Constitutional Law—Constitutional Rights of Parents Do Not Require Showing of Unfitness in Third Party Cases—*Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009)

The United States Constitution and the Montana Constitution protect a natural parent's fundamental right to parent his or her children.[1] Courts have, however, differed in defining the extent of that right and the protection it affords the natural parent in relation to a third party seeking to establish contact with a child.[2] In *Kulstad v. Maniaci*,[3] the Montana Supreme Court considered whether the constitutional rights of a natural parent required a showing that the natural parent was unfit as a prerequisite to awarding a third party a parental interest.[4] In upholding the constitutionality of sections 40-4-211 and 40-4-228 of the Montana Code, the court held that the absence of a requirement that a court first determine the fitness of the parent before granting a parental interest to a third party does not violate a natural parent's fundamental rights.[5]

Michelle Kulstad and Barbara Maniaci began a relationship in 1995, eventually moving in together in Montana and exchanging rings with each

1. *See* U.S. CONST. amend. XIV (mandating no state shall deprive any person of liberty without due process of law); MONT. CONST. art. II, § 17 (protecting against deprivation of liberty without due process of law); *see also* Troxel v. Granville, 530 U.S. 57, 65 (2000) (explaining Fourteenth Amendment provides protection against interference with fundamental liberties); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (recognizing fundamental right of parents to decide care, custody and control of children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (explaining Due Process Clause protects right of parents to raise their own children); *In re* A.R.A., 919 P.2d 388, 391 (Mont. 1996) (explaining state's ability to intrude on parent-child relationship must be guarded); *In re* Guardianship of Doney, 570 P.2d 575, 577 (Mont. 1977) (holding constitutional protection of parental rights not mere matter of "legislative grace").

2. *See* E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (recognizing de facto parent visitation does not infringe legal parent's constitutional rights). Massachusetts affords third parties de facto parent status when they have no biological relationship with the child, have resided with the child, and have acted as a caretaker with the consent of the legal parent. *Id.*; *see also* Soohoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007) (holding visitation permitted over fit parent's wishes). The Minnesota court upheld a statute allowing third party visitation upon a showing that the third party resided with the child for more than two years, visitation would be in child's best interests, the third party had established a parent-child relationship, and third party visitation would not interfere with the relationship between the custodial parent and the child. *Soohoo*, 731 N.W.2d at 819-20. *But see* Janice M. v. Margaret K., 948 A.2d 73, 87 (Md. 2008) (requiring lower courts to determine fitness of parent before awarding custody or visitation); *In re* Clausen, 502 N.W.2d 649, 687 (Mich. 1993) (holding natural parent's right to custody not disturbed without showing of unfitness).

3. 220 P.3d 595 (Mont. 2009).

4. *Id.* at 603 (stating issue under consideration).

5. *Id.* at 603-04 (summarizing court's holding). Section 40-4-228 of the Montana Code provides that a third party may seek a parental interest in a child when the natural parent has engaged in conduct contrary to the child-parent relationship, the nonparent has established a child-parent relationship pursuant to section 40-4-211, and contact would be in the best interests of the child. *See* MONT. CODE ANN. §§ 40-4-211, 40-4-228 (2009) (defining parenting and visitation matters between natural parent and third party).

other.[6] As their relationship progressed, they discussed the possibility of parenting a child together.[7] They met with a lawyer who advised them that only one of them could legally adopt a child under Montana law.[8] When they got the opportunity to adopt a child, they agreed Maniaci would be the adoptive parent, but both would act equally as parents in raising the child.[9] Later, Maniaci pursued a second adoption despite objections from Kulstad.[10] Although Kulstad disagreed with the second adoption, she nevertheless acted as a parent to both children, providing physical and emotional support on a daily basis until she and Maniaci ended their relationship in 2006.[11]

