**Montana Law Review**

Volume 58
Issue 2 *Summer 1997*

Article 7

7-1-1997

# Erger v. Askren: Protecting the Biological Parent's Rights at the Child's Expense

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# NOTE

## *ERGER V. ASKREN*: PROTECTING THE BIOLOGICAL PARENT'S RIGHTS AT THE CHILD'S EXPENSE

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### I. INTRODUCTION

*The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility.*[1]

As Justice Stevens so eloquently stated, the structures of family relationships extend across the spectrum, and those structures are constantly transforming. The changing composition of the American family continually presents the courts with new situations and issues that challenge existing laws, precedent, and societal norms. In an attempt to address the steady increase in the number of stepfamilies, and the issues they raise, the 1979 Montana Legislature enacted section 40-4-221 of the Montana Code.[2]

This statute provides the stepparent with the right to request a custody hearing after the death of the custodial parent.[3] The statute also provides that the custody dispute must be resolved according to the best interest of the child.[4] The statute, as drafted by the legislature, attempts to balance the constitutional rights of all the parties involved after the death of a custodial parent—the child, stepparent, and mother or father.

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1. Lehr v. Robertson, 463 U.S. 248, 256 (1983).
2. *See* Ch. 127, H.B. 335, 46th Leg. Sess. (Mont. 1979) (Statements of Representative Ramirez).
3. *See* MONT. CODE ANN. § 40-4-221(1),(2)(b) (1995).
4. *See* MONT. CODE ANN. § 40-4-212(1), 40-4-221(3) (1995).

However, in the case of *Erger v. Askren*,[5] the Montana Supreme Court found this statute unconstitutional to the extent it infringes upon the rights of the natural parent who has not been adjudicated "unfit."[6] This note reviews the reasoning of the Montana Supreme Court in the *Erger v. Askren* opinion. It focuses on the court's analysis and supplements it with a discussion of all the parties' constitutional rights. Part II summarizes the Montana Supreme Court's opinion in *Erger v. Askren*. Part III explains the historical analysis and development of the rights belonging to the biological parents, the stepparent, and the child. Part IV illustrates how the best interest of the child standard attempts to balance these sometimes conflicting rights to protect the constitutional rights of all the parties and suggests that the analysis of the Montana Supreme Court was not complete. Part V analyzes the effects of this decision. Part VI concludes that the rights of the natural parent must be balanced against the rights of the child and the stepparent.

## II. *ERGER V. ASKREN*

### *A. Summary of Facts*

A.R.A. was born in 1987, four years after Tracy Erger and Bill Askren, her parents, were married.[7] Soon after the birth of their child, Tracy and Bill experienced marital difficulties, culminating in physical violence.[8] Tracy's coworkers noticed on more than one occasion that her face was bruised and that she wore sunglasses while working.[9] In January of 1988, Bill was charged with assault after striking Tracy.[10] He was ordered to attend an anger management class and although he attended some of the sessions, he did not complete the course.[11]

Tracy and Bill reconciled, but shortly thereafter Bill's violent behavior resurfaced.[12] When Bill assaulted Tracy once again, Tracy and her daughter fled their home and sought shelter at a safe house.[13] Bill and Tracy separated permanently after this

5. 277 Mont. 66, 919 P.2d 388 (1996).
6. *See Erger*, 277 Mont. at 71, 919 P.2d at 392.
7. *See id.* at 68, 919 P.2d at 389.
8. *See* Findings of Fact and Conclusions of Law and Order at 2-3, *In re* the Custody of A.R.A., No. DR 92-1200 (13th Dist. Ct. Mont. filed Aug. 10, 1994).
9. *See id.*
10. *See id.*
11. *See id.* at 3.
12. *See id.*
13. *See* Findings of Fact and Conclusions of Law and Order at 3, *In re* the

final incident.[14] At this time, A.R.A. was approximately eighteen months old.

Bill and Tracy were divorced in 1989.[15] In the divorce decree, Tracy was awarded sole custody of A.R.A., and Bill was given reasonable rights of visitation and ordered to pay child support in the amount of $200 per month.[16] Bill moved to Salt Lake City and consequently did not exercise his visitation rights with the exception of telephone calls and yearly visits.[17] Bill also failed to pay approximately $4,000 in court ordered child support.[18]

Tracy married Patrick Erger, the Petitioner, in 1990.[19] In February of 1992, Tracy and Patrick had a child, Joshua Joseph Erger.[20] Ten months later, Tracy was killed in an airplane crash when she was returning home from a business trip.[21] In her will, she designated Patrick as A.R.A.'s guardian.[22]

The day after Tracy's death, Bill traveled to Patrick's residence to take A.R.A., but Patrick refused to relinquish physical custody of her.[23] Patrick, as the guardian nominated in Tracy's will, filed an action in district court seeking custody of A.R.A. pursuant to section 40-4-221(2)(b)(c) of the Montana Code.[24] The district court heard the case and determined that Patrick was

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Custody of A.R.A., No. DR 92-1200 (13th Dist. Ct. Mont. filed Aug. 10, 1994).

14. *See id.*

15. *See Erger*, 277 Mont. at 68, 919 P.2d at 389.

16. *See id.*

17. *See id.*

18. *See* Findings of Fact and Conclusions of Law and Order at 5, *In re* the Custody of A.R.A., No. DR 92-1200 (13th Dist. Ct. Mont. filed Aug. 10, 1994).

19. *See id.* at 4.

20. *See id.*

21. *See id.* at 4-5.

22. *See Erger*, 277 Mont. at 68, 919 P.2d at 390.

23. *See* Findings of Fact and Conclusions of Law and Order at 5, *In re* Custody of A.R.A., No. DR 92-1200 (13th Dist. Ct. Mont. filed Aug. 10, 1994).

