental rights to Maniaci’s children.¹⁶⁵ The Court rejected each of these arguments.

First, the Court rejected Maniaci’s argument that contrary conduct was limited to cases of “abuse or neglect” because “[n]othing in § 40–4–228, MCA, limits its application to cases of abuse or neglect.”¹⁶⁶ After rejecting that argument, the Court affirmed the district court’s finding that Maniaci had acted contrary to her child-parent relationship when she ceded her exclusive parenting authority to *Kulstad*.¹⁶⁷ Next the Court disagreed that *In re J.N.P.* implicitly held § 40–4–228 unconstitutional. The Court reasoned that it was the policy of the State of Montana to recognize the constitutionally protected rights of parents and the integrity of the family unit, but § 40–4–228, along with § 40–4–227, properly sought to balance the parent’s rights with the constitutionally protected rights of the child to determine the best interest of the child.¹⁶⁸ Finally, the Court rejected Maniaci’s claims under *In re A.R.A.*, stating simply that because that case was decided prior to the 1999 statute, it had no applicability in the *Kulstad* case.¹⁶⁹

In sum, the Court upheld the district court’s ruling along with the constitutionality of § 40–4–228.¹⁷⁰ The Court affirmed the district court’s ruling because the evidence clearly showed that *Kulstad* had established a child-parent relationship.¹⁷¹ In addition, the Court also determined that it was in the children’s best interests for the relationship to continue.¹⁷² The

161. *In re A.R.A.*, 919 P.2d at 391 (citing *Stanley v. Ill.*, 405 U.S. 645 (1972)).

162. *In re A.R.A.*, 919 P.2d at 392.

163. *Kulstad*, 220 P.3d at 607.

164. *Id.* at 604.

165. *Id.* at 605.

166. *Id.* at 606.

167. *Id.* at 608.

168. *Id.* at 606; Mont. Code Ann. § 40–4–227(1)(a)–(c).

169. *Kulstad*, 220 P.3d at 603.

170. *Id.* at 606.

171. *Id.* at 609–610.

172. *Id.*

Court found that Maniaci had clearly engaged in conduct contrary to the child-parent relationship when she ceded her exclusive parenting authority to Kulstad.¹⁷³ With respect to § 40-4-228, the Court stated that the 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."¹⁷⁴ Maniaci failed to prove beyond a reasonable doubt that neither § 40-4-221 nor § 40-4-228 impermissibly infringed upon her constitutional right to parent her children.¹⁷⁵ By holding that § 40-4-228 was constitutional, the *Kulstad* Court reinforced the basic parameters under which third parties may acquire a parental interest in a child.

*D. In re the Parenting of A.P.P. v. Price*¹⁷⁶

The Montana Supreme Court recently confirmed nonparental rights to children in *In re A.P.P.* In that case, even though A.P.P. resided with her natural father after her mother's death, the district court granted A.P.P.'s stepfather parental and visitation rights and granted her adult half-sister visitation rights based upon A.P.P.'s best interests.¹⁷⁷ The child's mother had been married to the stepfather for only two months, but A.P.P. was residing with her mother and stepfather when her mother was killed in a motorcycle accident.¹⁷⁸ The natural father demanded that A.P.P. be returned to him, and the stepfather acquiesced.¹⁷⁹ Later, the natural father sought to restrict A.P.P.'s contact with her stepfather and her adult half-sister by moving out of state with A.P.P., candidly proclaiming he did so to keep the stepfather and half-sister from being able to see her.¹⁸⁰ The stepfather and half-sister petitioned for a determination of parental interest and visitation rights, respectively.¹⁸¹ After the district court granted the stepfather parenting time and the half-sister visitation time with A.P.P., the natural father appealed citing *In re A.R.A.* and *Girard*.¹⁸²

While the Court conceded that there were factual similarities between *In re A.R.A.*, *Girard*, and the case at bar, it determined the cases were legally distinguishable.¹⁸³ *In re A.R.A.* did not apply for several reasons, pri-

173. *Id.* at 606-607.

174. Mont. Code Ann. § 40-4-227(2)(b).

175. *Kulstad*, 220 P.3d at 603, 606.

176. *In re the Parenting of A.P.P. v. Price*, 251 P.3d 127 (2011).

177. *Id.* at 128.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *In re A.P.P.*, 251 P.3d at 128.