In January 2007, Kulstad sought an order from the district court granting her a parental interest.[12] After an initial hearing to determine whether Kulstad had a parental interest, the court concluded that pursuant to sections 40-4-211(4)(b) and (6) of the Montana Code, Kulstad established by clear and convincing evidence that she had formed a parent-child relationship with both minor children.[13] The court established an interim parenting plan, and found section 40-4-228 of the Montana Code would apply to the final decision that would be made at a later date regarding the parenting arrangement between Kulstad and Maniaci.[14] A bench trial was held in May 2008 to determine whether Kulstad should be awarded a permanent parental interest in the children.[15] After hearing testimony from several medical professionals, the court found both children had attachment disorders, both recognized Kulstad as their parent and, therefore, it would be in the children's best interest to award Kulstad a parental interest.[16] On appeal, the Montana Supreme Court held by a six to one majority that the district court did not violate Maniaci's constitutional rights as a natural parent by not first establishing that Maniaci was unfit before awarding Kulstad

6. 220 P.3d at 597 (describing initial relationship between the parties).

7. *Id.* (noting couple periodically discussed co-parenting a child). Maniaci and Kulstad met their first child, L.M., when one of Maniaci's chiropractic patients voiced concern about leaving her great grandson with L.M.'s biological mother. *Id.* Shortly thereafter, Maniaci and Kulstad were contacted to bring L.M. to the hospital where the biological mother relinquished custody. *Id.*

8. *Id.* (describing advice received from counsel regarding adoption in Montana); *see also* MONT. CODE ANN. § 42-1-106 (2009) (describing eligibility requirements for adoption in Montana). The statute provides that a husband and wife, either individually or jointly, an unmarried individual over eighteen, or a married individual who is at least eighteen and is legally separated from a spouse may pursue an adoption. § 42-1-106.

9. 220 P.3d at 597 (detailing arrangement parties agreed on regarding adoption).

10. *Id.* at 598 (outlining facts leading to second adoption).

11. *Id.* (describing Kulstad's role in children's upbringing). Kulstad cared for the children in the afternoon and evenings when Maniaci was seeing chiropractic patients. *Id.*

12. *Id.* at 599 (describing actions Kulstad took in lower court). Kulstad also sought to dissolve the parties' common law marriage and to dissolve the parties' assets. *Id.*

13. 220 P.3d at 599-600 (reasoning based on testimony of children's teachers and family friend).

14. *Id.* (stating district court's determination of applicable law).

15. *Id.* (describing procedure of district court).

16. *Id.* at 601 (stating holding of district court judge). The district court relied heavily on the testimony of court-appointed expert, Dr. Cindy Miller, who conducted a parenting plan evaluation and concluded that the children would benefit from having both parties in their lives. *Id.*

a parental interest.[17]

The Montana Supreme Court has long held that the "careful protection of parental rights is not merely a matter of legislative grace, but is constitutionally required."[18] The court has interpreted this constitutional protection to require a showing of parental abuse or neglect before a court can consider granting visitation or transferring custody to a third party.[19] In upholding this standard, the court has expressed the need to carefully guard against the state's ability to interfere with the parent-child relationship.[20] In a pair of decisions, the court rejected as unconstitutional two different statutory schemes permitting a lower court to award custody to a third party over a fit parent based on the best interest of the child.[21] The court voiced its distaste for making custody decisions based solely on the subjective best interest standard in third party cases, because the court would be invited to inquire into whether a child's best interest means that he or she should be raised by a wealthy or intelligent family as opposed to a natural parent.[22]

17. 220 P.3d at 602 (stating Maniaci appealed). The supreme court agreed with the district court's application of sections 40-4-211 and 40-4-228 and held that the application of those statutes did not violate Maniaci's constitutional rights as a parent. *Id.* at 603.

18. *In re* Guardianship of Doney, 570 P.2d 575, 577 (Mont. 1977) (mandating district court must find parent abusive before interfering with parent's rights). The court specified that the integrity of the family is protected by the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. *Id. But see* Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 393-407 (2002) (arguing constitutional principles not well-suited to resolving family disputes). Dolgin posits that while constitutional principles have been increasingly relied upon for moral guidance as traditional moral institutions such as church and social groups have waned, these constitutional principles serve to protect individual autonomy, and courts are ill equipped when dealing with entities such as children, who they tend to view as lacking full autonomy. *Id.* at 405-06.