24. *See id.*; MONT. CODE ANN. § 40-4-221 (1995) provides in pertinent part:

> (1) Upon the death of a parent granted custody of a child, custody shall pass to the noncustodial parent unless one or more parties named in subsection (2) request a custody hearing. The noncustodial parent shall be a party in any proceeding brought under this section.
>
> (2) Upon the death of a parent granted custody of a child, any of the following parties may request a custody hearing and seek custody of the child:
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> . . . .
>
> (b) the surviving spouse of the deceased custodial parent;
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> (c) a person nominated by the will of the deceased custodial parent;
>
> . . . .
>
> (3) The hearing and determination of custody shall be governed by this part.

the appropriate person to have custody of A.R.A.[25] The court's decision was supported by Jeannie Atkinson, a psychotherapist providing grief counseling to A.R.A., who testified that A.R.A. perceived Patrick and Joshua as her primary family.[26] The district court based its custody determination on the best interest of A.R.A.,[27] and it is from this determination that Bill appealed the case to the Montana Supreme Court.[28]

### *B. Holding of the Montana Supreme Court*

On appeal, Bill alleged that the district court's use of the best interest test violated his constitutional right as the natural father.[29] The issue presented to the Montana Supreme Court was whether the district court applied the correct standard to determine custody in a dispute between a biological parent and a third party.[30] The Montana Supreme Court held that the best interest of the child standard did not adequately protect the constitutional rights of the natural father.[31] The court instead found that the natural father's right to raise his child must be

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25. *See Erger*, 277 Mont. at 68, 919 P.2d at 390.

26. *See* Findings of Fact and Conclusions of Law and Order at 6, *In re* the Custody of A.R.A., No. DR 92-1200 (13th Dist. Ct. Mont. filed Aug. 10, 1994).

27. See MONT. CODE ANN. § 40-4-212 (1995) which sets forth the following factors and presumptions as relevant to determining the child's best interest:

> (a) the wishes of the child's parent or parents as to custody;
> (b) the wishes of the child as to a custodian;
> (c) the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who may significantly affect the child's best interest;
> (d) the child's adjustment to home, school, and community;
> (e) the mental and physical health of all individuals involved;
> (f) physical abuse or threat of physical abuse by one parent against the other parent or the child; and
> (g) chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent.
> . . . .
> (3) The following are rebuttable presumptions and apply unless contrary to the best interest of the child:
> (a) Custody should be granted to the parent who has provided most of the primary care during the child's life.
> . . . .
> (4) The following are rebuttable presumptions:
> (b) Failure to pay child support that the person is able to pay is not in the best interest of a child in need of support.
> . . . .

28. *See Erger*, 277 Mont. at 68, 919 P.2d at 390.

29. *See id.* at 70, 919 P.2d at 391.

30. *See id.* at 68, 919 P.2d at 390.

31. *See id.* at 71-72, 919 P.2d at 392.

protected by requiring a finding of abuse, neglect or dependency prior to awarding custody to a third party.[32]

In *Erger*, the court cited *In re Guardianship of Doney*, a case relying on United States Supreme Court precedent, to find that natural parents have a constitutional right to parent their children.[33] The Montana Supreme Court adopted the reasoning of the United States Supreme Court, which found protection of parental rights and the integrity of the family unit under the Due Process Clause of the Fourteenth Amendment,[34] in the Equal Protection Clause of the Fourteenth Amendment,[35] and in the Ninth Amendment.[36] Additionally, the court stated that "[t]he careful protection of parental rights is not merely a matter of legislative grace, but is constitutionally required."[37] The court indicated that it must construe the statute governing custody disputes after the death of a custodial parent to ensure preservation of the constitutional rights of the parties.[38]

Consequently, the court protected the state's ability to interfere with the private relationships within a family.[39] The court relied heavily on the holdings of other courts that require a finding of abuse, neglect, or dependency as a prerequisite to any court-ordered transfer of custody from a natural parent to a third party.[40] To the extent that section 40-4-221 of the Montana Code allows a third party to obtain custody of a child prior to terminating the natural parent's rights, the Montana Supreme Court found it to be unconstitutional.[41]

Upon reaching its holding, the court was forced to overrule two Montana cases that applied the best interest of the child test

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32. *See id.*

33. *See Erger*, 277 Mont. at 70, 919 P.2d at 391 (citing *In re* Guardianship of Doney, 174 Mont. 282, 286, 570 P.2d 575, 577 (1977) (citations omitted)).

34. *See Erger*, 277 Mont. at 70, 919 P.2d at 391 (quoting *Doney*, 174 Mont. at 286, 570 P.2d at 577 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972))).

35. *See id.* (quoting *Doney*, 174 Mont. at 286, 570 P.2d at 577 (quoting *Stanley*, 405 U.S. at 651)).

36. *See id.* (quoting *Doney*, 174 Mont. at 286, 570 P.2d at 577 (quoting *Stanley*, 405 U.S. at 651)).

37. *See id.* (quoting *Doney*, 174 Mont. at 286, 570 P.2d at 577 (citing Stanley v. Illinois, 405 U.S. 645 (1972)).

38. *See id.* (citing LaFountaine v. State Farm Mut. Auto. Ins., 215 Mont. 402, 406-07, 698 P.2d 410, 413 (1985)).

39. *See Erger*, 277 Mont. at 71, 919 P.2d at 391 (citing Schultz v. Schultz, 184 Mont. 245, 247, 602 P.2d 595, 596 (1979); *Doney*, 174 Mont. at 285-86, 570 P.2d at 577)).

40. *See id.* (quoting Babcock v. Wonnacott, 268 Mont. 149, 152, 885 P.2d 522, 524 (1994)).