183. *Id.* at 129-130.

marily because the stepfather was not seeking *exclusive* custody of A.P.P.; therefore, the natural parent's constitutional rights to parent were not threatened.¹⁸⁴ *Girard* was also distinguishable because the *Girard* Court had addressed whether nonparents have standing to seek permanent and full custody over children when the natural parent was also seeking permanent and full custody, not where a nonparent was not seeking exclusive custody as in *In re A.P.P.*¹⁸⁵ The *In re A.P.P.* Court held that since the natural father had acted in a manner contrary to a child-parent relationship by missing a significant number of visits and failing to make all of his child-support payments, and because the stepfather had clearly established a child-parent relationship with A.P.P., the district court did not err by granting the stepfather parenting time.¹⁸⁶ Also, since the half-sister was only seeking visitation rights and not parenting rights, the district court did not err in granting those rights based upon A.P.P.'s best interests.¹⁸⁷ The Court specifically noted that § 40-4-228(3) provided that visitation rights may be ordered "based on the best interests of the child."¹⁸⁸

E. *Snyder v. Spaulding*¹⁸⁹

Although visitation rights of a nonparent was the lesser issue in *Snyder v. Spaulding*, it is worth noting that the Montana Supreme Court reversed a district court's finding that contact between two minor children and their paternal grandmother was in the children's best interests.¹⁹⁰ In *Snyder*, the mother and paternal grandmother entered into a stipulation after the children's father died that allowed the grandmother contact with the children.¹⁹¹ Fifteen months later, the mother terminated contact between the children and their grandmother.¹⁹² The grandmother obtained an order of contempt, and the mother appealed.¹⁹³

The Court acknowledged that, while § 40-4-228 states that visitation rights may be ordered based upon "the best interests of the child," a child's interests were not the only factor a court must consider in grandparent visitation cases.¹⁹⁴ The Court set forth other factors that must be considered before courts may uphold the visitation order. Those factors included

184. *Id.* at 130.

185. *Id.*

186. *Id.*

187. *Id.*

188. *In re A.P.P.*, 251 P.3d at 130.

189. *Snyder v. Spaulding*, 235 P.3d 578 (Mont. 2010).

190. *Id.* at 579.

191. *Id.*

192. *Id.*

193. *Id.* at 580.

194. *Id.* at 584.

whether the mother is a fit parent, whether the modification or termination of the court's contact order is in the child's best interests, and whether the grandparent-grandchild contact order is unduly interfering with the mother's primary role in rearing her child.¹⁹⁵ The Court also determined that it was the mother's burden to show that modification or termination of the contact was appropriate.¹⁹⁶ The Court further ordered that if the mother was found to be a fit parent, then her views on continued visitation and the best interests of her children must be given deference.¹⁹⁷

While *Snyder* specifically involved grandparent visitation rights, the Court's analysis—that a parent's position on visitation would be given deference—might extend to visitation rights of other nonparents. However, the Court was careful to distinguish between standards for grandparent-grandchild contact and third parties who have exercised parenting functions as defined by Montana law—a very important distinction.¹⁹⁸

VI. THIRD-PARTY PARENTING FACTORS IN MONTANA

The view of Montana courts has evolved from recognizing only biological parents' absolute right to control their child to recognizing that a child's particular circumstances must be considered in determining a parenting arrangement that addresses the child's best interests. Still, as discussed in *Snyder*, any statute permitting the destruction of a natural parent's fundamental right to custody based solely on the best-interest test is unconstitutional.

As the Court noted in *In re J.N.P.*, if best interests were the only test, people could argue that it would in be in a child's best interest to be raised by an affluent family as opposed to an impoverished one, that it might be better that a child be raised by extremely intelligent parents rather than by people of average intelligence, or that a child might be better off being raised by parents with a conventional lifestyle rather than an unconventional one.¹⁹⁹ All of these factors arguably could be considered in determining the child's best interests, but none would justify denying a parent's constitutional and fundamental right to the custody of his or her child.²⁰⁰

Under Montana law today, the parental rights of natural parents do not have to be terminated before third parties can acquire rights to their child. When third parties act as the child's parent and the natural parent does not demonstrate a timely commitment to the responsibilities of parenthood, the

195. *Snyder*, 235 P.3d at 585.

196. *Id.*

197. *Id.*

198. *Id.* at 582.

199. *In re J.N.P.*, 27 P.3d at 958.

200. *Id.*

natural parent's rights are not terminated *per se*, but they are restricted to the extent necessary to allow a third party to exercise parenting rights for the benefit of the child.

In *Kulstad*, for example, Maniaci acted contrary to her child-parent relationship when she ceded her exclusive parenting authority to Kulstad.²⁰¹ Kulstad functioned as a co-parent for both children. The Court's inevitable conclusion was that Maniaci's actions had been entirely inconsistent with an exclusive child-parent relationship. And, given that Kulstad had established a child-parent relationship with the children, the Court determined that it was in the children's best interests that Kulstad continue to have parenting rights.

In *In re A.P.P.*, the Court found that the natural father engaged in conduct contrary to his parental relationship by not exercising the entire visitation rights that he was granted in his custody agreement and by failing to make all of his child-support payments.²⁰² The new husband of only two months had established a child-parent relationship with the child because, for nine months, he had financially supported her, helped her with homework, attended her sporting and school events, prepared meals for her, and took care of her while the mother worked.²⁰³ In both *Kulstad* and *In re A.P.P.*, the Court found that the children were best served by continuing their relationships with third parties who had played significant roles in their lives.