19. *See* Polasek v. Omura, 136 P.3d 519, 522 (Mont. 2006) (instructing court to determine parental fitness before granting contact with grandparents); *In re* Parenting of D.A.H., 109 P.3d 247, 249-50 (Mont. 2005) (declaring grandparents seeking custody had no standing without first showing parental rights previously terminated); *In re* Parenting of J.N.P., 27 P.3d 953, 958 (Mont. 2001) (holding natural parent cannot be denied custody absent finding of abuse or neglect); Girard v. Williams, 966 P.2d 1155, 1158-59 (Mont. 1998) (requiring third party show natural parent forfeited rights through abuse or neglect); *In re* A.R.A., 919 P.2d 388, 392 (Mont. 1996) (invalidating statute allowing custody to third party based on best interest standard not parental fitness); *In re* Guardianship of Doney, 570 P.2d 575, 577 (Mont. 1977) (returning custody to natural father because no showing of abuse or neglect).

20. *See* Polasek v. Omura, 136 P.3d 519, 522 (Mont. 2006) (stating natural parent has fundamental liberty interest in care and custody of child); *In re* A.R.A., 919 P.2d 388, 391 (Mont. 1996) (explaining standard of abuse or neglect necessary to guard against state intrusion); *In re* Guardianship of Doney, 570 P.2d 575, 577 (Mont. 1977) (stressing few invasions by state more extreme than depriving parent of custody).

21. *See In re* Parenting of J.N.P., 27 P.3d 953, 957 (Mont. 2001) (recognizing fit parent's right to custody as constitutionally protected). The court struck down section 40-4-211(4)(b) of the Montana Code, which allowed a nonparent with temporary custody to seek full custody and instructed the court to decide the petition according to the best interest of the child standard. *Id.* at 957-58; *see also In re* A.R.A, 919 P.2d 388, 392 (Mont. 1996) (explaining showing nonparent can provide better environment irrelevant to custody determination). The court invalidated section 40-4-221 of the Montana Code, which allowed a nonparent to gain custody prior to the termination of a natural parent's constitutional rights. 919 P.2d at 392.

22. *See In re* Parenting of J.N.P., 27 P.3d 953, 958 (Mont. 2001) (cautioning against heavy reliance on best interests standard). The court concluded that none of these considerations, which may be valid under the best interest standard, would warrant denying a parent's constitutional right to custody absent a showing of

In *Troxel v. Granville*,[23] the United States Supreme Court considered the constitutionality of a Washington state statute permitting "any person" to petition a court for visitation at any time when visitation would be in the best interests of the child.[24] In a plurality opinion, the Court held that the statute unconstitutionally interfered with the fundamental liberty interest that parents have in caring for and raising their children.[25] The Court based its holding on the broad language of the statute and its failure to require Washington courts to give deference to a parent's determination of the child's best interest.[26] While acknowledging that when a parent is fit there is normally no reason for the state to intervene in private, family affairs, the Court did not decide the main constitutional question of whether the Due Process Clause requires a showing of parental abuse or neglect before allowing third party visitation.[27] The Court was hesitant to issue a per se rule with regard to constitutional protections of natural parents under third party visitation statutes because state courts often addressed those questions on a case-by-case basis.[28]

Following *Troxel*, state courts have continued to struggle with defining the

abuse or neglect. *Id.*; *see also* Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 93-96 (2008) (criticizing best interest standard in favor of harm to child standard). Gupta-Kagan argues that the best interest standard is "notoriously vague" and invites subjective decisions based on the values and biases of judges. Gupta-Kagan, *supra*, at 94. He favors the more objective requirement of third parties having to demonstrate that granting custody to a natural parent would harm the child. *Id.* at 95. He differentiates the harm standard from parental unfitness in this way: a recovering drug user seeking to regain custody from a third party might pass the fitness test, but a harm standard would still require the court to look not just at the parent's current status, but also the entire history of the parent's relationship with the child. *Id.* at 99-100; *see also* Lauren F. Cowan, Note, *There's No Place Like Home: Why the Harm Standard in Grandparent Visitation Disputes is in the Child's Best Interests*, 75 FORDHAM L. REV. 3137, 3183 (2007) (arguing states should adopt harm standard).