41. *See Erger*, 277 Mont. at 72, 919 P.2d at 392.

in awarding custody to a nonparent over a natural parent without a finding of abuse, neglect or dependency.[42] In *Brost v. Glasgow*,[43] the court applied the best interest of the child standard after the mother's death to award custody to the children's maternal grandmother and not the childrens' natural father.[44] In the case of *In re Paternity of C.G.*,[45] the court was faced with two men who both sincerely believed that they were the child's father and who both wished to have custody of the child following the mother's death.[46] Blood tests conclusively proved that the man who had been living with the child was not the child's natural father.[47] The court refused to require the more stringent standard of abuse, neglect or dependency and instead applied the best interest of the child standard when making its custody determination.[48]

The court justified overruling the above two cases primarily by relying on its holding in *In re Guardianship of Doney*,[49] a case involving the termination of parental rights.[50] In that case the Montana Supreme Court emphasized the importance of protecting a parent's constitutional right to retain custody of his or her child. The court held that to protect the parent's rights, the state must carefully follow the procedures set forth by the legislature, and the court must make specific findings of fact prior to removing the child from the natural parent's custody.[51]

The Montana Supreme Court concluded its opinion in *Erger* by acknowledging that section 40-4-221 of the Montana Code still provides stepparents with the necessary standing to request a custody hearing.[52] However, courts may no longer rely upon section 40-4-221(3) of the Montana Code in making a determination of custody between a parent and a third party.[53] The court altered the proper standard for making a custody determination under this statute by construing it to require a two step process:

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42. *See id.* (overruling Brost v. Glasgow, 200 Mont. 194, 651 P.2d 32 (1982) and *In re* Paternity of C.G., 228 Mont. 118, 740 P.2d 1139 (1987)).
43. 200 Mont. 194, 651 P.2d 32 (1982).
44. *See id.*
45. 228 Mont. 118, 740 P.2d 1139 (1987).
46. *See id.* at 120, 740 P.2d at 1140.
47. *See id.*
48. *See id.* at 121, 740 P.2d at 1141.
49. 174 Mont. 282, 570 P.2d 575 (1977).
50. *See id.*
51. *See id.* at 285, 570 P.2d at 577.
52. *See Erger*, 277 Mont. at 72, 919 P.2d 388 at 392.
53. *See id.*; MONT. CODE ANN. § 40-4-221(3) (1995) (providing that the custody determination should be based on the best interest of the child).

first, the court must determine whether parental rights were lost by termination, death, or any other statute that provides for the forfeiture, relinquishment or abandonment of parental rights; and second, if parental rights were in fact lost, then the court must make a determination of custody based on the best interest of the child.[54] Accordingly, the decision of the district court was reversed and custody of A.R.A. was awarded to Bill, her natural father.[55]

## III. HISTORICAL BACKGROUND OF RIGHTS AT ISSUE IN CUSTODY DETERMINATIONS

### *A. The Rights of Biological Parents*

#### *1. Privacy Rights*

The Montana Supreme Court has not yet addressed the right to privacy, as enumerated in the Montana Constitution,[56] within the context of familial relationships. However, within the federal constitutional right to privacy, the United States Supreme Court has found a fundamental liberty interest in the privacy of family affairs.[57] Montana has relied on the United States Supreme Court's interpretation of privacy to interpret its own privacy clause in the context of familial relationships.[58]

Although neither the right to privacy nor the more general liberty interest in having a family is enumerated in the United States Constitution, the United States Supreme Court has protected both of these fundamental rights.[59] The United States Supreme Court has also held that the right to privacy includes general liberty interests, such as freedom of choice in marital decisions,[60] reproduction,[61] and child rearing.[62] The protection

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54. *See Erger*, 277 Mont. at 74, 919 P.2d at 393 (Nelson, J., concurring).
55. *See Erger*, 277 Mont. at 73, 919 P.2d at 392.
56. *See* MONT. CONST. art. II, § 15.
57. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972):
> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

*Id.* (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).
58. *See* Town of Ennis v. Stewart, 247 Mont. 355, 359, 807 P.2d 179, 182 (1991).
59. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7 at 403-04 (5th ed. 1995).
60. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).
61. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438,

of parental rights as fundamental rights arose out of the general principle that parents have a liberty interest in ongoing relationships with their children[63] and that individual family members are entitled to privacy within the family unit.[64]

### 2. *Due Process Rights*[65]

Due process safeguards apply whenever the state attempts to burden an individual's exercise of fundamental constitutional rights.[66] Therefore, a due process analysis must be applied when the state attempts to infringe upon the right of privacy or upon the autonomy of the family. However, the analysis employed differs according to the role of the parent within the family unit.

The constitutional protection afforded a mother's rights differs from the constitutional protection provided to a father. Because the mother carries the child and is easily recognizable as the child's parent, her constitutional rights to care for her child and make child rearing decisions arise automatically.[67] However, as a prerequisite to finding that a father has constitutional rights as a parent, he must establish proof of both a biological link and his

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453 (1972).

62. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

63. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).

64. *See Prince*, 321 U.S. at 166.

65. The substantive due process protection provided to fathers' constitutional rights is grounded in a long line of United States Supreme Court cases recognizing the importance of the family. *See Stanley*, 405 U.S. at 651.

> The rights to conceive and to raise one's own children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citations omitted); "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (citations omitted); and "(r)ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533 (1953) (citations omitted). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citations omitted).

*Id.*

66. *See* NOWAK & ROTUNDA, *supra* note 59, § 13.4 at 527-28.

67. This freedom to make child rearing decisions seems to extend to the right of a mother to designate a guardian for her children in her will, as Tracy Erger did. Erger v. Askren, 277 Mont. 66, 68, 919 P.2d 388, 390 (1996). "Freedom of personal choice in matters of family life is one of the liberties protected by due process." Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (citing Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 639-40 (1974)). However, the Montana Supreme Court did not discuss the issue of whether the natural mother also has constitutional rights in need of protection by the court. *See* Erger v. Askren, 277 Mont. 66, 919 P.2d 388 (1996).

acceptance of parental responsibilities.[68]

*Stanley v. Illinois*[69] was the first case to analyze the substantive due process rights afforded to biological fathers.[70] In Illinois, married fathers and unwed mothers could not be deprived of their children absent a finding that they were "unfit"; however, unwed fathers were afforded no such protection.[71] Stanley filed suit alleging that he had been deprived of equal protection because of his status as an unwed father.[72] The United States Supreme Court agreed that he was entitled to a hearing on his fitness as a parent before the state could take action to remove his children from his home.[73] Thus, the Court found that Stanley and all unwed fathers have a substantial and cognizable interest in retaining custody of their children.[74]