These facts are not unusual in stepparent cases. It is common for parents to get behind on their child-support payments. It is also common for children to develop meaningful and important relationships with adults who assume day-to-day parenting responsibilities for them. Parents must make consistent efforts to stay actively involved with their children, and pay as much of their child-support obligations as possible; otherwise, they risk a court finding that their inaction is contrary to the child-parent relationship, which may result in the loss of some or all of their parental rights to third parties. It appears that as long as a third party is not asking for exclusive control over a child, but instead is only asking to insert themselves into the child's life on a best-interest basis, third parties will be able to acquire parenting rights if the parent has undertaken significant conduct contrary to the child-parent relationship.

Several questions do arise with the advent of third-party parental rights. Are third-party rights constitutional? What obligations do third parties have once they secure their rights? For example, do they have the duty to pay child support or to provide health insurance, and, if so, should there

201. *Kulstad*, 220 P.3d at 606.

202. *In re A.P.P.*, 251 P.3d at 129.

203. *Id.* at 128, 130.

be laws to back up their duties since third-party caregivers could become deadbeats too? And most importantly, once a parental interest is secured, can it be terminated or restricted, and how would anyone go about doing so? There is no statutory scheme for this. Can anyone petition for visitation rights based upon the child's best interests? How extensive can visitation be? These questions will undoubtedly be resolved as the courts and legislature continue to expand nonparent rights to children.

VII. CONCLUSION

Children are only young once. There is simply no opportunity to make up the lost years of childhood when children should receive direction, modeling, training, education, nurturing, and all of the other experiences that children should have to grow into productive adults. Where third parties can provide these meaningful experiences for children under the right circumstances, they will now be able to legally do so in Montana.

The challenge for the legal system is to find a balance between the conflicting constitutionally protected rights of parents and the rights of children to be properly nurtured so that they have the best chance in life to succeed. The seeds for third parties to be able to exercise parenting rights under the right circumstances were planted in Article II, § 15 of Montana's 1972 Constitution, which endows Montana's children with the same fundamental rights enjoyed by adults, including the right to pursue life's basic necessities, to enjoy their lives and liberties, and to seek their safety, health, and happiness. Twenty-five years after the Montana Constitution was ratified, the Montana Legislature recognized that children are the important component of a custody dispute between parents—not the parents. In 1999, Montana passed legislation balancing the constitutional rights of parents with the constitutional rights of children. In doing so, the Legislature provided that third parties may obtain a parental interest in a child if the natural parent has engaged in conduct that is contrary to the child-parent relationship, the third party has established a child-parent relationship with the child, and it is in the child's best interest to continue that relationship with the third party.²⁰⁴ The law now recognizes the importance of stable family relationships and children's rights to have such relationships maintained, as predicted by Justice Leaphart in *Girard*.

Section 40-4-211 allows for anyone who establishes a child-parent relationship to petition the court for rights to care for that child. While this language does sound similar to the language in the Washington State statute found unconstitutional in *Troxel*, there are significant differences between the two statutes. The best interest standard is only one part of Montana's

204. Mont. Code Ann. § 40-4-228 (2011).

statute, whereas “best interest” was the only standard in the Washington State statute.²⁰⁵ Applying only the best interest standard could entitle boy-friends, girlfriends, nannies, and other individuals to parental rights—a wholly unacceptable and obviously unconstitutional proposition. Montana has designed sufficient legal requirements that must be met for a third party to have standing to petition the court for a parental right. *Kulstad* is not only a pivotal case regarding nonparents establishing child-parent interests, it also shows the law’s expansion of custody and parenting issues beyond divorcing parents in the traditional sense to partnerships, same-sex relationships, stepparents and significant others.

Today in Montana, parenting is no longer a zero-sum game where the “winner” takes the child and the “loser” is relegated to a subservient role dictated by the winning parent. Parenting has taken on a much more realistic and proficient approach to protect each child according to the child’s particular circumstances. The term “parenting” is a verb. An individual with parenting rights needs to perform their parenting duties when their child is in need of a parent—not later or at a parent’s convenience. In Montana, acting like a parent means at least staying current on child-support payments and exercising all of the parenting time that is granted. Failure to do so without justification means that a nonparent who has provided the necessary routine parental care for the child and has engaged in meaningful activities and a relationship that is important to the child may legally insert himself or herself into the child’s life in contravention of the natural parent’s rights.

Certainly the requirements necessary to establish nonparent visitation rights will continue to be developed in future cases, but it appears that Montana has found the correct statutory framework to balance parental rights with children’s rights to achieve a result that meets a minor child’s best interests and reasonably maintains the integrity of the diverse family unit. Ultimately, other states may want to consider Montana’s approach to third-party parental rights to children.

205. Wash. Rev. Code § 26.10.160(3) (1996).