23. 530 U.S. 57 (2000).

24. *See* Troxel v. Granville, 530 U.S. 57, 60 (2000) (describing breadth of section 26.10.160 of Washington Code).

25. *See* Troxel v. Granville, 530 U.S. 57, 67 (2000) (plurality opinion) (noting language allowed any third party to subject parent's decisions to court review); *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (asserting role of parents in raising their children firmly established in American law); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (describing fundamental rights of parents regarding children). Justice O'Connor, writing for the plurality in *Troxel*, was joined by Chief Justice Rehnquist, and Justices Ginsburg and Breyer. 530 U.S. at 60. Justices Souter and Thomas filed separate concurring opinions. *Id.* at 75-80.

26. *See* Troxel v. Granville, 530 U.S. 57, 69 (2000) (criticizing state court for ignoring presumption that fit parents act in best interest of child). The Court noted that this failure to give any special consideration to the wishes of a fit parent was an unconstitutional interference with the right of a parent to make decisions regarding the care of his or her child. *Id.* at 70.

27. *See* Troxel v. Granville, 530 U.S. 57, 68-69, 73 (2000) (stating constitutionality of standard for visitation depends on its application); *see also* Alessia Bell, Note, *Public and Private Child:* Troxel v. Granville *and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 228 (2001) (describing reactions of interest groups to *Troxel* decision). Bell points out that following *Troxel*, without any definitive statement of parental rights under the Due Process Clause, many different special interest groups—from grandparent groups to gay rights organizations—claimed *Troxel* was a victory for their side. Bell, *supra.*

28. *See* Troxel v. Granville, 530 U.S. 57, 73-74 (2000) (pointing to fifty state statutes dealing with grandparent visitation and varying interpretations).

extent of the constitutional rights of natural parents.[29] In Montana, the state supreme court held that *Troxel* was consistent with the court's long held view that there must be an initial determination regarding the parent's fitness before awarding a third party visitation or custody.[30] If the parent is fit, there is a presumption in favor of the parent's wishes, but if the parent is not fit, then the court may determine by clear and convincing evidence that contact with a grandparent is in the child's best interest.[31] In the absence of a per se rule regarding the constitutionality of third party visitation statutes, the Minnesota Supreme Court held that *Troxel* describes "guiding principles," requiring a statute give weight to the decisions of a fit parent and provide for more than just a best interest analysis to overcome the decisions of a fit parent.[32] But in rejecting a grant of visitation to a domestic partner who was determined to be a de facto parent, the Maryland Court of Appeals held that *Troxel*, in conjunction with Maryland jurisprudence, required a finding that the natural mother was unfit in order to overcome her constitutional right to raise her child as she saw fit.[33]

29. *Compare* Soohoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007) (affirming state ordered visitation without first assessing parental fitness), *and* Hamit v. Hamit, 715 N.W.2d 512, 528 (Neb. 2006) (upholding grandparent visitation statute based on parent-child relationship and best interests standard), *and* Hiller v. Fausey, 904 A.2d 875, 886 (Pa. 2006) (upholding grandparent visitation statute lacking determination of parental fitness), *and* Rubano v. DiCenzo, 759 A.2d 959, 975 (R.I. 2000) (allowing de facto parent to visit child despite wishes of fit parent), *with* Evans v. McTaggart, 88 P.3d 1078, 1083 (Alaska 2004) (holding grandparent claiming custody must show parent unfit), *and* Dutkiewicz v. Dutkiewicz, 957 A.2d 821, 833 (Conn. 2008) (holding state can only override natural parent upon showing parent unfit), *and* Janice M. v. Margaret K., 948 A.2d 73, 87 (Md. 2008) (deeming parental unfitness prerequisite to awarding custody to third party).