The Court's recognition of Stanley's constitutional rights as an unwed father and the Court's finding that the statute at issue did not further any state interest led the Court to conclude that the statute impermissibly infringed on Stanley's constitutional rights.[75] The Court held that Stanley was entitled to the same protection that married parents and unwed mothers were afforded in Illinois; specifically, a hearing on his "fitness" as a parent prior to removing the children from his home.[76]

Questions remain as to the exact implications of the holding in *Stanley v. Illinois*. Some courts have found that *Stanley* establishes a constitutional requirement that a parent be found "unfit" prior to denying that parent custody of his or her child.[77] However, commentators argue that *Stanley* merely forbids termination of parental rights based on a presumption that a class of parents is unfit.[78] What is clear is that fathers have due process rights that must be considered by the courts.

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68. *See* Caban v. Mohammed, 441 U.S. 380, 397 (1979).
69. 405 U.S. 645 (1972).
70. *See id.*
71. *See id.* at 648.
72. *See id.* at 646.
73. *See id.* at 645.
74. *See id.* at 652.
75. *See id.* at 649.
76. *See id.*
77. *See, e.g.*, Sheppard v. Sheppard, 630 P.2d 1121, 1126-27 (Kan. 1981).
78. *See, e.g.*, David L. Nersessian, *Mom Versus Grandma-or-Grandparent Preference Versus Best Interest: An Examination of the Case for Grandparent Custody*, 13 PROB. L.J. 133, 137 (1996).

### B. The Rights of Stepparents

Although the rights of natural parents have been protected as fundamental rights, courts generally have not recognized stepparents as a group possessing constitutional rights. "[T]he legal system favors the placement of children with one or both parents, and third parties typically face a difficult burden in overcoming this parental preference."[79] However, this burden is not insurmountable because as society's concept of parenting and family change, so does the recognition of the corresponding rights.

Professor Margaret M. Mahoney cites the 1990 census, which estimated that "approximately 5.5 million married-couple households contained at least one stepchild under age eighteen. This number constituted twenty-nine percent of all married-couple households with children. The total number of stepchildren residing in these families was 7,208,000."[80] These statistics are a reflection of the changes that are occurring in what we, as a society, perceive as the traditional nuclear family. "The reality today is that many children do not grow up in the traditional construct of a family—two natural parents, a full sibling or two, a dog, a cat, and a minivan."[81]

However, courts still prefer biological links over the psychological links that may bind individuals together as a family. "Genetic parentage . . . enjoys an historic advantage in the ancient tradition of patriarchal ownership of children. Rights attaching to genetic paternity tap into a tradition as old as Genesis and Aristotle."[82]

Stepparents typically act *in loco parentis*.[83] Where, as in stepfamilies, the natural father's parental opportunity conflicts with the similar opportunity of the stepfather, it is not unconstitutional to give preference to the latter.[84] The Court has found that resolution of these conflicting rights is best left to the legislature.[85]

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79. MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 124 (1994).

80. MAHONEY, *supra* note 79, at 2, (citing Bureau of the Census, U.S. Dep't of Commerce, Current Population Rep., Special Studies Series P23-180, Marriage, Divorce and Remarriage in the 1990's, Table L, at 10 (Oct. 1992)).

81. Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1052 (1996).

82. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective On Parents' Rights*, 14 CARDOZO L. REV. 1747, 1777 (1993).

83. *See* MAHONEY, *supra* note 79, at 124. *In loco parentis* is a Latin term which means "in the place of a parent." *Id.* at 7.

84. *See Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (relying on the language from Lehr v. Robertson, 463 U.S. 248, 260 (1983)).

85. The Court found that the following issue was a question of legislative policy

When the individual fulfills the role and the duties of a parent, some courts recognize this individual as the "parent" of the child with the rights that attach by virtue of parenthood.[86] However, in the context of foster families, the Court held that third parties only have rights derivative of the child's best interest.[87] When the rights of the third party and the best interest of the child conflict with the rights of the natural parent, the Constitution may not require the state to protect the biological relationship with any process greater than the best interest standard.[88] Whether it is a foster parent or a stepparent, the third party's liberty interests are recognized at least to the extent that they further the best interest of the child.

### *C. The Rights of Children*

#### *1. Privacy Rights*

Children in Montana have substantially the same privacy rights as adults.[89] Consequently, the privacy rights of children as members of a family unit merit individual recognition. As discussed previously, the definition of family usually implies a biological relationship, but biology is not the exclusive deter-

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and not constitutional law: Can the presumed parenthood of a couple desiring to retain a child born into their marriage trump the biological father's right to rebut the presumption? *See id.* at 129-30.

86. *See generally* Michael H. v. Gerald D., 491 U.S. 110 (1989).

87. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 861 (1977) (citing Bennett v. Jeffreys, 356 N.E.2d 277, 285 (N.Y. 1976) (Stewart, J., concurring)). It has been suggested that the analysis of foster parent's rights applies to stepparents as well. However, the intent to create a permanent family distinguishes a stepparent from a foster parent or any other temporary caretaker. A child in a stepfamily may have no expectation that he or she will ever return to live with the noncustodial parent. *See* Kaas, *supra* note 81, at 1099. Conversely, the placement of a child in a foster family is treated as temporary, and the best interest of the child is to leave the foster system and return to a permanent home. *See Smith*, 431 U.S. at 861-62.

88. *See* Kaas, *supra* note 81, at 1089 (concluding that the Constitution would permit application of a best interest of the child test in a child custody dispute between the child's stepparent and the child's natural parent); Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody Is Constitutionally Protected?*, 20 GA. L. REV. 705, 736 (1986) (concluding that undue emphasis on biology is unconstitutional); *but see Sheppard*, 630 P.2d at 1128 (holding that application of the best interest test prior to terminating parental rights is unconstitutional).