30. *See* Polasek v. Omura, 136 P.3d 519, 522 (Mont. 2006) (outlining implications of *Troxel* holding). The court reasoned that "*Troxel* instructs that when a grandparent petitions for contact with a grandchild, a court must first inquire whether the child's parent is fit; that is, the court must determine whether the parent 'adequately cares for his or her children.'" *Id.* (quoting Troxel v. Granville, 530 U.S. 57, 68 (2000))

31. *See* Polasek v. Omura, 136 P.3d 519, 522 (Mont. 2006) (describing operation of presumption in favor of fit parent).

32. *See* Soohoo v. Johnson, 731 N.W.2d 815, 820-21 (Minn. 2007) (commenting on *Troxel*'s requirements for constitutional third party visitation statute). The court reasoned that section 257C.08 of the Minnesota Statutes was constitutional under *Troxel* because it required the third party to have resided with the child for two years, and further required the court to determine whether visitation would be in the child's best interest, whether the third party had established a parent-child relationship, and whether the third party visitation would interfere with the relationship between the custodial parent and the child. *Id.* at 822-23; *see also* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 44-45 (2002) (describing ALI approach to third party claims). Bartlett describes the American Law Institute's recommendations for custody cases, noting that the ALI recommends allowing a third party who lived with the child for two years and functioned as a parent to petition a court for a custodial role in the child's life. Bartlett, *supra*.

33. *See* Janice M. v. Margaret K., 948 A.2d 73, 86 (Md. 2008) (reasoning Maryland lower court recognized de facto parent status prior to *Troxel*). The Maryland Court of Special Appeals relied on a four part test to determine de facto parent status: whether the adoptive or biological parent consented to the formation of a parent-child relationship with the third party, whether the third party lived with the child in the same household, whether the third party assumed significant responsibility for the child, and whether the third party had spent enough time with the child to have formed a relationship that was parental in nature. *Id.* at 87. *See generally* Emily R. Lipps, Note, Janice M. v. Margaret K.*: Eliminating Same-Sex Parents' Rights to Raise*

In *Kulstad v. Maniaci*, the court determined that the constitutional rights of natural parents did not require third parties to demonstrate parental unfitness as a condition to pursuing a parental interest in a child.[34] The court distinguished much of its early jurisprudence by noting that prior to the 1999 amendments to the nonparental statutes, the termination of parental rights under the statute could only be done based upon a showing of abuse or neglect by a natural parent.[35] After the 1999 amendments, the court reasoned that the legislature sought to balance the constitutional rights of the parent with the child's constitutional rights by providing standing to a third party seeking a parental interest on the condition that the third party had established a parent-child relationship with the minor.[36] The court disagreed that *In re Parenting of J.N.P.* rejected the constitutionality of the 1999 amendments, noting the plaintiffs in that case could not have relied on the statute in question, section 40-4-228 of the Montana Code, because they never established the prerequisite parent-child relationship as defined by section 40-4-211.[37]

The court embraced the dicta in *Troxel*, where the United States Supreme Court declined to issue a per se rule regarding the rights of natural parents relative to third parties, opting instead to leave that question to a case-by-case adjudication in the state courts.[38] The absence of a per se rule provided the court flexibility to distinguish its prior holding in *Polasek v. Omura*, which required a determination of parental fitness, from its analysis of section 40-4-228 by reasoning that the Montana Legislature specifically allowed a court to determine a third party parental interest claim without having to find the natural parent unfit.[39] The court distinguished sections 40-4-211 and 40-4-228 from

Their Children by Eliminating the De Facto Parent Doctrine, 68 MD. L. REV. 691 (2009) (arguing de facto parent doctrine consistent with parent's constitutional rights). Lipps argues that the de facto parent doctrine imposes a high threshold on third parties, consequently protecting the constitutional rights of natural parents by narrowing the class of third parties who are eligible to seek custody or visitation. *Id.* at 713.

34. *See* 220 P.3d at 604 (holding statute requiring third party demonstrate parent-child relationship before seeking parental interest constitutional). The court reasoned that the statutory scheme Maniaci challenged sought to balance the rights of the parent with the child's constitutional rights, and section 40-4-227(2)(b) of the Montana Code instructed that the parent's constitutional rights should yield to the child's best interest when the parent's conduct has been contrary to the parent-child relationship. *Id.*

35. *See id.* at 603 (distinguishing Montana jurisprudence prior to 1999 amendments to nonparental statutes). The court considered *Girard v. Williams*, *In re A.R.A.*, and *In re Guardianship of Doney*, concluding that "[t]he pre-1999 statutes made termination of parental rights, based upon dependency, abuse, or neglect, the only option available to the Court before it could award a nonparent a custodial interest." *Id.*

36. *See id.* (explaining legislature sought to recognize child's constitutional rights in nonparental proceedings).

37. *See id.* at 604 (noting grandparents in *In re Parenting of J.N.P.* relied on section 40-4-212 of Montana Code). Section 40-4-211(4)(b) allowed a nonparent of a child residing with someone other than the natural parent to petition the court for legal custody. *Id.* The court then had to decide that petition pursuant to a best interest of the child standard as outlined in section 40-4-212. *Id.*

38. *See* 220 P.3d at 605 (citing absence of per se rule regarding constitutionality of nonparental visitation statutes).

39. *See id.* at 605-06 (rejecting Maniaci's attempt to extend parental fitness condition to nonparental statutes).

the Washington state statute struck down in *Troxel*; the Washington statute permitted anyone at any time to seek visitation, while Montana's statutory scheme narrowed the class of third parties to those who had established a parent-child relationship and who had also demonstrated that visitation would be in the best interests of the child.[40] The court concluded that this limited approach to third party visitation was both consistent with *Troxel* and with other state cases upholding visitation rights for third parties without first requiring a showing of parental unfitness.[41]

In upholding the constitutionality of sections 40-4-211 and 40-4-228 of the Montana Code, the *Kulstad* court diverged dramatically from well-established precedent and, in the process, weakened the constitutional protections afforded to parents to raise their children as they see fit.[42] In order to reach this conclusion, the court reinterpreted its analysis of prior cases dealing with nonparental visitation statutes both before and after the 1999 amendments.[43] The court stated that the pre-1999 statutes made the termination of parental rights due to abuse or neglect the only option available to a court before awarding custody to a nonparent.[44] The majority, however, failed to even mention in its analysis that *In re A.R.A.* struck down a similar statutory scheme precisely because it permitted a custody decision based on the best interests of the child standard without first showing that a natural parent was unfit.[45] After the 1999 amendments, the court, in *In re Parenting of J.N.P.*, clearly articulated that a natural parent cannot be denied custody without first establishing that his or her parental rights have been terminated due to abuse or neglect.[46] The

40. *See id.* at 606 (distinguishing Montana statutes from Washington statute). The Montana statutory scheme, taken as a whole, imposes three requirements on the nonparent petitioning for a parental interest: there must first be a parent-child relationship, the natural parent must have engaged in conduct contrary to the parent-child relationship, and the granting of a parental interest to a nonparent must be in the best interest of the child. *See id.* at 603-04.

41. *See id.* at 606 (discussing constitutional infirmity of Washington statute). The court then reasoned that the Montana statutes were closer to the Minnesota statutes that were upheld by that state's supreme court in *Soohoo v. Johnson*. *Id.* The court then distinguished its holding from that of the Maryland Court of Appeals in *Janice M. v. Margaret K.* by reasoning that the Maryland court considered the common law de facto parent doctrine, and not any Maryland statute comparable to the Montana statutes before the court. *Id.*

42. *See* 220 P.3d at 603-04 (upholding constitutionality of Montana statutes); *see also supra* note 1 and accompanying text (highlighting Montana Supreme Court holdings requiring showing of parental unfitness).

43. *See* 220 P.3d at 603-04 (discussing court's holding prior to and following 1999 amendments to nonparental visitation statutes).