89. *See* MONT. CONST. art. II, §15. "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." *Id.; see also* Matthew B. Hayhurst, *Parental Notification of Abortion and Minors' Rights Under the Montana Constitution*, 58 MONT. L. REV. 565, 575-78 (1997).

mination of what constitutes a family.[90] The importance of family "stems from the emotional attachments that derive from the intimacy of daily association . . . ."[91] Unlike adults, young children have no psychological conception of relationships by blood-ties;[92] conversely, a child's perception of a parent is shaped by his or her day-to-day needs.[93] This relationship, not the biological relationship, merits protection under the privacy and the minor rights clauses of the Montana Constitution.

### 2. *Liberty Interest and Other Basic Human Rights*

United States Supreme Court precedent indicates that a child may also have a liberty interest in maintaining a relationship with a person who meets the child's needs and best interests.[94] In *Michael H. v. Gerald D.*,[95] the Court recognized a child's interest in maintaining a relationship with her presumed father, the man with whom she had been living in a stable family environment.[96] Conversely, the Court refused to recognize that she had a liberty interest in maintaining a filial relationship with her natural father.[97] The court also refused to acknowledge that she had any right to maintain filial relationships with both her biological father and her presumed father. The decision of the Supreme Court recognized the custodial mother's ability to determine that the best interests of her daughter would be served by not allowing the biological father visitation rights.[98] Thus, a child has a liberty interest in maintaining relationships with those persons who serve the best interests of the child.

In addition to the United States Supreme Court's decision holding that children have privacy and liberty interests, the Montana Supreme Court has recognized that children are entitled

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90. *See Smith*, 431 U.S. at 843.

91. *Smith*, 431 U.S. at 844.

92. *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 12 (rev. ed. 1979).

93. *See* James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. TOL. L. REV. 805, 808 (1995) (citing Gilbert A. Holmes, *The Tie That Binds: The Constitutional Rights of Children to Maintain Relationships With Parent-Like Individuals*, 53 MD. L. REV. 358 (1994)).

94. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989).

95. 491 U.S. 110 (1989).

96. *See id.* at 129.

97. *See id.* at 130-31.

98. *See id.* at 131-32. The Supreme Court stated that there was nothing fundamentally unfair about the district court judge's exercise of discretion which allowed the mother to decide what arrangement would best serve the interests of her daughter. *See id.*

to additional rights. The Montana Supreme Court held that children enjoy "the basic human right to maintain and enjoy the relationship which normally exists between parents and children."[99] The court reasoned that inalienable rights, as guaranteed by the Declaration of Rights in the Montana Constitution, include "basic human rights."[100] Because inalienable rights are found in the Declaration of Rights, they are classified as fundamental rights.[101] By recognizing that children have a fundamental right to enjoy normal family relationships, the court also guaranteed constitutional protection of this right and, therefore, children may not be deprived of due process in any custody proceeding.[102] In *Gullette*, the court held that it would be a violation of a child's due process rights to change a child's custody arrangement without presenting the child's best interests to the court.[103]

Independent counsel is required not only to advocate the child's position, but also to ensure that there is a complete and accurate record upon which the court may rely.[104] Thus, independent counsel must ensure that the child is protected and that the best interests of the child are presented to the court completely and accurately.[105] Accordingly, failing to consider the best interests of the child in any custody dispute would violate the child's fundamental rights as well as the child's due process rights.

## IV. ANALYSIS: THE COURT'S DEPARTURE FROM BALANCING THE RIGHTS OF THE CHILD AGAINST THE RIGHTS OF THE BIOLOGICAL PARENT

99. *In re* Guardianship of Gullette, 173 Mont. 132, 138, 566 P.2d 396, 399 (1977) (citations omitted).

100. *See* MONT. CONST. art. II, § 3. This section states:

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing, and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

*Id.*

101. *See* Butte Community Union v. Lewis, 219 Mont. 426, 430, 712 P.2d 1309, 1311-13 (1986).

102. *See Gullette*, 173 Mont. at 138, 566 P.2d at 399 (citations omitted).

103. *See id.* at 139, 566 P.2d at 399.

104. *See id.* at 140, 566 P.2d at 400.

105. *See id.*

### A. Best Interest of the Child Standard

The best interest of the child standard focuses the court primarily on the needs of the child when resolving custody disputes. Although application of this standard has gained general acceptance in custody disputes between two natural parents, it has not been widely employed in third party custody disputes.[106] This is because there is some disagreement as to whether or not a custody determination in favor of a third person, based on the best interest of the child, violates the due process rights of the natural parent.

In *Quilloin v. Walcott*,[107] the United States Supreme Court held that a natural father's substantive rights under the due process clause were not violated by application of the "best interest of the child" standard.[108] In that case, the natural father attempted to block the child's stepfather from adopting the child.[109] The natural father had provided only sporadic support, contact, and gifts to the child over the previous eleven years.[110] The Court did not find that the father had abused, neglected or abandoned his child prior to terminating his rights as a parent.[111]

The Court reiterated its prior holdings, which required that constitutional protection must be provided to the relationship between a parent and a child.[112] Specifically, the forced breakup of a natural family based solely on the best interest of the child test would offend the due process clause.[113] However, the court noted that the due process clause is not offended by the application of the best interest test to recognize a family unit already in

106. *See* UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987). The Uniform Marriage and Divorce Act has been adopted in nine states. *See id.* at 147. Section 402 of the uniform act, which was designed to codify existing law, requires courts to make custody determinations based on the best interests of the child. *See id.* at 561. Section 402 has been interpreted as applying to all custody disputes, and it has been interpreted as applying only to custody disputes between two natural parents. *Compare In re* Custody of Henkins, 453 N.E.2d 78 (1983) (applying the best interest standard to a third party custody dispute) *with* Henderson v. Henderson, 177 Mont. 1, 568 P.2d 177 (1977) (holding that custody could not be awarded to a nonparent as against the natural parent based on the best interest of a child).

107. 434 U.S. 246 (1978).

108. *See id.* at 254.

109. *See id.* at 247.