44. *Id.* at 603 (describing impact of pre-1999 statutes)

45. *See id.* (holding prior to 1999 court could only consider parental abuse or neglect). In *In re A.R.A.*, the court considered section 40-4-221 of the Montana Code, which allowed a third party to petition the court for custody, and dictated that the court's custody decision should be based on the best interest of the child. 919 P.2d 388, 390 (Mont. 1996) (quoting provisions of section 40-4-221). The provisions gave the court the option to award custody based upon the best interest of the child standard without first finding abuse or neglect. *See* 220 P.3d at 612 (Rice, J., dissenting) (explaining pre-1999 statute invalidated for allowing option to grant custody based solely on best interest). The dissent further noted it was the Montana Constitution, and not the pre-1999 statutes, that created a high threshold against third party claims for visitation or custody. *Id.*

46. *In re* Parenting of J.N.P., 27 P.3d 953, 958 (Mont. 2001) (prohibiting denial of parent's custody

majority in *Kulstad* again failed to acknowledge in its discussion that *In re Parenting of J.N.P.* invalidated another nonparental custody statute because it allowed custody to be decided absent a showing of abuse or neglect by the natural parent.[47] The majority in *Kulstad* recast the holding of *In re Parenting of J.N.P.* in a more favorable light, stating that the court cannot interfere with the fundamental rights of a parent by relying "solely upon the child's best interest."[48]

Troxel provides little guidance to state courts in defining the constitutional protections of parents; it simply instructs states that third party statutes should not be overly broad, and state courts should give special weight to a fit parent's wishes.[49] By leaving the states wide latitude to assess third party statutes on a case-by-case basis, the Montana Supreme Court was able to use *Troxel* to support inconsistent positions with regard to grandparent visitation and third party visitation.[50] The court neglected to explain in any detail why it will treat the constitutional rights of natural parents differently when the party seeking contact with a minor is an unrelated third party as opposed to a grandparent seeking visitation.[51] Instead, the majority defers its analysis of section 40-4-228 to the legislature's determination of a parent's constitutional rights.[52]

While the majority never accounted for its abrupt departure from precedent,

absent showing of abuse or neglect).

47. *See* 220 P.3d at 604 (discussing facts and reasoning of *In re Parenting of J.N.P.*); *see also In re* Parenting of J.N.P., 27 P.3d 953, 957 (Mont. 2001) (describing "constitutional infirmity" of section 40-4-211(4)(b)).

48. *See* 220 P.3d at 604 (describing holding of *In re Parenting of J.N.P.*). The court in *In re Parenting of J.N.P.* stated that the parent's right to custody cannot be terminated "simply on the subjective determination of that child's best interest." 27 P.3d 953, 958 (Mont. 2001). By changing "simply" to "solely," the *Kulstad* majority makes its holding appear more in line with *In re Parenting of J.N.P.* because parental interest decisions under sections 40-4-211 and 40-4-228 are not based solely on the child's best interest, but also on whether a parent-child relationship had been established between the third party and the child. *See* 220 P.3d at 603-04 (describing requirements for parental interest under nonparental statutes).

49. *See supra* note 29 and accompanying text (highlighting wide disparity among state courts in interpreting *Troxel*).

50. *See* Polasek v. Omura, 136 P.3d 519, 522 (Mont. 2006) (holding *Troxel* instructs court to determine parent's fitness). Despite this clear holding in *Polasek*, the *Kulstad* court took the opposite position and relied on *Troxel* to declare the nonparental statutes constitutional because they require the court to consider the wishes of the fit parent and also whether a parent-child relationship had been established. *See* 220 P.3d at 606 (describing twin thresholds of Montana statutes).

51. *See* 220 P.3d at 605 (noting language of nonparental statute states determination of fitness not necessary). The court avoids addressing the difference further by citing *Troxel*'s deference to a case-by-case determination of visitation by the state courts. *Id.*; *cf.* Sally F. Goldfarb, *Visitation for Nonparents after* Troxel v. Granville*: Where Should States Draw the Line?*, 32 RUTGERS L.J. 783, 811 (2001) (arguing against distinctions between grandparents and nonparents when considering visitation). In arguing that grandparents and nonparents should be judged under the same standard, Goldfarb notes that far more often grandparents receive preferential treatment from state statutes than other nonparents. Goldfarb, *supra*, at 811-12.