110. *See id.* at 250-51.

111. *See id.*

112. *See id.* at 255 (citing Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Stanley v. Illinois, 405 U.S. 645, 649-52 (1972); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923)).

113. *See id.*

existence.[114] In *Quilloin*, the Court applied the best interest of the child test to permit the stepfather, with whom the child had been living for six years, to adopt her despite her natural father's objections and the absence of a finding of abuse, neglect or dependency.[115] The Court protected the due process rights of the natural father by affording him a hearing at which he had the opportunity to offer evidence on any matter he thought relevant, including his ability as a parent.[116] Thus, to adequately protect the due process rights of the natural parent, the law in Montana must provide a similar opportunity.

The best interest test in section 40-4-221 of the Montana Code provides similar, if not additional, protection for the natural father's constitutional rights. First, the statute requires that the custodial parent be included as a party in any custody proceeding brought under that statute.[117] Second, the statute requires that the custody dispute be resolved according to the best interest of the child.[118] The natural parent is given the opportunity to present evidence on any matter that he or she finds relevant, including his or her wishes regarding custody.[119] Section 40-4-212 of the Montana Code was designed to codify the existing law, including the presumption that a custody determination favoring the natural parent is preferred to awarding custody to a third party.[120] Additionally, studies have found that subsequent to a best interest of the child standard being adopted, the likelihood that the biological parent will be awarded custody of his or her own child over a third party has increased.[121]

Section 40-4-221 of the Montana Code was adopted to provide the court flexibility in determining if it is in the child's best interest to return to the custody of the natural parent after the death of the custodial parent.[122] The judiciary committee was particularly concerned with situations in which the child had minimal

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114. *See id.*
115. *See id.* at 254-55.
116. *See Quilloin*, 434 U.S. at 254.
117. *See* MONT. CODE ANN. § 40-4-221(1) (1995).
118. *See* MONT. CODE ANN. § 40-4-221(3), 40-4-212 (1995).
119. *See* MONT. CODE ANN. § 40-4-212 (1995).
120. *See* MONT. CODE ANN. § 40-4-212 (Commissioners' Note in Annotations) (1995).
121. In 1920, 15% of the children involved in custody disputes were placed with a nonparent. Compare to 1990, when only 3.8% of the children involved in custody disputes were placed with a nonparent. *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 134 (1994).
122. *See* Ch. 127, H.B. 335, 46th Leg. Sess. (Mont. 1979) (Statement of Representative Ramirez).

or even no contact with the natural parent, but had developed a close relationship with the stepparent.[123] The legislature appears to have intended to allow the child to remain in the stepparent's home even absent a finding of abuse or neglect.

### *B. The Montana Supreme Court's Incomplete Consideration*

In *Erger v. Askren*,[124] the court did not address the rights of the child. Instead, the court focussed exclusively on the rights of the natural parent.[125] Based on the court's limited inquiry, it found section 40-4-221 of the Montana Code unconstitutional to the extent that it considered the best interests of the child. This decision failed to evaluate the fundamental rights of all of the parties. Consequently, it did not consider that balancing the parties' rights may have justified an infringement upon the father's rights.[126]

Section 40-4-212 of the Montana Code weighs a number of relevant factors that consider both the child's best interests and the level of responsibility assumed by the natural parent. The statute is constitutional as it was narrowly drafted, thus allowing infringement upon the natural parent's rights only in very limited circumstances and only to the extent necessary to protect the child's rights.

#### *1. The Rights of the Biological Parent*

In *Erger v. Askren*, the Montana Supreme Court found that section 40-4-221 of the Montana Code is not constitutional because it unduly infringes upon the fundamental rights of the natural parent.[127] However, the court's analysis of the natural parent's rights neither proceeded through the proper inquiry nor considered all of the relevant factors. First, the court did not articulate the particular state interest against which the father's rights ought to be weighed. Second, the court did not distinguish between cases involving the removal of a child from the natural parents and cases involving a reunification of the child with the natural parent and, as a result, failed to note the father's reduced privacy interest in reunification cases. Third, the court did not evaluate the

123. *See* Ch. 127, H.B. 335, 46th Leg. Sess. (Mont. 1979) (Statement of Representative Ramirez).

124. 277 Mont. 66, 919 P.2d 388 (1996).

125. *See id.*

126. Note that the court did not address the rights of third parties either.

127. *See Erger*, 277 Mont. at 71-72, 919 P.2d at 392.

father's rights according to his assumption of parental responsibility. Finally, the court's analysis of the natural father's rights was based on cases involving the termination of parental rights and not cases involving custody disputes. Consequently, the increased burden of proof in termination of parental rights cases was wrongly employed in this custody dispute.

*a. Compelling State Interest*

There are three general approaches to identifying a compelling state interest in statutes that infringe upon the rights of the natural parent to protect the rights of the child. First, there is a general interest in ensuring that children maintain meaningful relationships, as stability and continuity in relationships build a healthy psyche in children.[128] Second, the state has a compelling interest in the welfare of children.[129] Third, some courts have held that the states have an interest in protecting the best interest of the child.[130] Furthermore, the state occupies the role of *parens patriae* and, as such, can supervise the welfare of children to promote their best interests.[131] Therefore, the state is responsible for ensuring that the needs of children are met when addressing issues of parental rights.[132] Protecting the well-being of children is the compelling interest that justifies infringing upon the natural parent's rights when those rights conflict with the child's best interests.

Montana has affirmatively stated its policy of protecting children in the introduction to the chapter on child abuse and neglect in the Montana Code.[133] It is the policy of the state of Montana to "ensure that all youth are afforded an adequate physical and emotional environment to promote normal development" and to "provide for the protection of children whose health and welfare are or may be adversely affected," while at the same time protecting family unity.[134] Therefore, it is essential that the

128. *See, e.g.*, Michael v. Hertzler, 900 P.2d 1144, 1148-49 (Wyo. 1995) (citing Lehrer v. Davis, 571 A.2d 691, 695 (Conn. 1990)).