52. *See* 220 P.3d at 613 (Rice, J., dissenting) (arguing court bows to legislature's determination of constitutional rights). Justice Rice continues, arguing that the court failed to do its duty by deferring to the legislature's assessment of the constitutional rights of natural parents. *See id.* at 614. The courts are charged with defining the scope of constitutional rights, not the legislature. *See id.*

the concurring opinion reminds its readers that *Kulstad* considered an important "elephant in the room": the rights of same-sex couples to parent children that only one of them was legally permitted to adopt.[53] In affirming the constitutionality of sections 40-4-211 and 40-4-228, the court attempted to bring the rights of same-sex couples in line with the rights of heterosexual parents, but the trade-off is a weakening of constitutional protections for all fit parents.[54] The court's holding will likely increase litigation between fit parents and third parties, while leaving intact the statute that does the greatest damage to same-sex couples by allowing only one—and not both partners—to legally adopt a child.[55]

In *Kulstad v. Maniaci*, the Montana Supreme Court once again considered the extent of constitutional protections provided to parents to raise their children as they see fit. In holding that courts need not find a parent to be unfit before considering the issue of awarding a parental interest to a third party, the court departed from a long line of cases affirming a high threshold of protection against third party petitions. The court's holding also provides little consistency for lower courts adjudicating third party cases. The constitutional

53. *See id.* at 610 (Nelson, J., concurring). Justice Nelson shifts the focus of analysis to the disparate treatment of homosexuals under Montana law, arguing that classifications based on sexual orientation should be treated as a suspect classification under equal protection analysis. *Id.* at 611.

54. *See* Brief of the Domestic Violence Project Inc./Safe House (Michigan) et al. as Amici Curiae Supporting Respondent at 23-27, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138) (describing effect of third party cases on low-income and single parent households). Various domestic violence agencies expressed support for the constitutional rights of natural parents by advocating for a required showing of unfitness before awarding a custody or visitation interest to a third party. *See id.* at 11. The brief further details how low income families are disproportionately affected by third party claims, often because single mothers rely on an extended network of family members for help in raising children. *See id.* at 23. Lowering the threshold to third party visitation was of particular concern to domestic violence advocates because victims of domestic violence are often forced to litigate custody claims against the parents of their abusers. *See id.* at 27; *see also* Gupta-Kagan, *supra* note 22, at 97 (recognizing best interest standard negatively affects low income and minority parents). Gupta-Kagan advocates for a policy that will allow third parties to petition the court if they believe a child is being harmed, but the policy should not punish natural parents who have relied on third party caregiving. Gupta-Kagan, *supra* note 22, at 97.

55. *See* 220 P.3d at 616 (Rice, J., dissenting) (discussing consequences of majority's decision). Justice Rice asserts that the court's reassessment of the constitutional rights of parents will force more fit parents into court to defend against claims that would have previously been barred. *Id.*; *see also* MONT. CODE ANN. § 42-1-106 (2009) (describing who may adopt in Montana). To remedy the inequality between heterosexual couples and same-sex couples in adoption, the Montana court might read its adoption statute broadly to recognize second parent adoption. *See In re* M.M.D., 662 A.2d 837, 840 (D.C. 1995) (permitting same sex partner to adopt her partner's child); Adoption of Tammy, 619 N.E.2d 315, 318 (Mass. 1993) (permitting second parent adoption); *In re* Jacob, 660 N.E.2d 397, 400 (N.Y. 1995) (permitting second parent adoption); *see also* Heather Buethe, Note, *Second-Parent Adoption and the Equitable Parent Doctrine: The Future of Custody and Visitation Rights for Same-Sex Partners in Missouri*, 20 WASH. U. J.L. & POL'Y 283, 293-96 (2006) (advocating recognition of second parent adoption). Permitting a same-sex partner to adopt the biological or legal child of his or her partner affords children the legal security of having two parents and also ensures that each parent will have a legal relationship to the child that will be recognized in the event their relationship ends. Buethe, *supra*, at 294. Construing the adoption statute broadly allows the court to extend equal rights to same-sex parents in states where the legislatures have been slow or unwilling to recognize those rights. *Id.* at 307.

rights of parents are allowed to fluctuate depending upon whether the party seeking a role in a minor's life is a grandparent or an unrelated third party.

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