129. *See id.* at 1149 (citing Sketo v. Brown, 559 So. 2d 381 (Fla. Dist. Ct. App. 1990)). "In Montana numerous statutes and cases have held the state has an active and continuing interest in the welfare of children." *In re* Guardianship of Gullette, 173 Mont. 132, 140, 566 P.2d 396, 400 (1977).

130. *See Michael*, 900 P.2d at 1149 (citing Bailey v. Menzie, 542 N.E.2d 1015 (Ind. Ct. App. 1989)).

131. *See id.* at 1150.

132. *See* Boskey, *supra* note 93, at 812-13.

133. *See* MONT. CODE ANN. § 41-3-101 (1995).

134. *See* MONT. CODE ANN. §41-3-101(1)(a), (2)(a), (2)(b) (1995).

state limit infringement on family privacy and interfere only to the extent necessary to protect the child.

*b. Removal Versus Reunification*

In *Erger*, the court was not faced with the issue of preventing the disruption of an intact biological family unit. Instead, the court was faced with the issue of whether to disrupt the stepfamily to reunite A.R.A. with her natural father. The Montana Supreme Court failed to recognize or address the distinction between cases involving the removal of a child from the natural parent's home and cases involving the reunification of a child with the natural parent.[135] The importance of this distinction lies in the fact that privacy is typically thought of in terms of freedom from state interference.[136] In *Stanley v. Illinois*, the Court spoke in terms of Stanley's "interest in retaining custody of his children," and the issue at stake was "the dismemberment of his family."[137] This language indicates that the Court resolved the issues in *Stanley* by focusing on removal and not reunification. Therefore, one may infer that the level of protection provided to Stanley need not be provided to a natural parent in a reunification case. While the privacy interests of a natural parent are of primary importance in a removal case, they may be of diminished value in a reunification case in which state intervention is not an issue.

*c. Parental Responsibility*

The United States Supreme Court has also asserted that the state has a "paramount interest in the welfare of children" and that the rights of the parent are protected in relation to the parent's assumption of parental responsibilities.[138] Although the state's interest in protecting the welfare of the child remains constant, the state's interest in protecting the rights of the parent may fluctuate.[139] Thus, in balancing the rights of the parties, the

135. *See generally* Kaas, *supra* note 81 (distinguishing between removal and reunification cases in third party custody disputes and identifying the unique issues involved in each case).

136. *See* Hodgson v. Minnesota, 497 U.S. 417, 447 (1990); H.L. v. Matheson, 450 U.S. 398, 434 (1981) (stating that the right to privacy guards against unwarranted state intervention); Montana v. Hyem, 193 Mont. 51, 630 P.2d 202 (1981) (stating that the right to privacy is the right to be let alone).

137. 405 U.S. 645, 652, 658 (1972).

138. Lehr v. Robertson, 463 U.S. 248, 257 (1983).

139. The best interest of the child standard takes into account, among other things, the natural parent's relationship with the child and financial support provided

state must evaluate the natural parent's fulfillment of his or her parental obligations and the needs of the child before making any custody determination. The Montana Supreme Court did not evaluate Bill's fulfillment of his parental responsibilities, nor did it take into account the district court's findings regarding this issue.

*d. Custody Proceedings Versus Termination Proceedings*

Both the Montana Supreme Court[140] and the United States Supreme Court[141] have distinguished custody proceedings from proceedings terminating parental rights. The standard for infringing upon the natural parent's rights is lower in a custody proceeding.[142] This distinction seems lost in the *Erger v. Askren* opinion. In *Erger*, the court relied heavily on *In re Guardianship of Doney*, a case involving the termination of parental rights.[143] In that case, the court required a showing of abuse, neglect, or dependency prior to terminating the natural father's rights as guardian of his two children.[144] The level of protection afforded a natural parent in a proceeding to terminate parental rights must be higher than the level of protection afforded in a custody dispute, because the implications of terminated parental rights are so severe. The court in *In re Custody of C.C.R.S.* rejected the natural parent's assertion that she had a substantive custodial right to the child and found instead that the parent would only enjoy the increased procedural protection during a termination proceeding.[145]

The Montana Supreme Court's opinion in *Erger* recognized the importance of the natural parent's due process and privacy rights that attach by virtue of parenthood. However, the court did not

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by the natural parent, both indications of the parent's assumption of responsibility for the child. *See* MONT. CODE ANN. § 40-4-212 (1995).

140. *See* Brost v. Glasgow, 200 Mont. 194, 198-99, 651 P.2d 32, 34 (1982) (applying the best interest of the child standard and not the more stringent standards set forth in prior cases involving termination of parental rights); *In re* Paternity of C.G., 228 Mont. 118, 121, 740 P.2d 1139, 1141 (1987) (in accord with the above holding in *Brost*).

141. *See* Stanley v. Illinois, 405 U.S. 645, 648-49 (1972) (distinguishing the level of cause required for terminating custody as compared to a neglect proceeding).

142. *See generally In re* Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995) (holding that the best interest of the child standard is the proper consideration in a custody dispute, not "unfitness" as in a termination of parental rights case).

143. 174 Mont. 282, 570 P.2d 575 (1977).

144. *See id.* at 285-86, 570 P.2d at 577.

145. 892 P.2d 246, 255 (Colo. 1995) (citing Santosky v. Kramer, 455 U.S. 745 (1982) as it interprets Lehr v. Robertson, 463 U.S. 248 (1983); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972)).

examine whether the natural parent's rights could be infringed upon in this particular situation. In *Erger*, the rights of the natural father should have been balanced against A.R.A.'s rights, the stepparent's rights and the compelling state interest in A.R.A.'s welfare.

### 2. *The Rights of the Stepparent*

The court in *Erger* did not analyze the issue of whether Patrick, the stepfather, had any constitutionally protected rights. A stepparent who has established a parental relationship with his or her stepchild is entitled to protection, even if that protection is significantly less than the protection provided to a natural parent. In *Erger*, the district court found that Patrick had excellent parenting skills and had developed a strong emotional bond with A.R.A.[146] The court further held that a stepparent's rights to care for his or her stepchild exist only to the extent that those rights would further the best interests of the child.[147] Using this standard, the district court found that it would be in A.R.A.'s best interests to remain with her stepfather. In fact, the rights of the stepparent, although limited, are similar to those of the natural parent—they fluctuate according to responsibilities assumed by the parental figure and the needs of the child.

Patrick had assumed the parental responsibilities necessary to care for A.R.A. In contrast, Bill had neglected his responsibilities as a parent by not exercising his visitation privileges and becoming $4,000 delinquent on his child support payments.[148] In *Erger*, the rights fluctuated in such a way that the court could have found that Patrick's rights should have priority over Bill's.

### 3. *The Rights of the Children*

Although children may have rights and interests that are not compatible with those of the adults involved, these rights are entitled to the same protection as those of adults.[149] When these rights conflict, the state and the courts inevitably confront a situation in which they must delicately balance the equally fundamental rights of both parties. The overriding question is

146. *See* Findings of Fact and Conclusions of Law and Order at 7, *In re* Custody of A.R.A., No. DR 92-1200 (13th Dist. Ct. Mont. filed Aug. 10, 1994).

147. *See supra* notes 86-88 and accompanying text.

148. *See Erger*, 277 Mont. at 68, 919 P.2d at 389.

149. *See* Michael v. Hertzler, 900 P.2d 1144, 1150 (Wyo. 1995); Boskey, *supra* note 93, at 813.

whether it is permissible to infringe upon the fundamental rights of the parent based on the best interest of the child. If the court had analyzed the statute in this light, it may have found that this statute was constitutional because: (1) it considers the best interest of the child; and (2) it considers the abilities and past performance of the natural parent.[150]

The compelling state interest in the welfare of children is also determinative in deciding the constitutionality of a statute that applies the best interest test, such as section 40-4-221 of the Montana Code.[151] These particular state interests are especially important in determining custody disputes after the death of a custodial parent. It is at this time that the child's interest in continuity and stability is most threatened because the child not only suffers the traumatic death of a parent, but is also subject to abrupt removal from his or her home.[152] *Erger* epitomized this situation. The district court found that A.R.A. had a strong, stable relationship with her stepfather and stepbrother, yet she only saw her natural father once a year.[153] The court also determined that A.R.A. suffered from a learning disability, which made continuity and consistency in her life even more important.[154] The compelling state interest in providing for her welfare was magnified after the death of her mother and may have justified infringement on the fundamental rights of her natural father.

Section 40-4-221 of the Montana Code was drafted to specifically and narrowly address the compelling state interest in the welfare of a child after the death of the custodial parent. Furthermore, it provides the court with a means of balancing the rights of the child against those of the natural parent.[155] This important step in the analysis of constitutional rights was eliminated by the Montana Supreme Court's decision that the statute was unconstitutional. The court's analysis also appears to indicate that when the constitutional rights of a child and a natural parent conflict, the court need only consider the natural parent's rights.

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150. *See* MONT. CODE ANN. § 40-4-221 (1995).

151. *See supra* Part V.B.1.a.

152. *See* MAHONEY, *supra* note 79 at 142.

153. *See* Findings of Fact and Conclusions of Law and Order at 5-7, *In re* Custody of A.R.A., No. DR 92-1200 (13th Dist. Ct. Mont. filed Aug. 10, 1994).

154. *See id.* at 8.

155. *See* MONT. CODE ANN. § 40-4-221 (1995) (addressing only custody determinations occurring after the death of the custodial parent).

## V. EFFECTS OF ERGER

By asserting that biology determines parental traits and rights, independent of societal norms, the court avoids the difficult task of identifying what constitutes a parent and the respective rights that should attach to that status.[156] The court also evades the issue of how to balance the sometimes conflicting rights of children and their natural parents. The court assumes that absent abuse, neglect or dependency, these rights always coincide. *Erger* illustrates that this is not always true. Biology is relevant, and it should be considered as a factor in custody disputes.[157] However, it should not be the deciding factor in a child custody case, as it was in *Erger*.[158]

As a result of *Erger*, the case law in a number of other family law areas has been left unresolved.[159] For example, grandparents remain entitled to seek custody of a child under section 40-4-211 of the Montana Code, and the best interest of the child standard still determines custody.[160] The court in *In re Marriage of K.E.V.* stated that the child should be awarded to a third party on the basis of equitable estoppel without terminating either the natural mother's or the natural father's rights.[161] This holding directly contradicts the holding in *Erger*, which was explicit in its requirement that a third party not be allowed to obtain custody as

156. In much the same way that the court has used biology as an "incontestable guide to gender difference—immutable biological traits that exist independent of legal and cultural norms," it has also used biology as a screen in family law cases. Tracy E. Higgins, *By Reason of Their Sex: Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1551 (1995). By maintaining that biology is a justifiable differentiation between men and women, the court could remain with its eyes closed to gender discrimination. *See id.*; *see also* Lehr v. Robertson, 463 U.S. 248 (1983) (finding that a law requiring only the unwed mother's consent to adoption was not gender discrimination, because the mother necessarily developed a relationship with the child, while fathers may or may not have a relationship with the child); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (holding that women's susceptibility to pregnancy is a valid justification for a law criminalizing intercourse with teenage girls, but not boys); Geduldig v. Aiello, 417 U.S. 484 (1974) (reasoning that discrimination against "pregnant persons" was not discrimination against women).

157. For instance, children who are not living with their biological parents are at a greater risk for abuse and neglect and receive less financial support than their counterparts. *See* Woodhouse, *supra* note 82, at 1777.

158. As we have gained enormous control over reproduction and genetics, biological conceptions of parenthood make even less sense. What logic is there in allowing the courts to base fundamental rights in part on genetics when adoption, artificial insemination and surrogate wombs are commonly used to facilitate parenthood?

159. *See* Erger v. Askren, 277 Mont. 66, 73, 919 P.2d 388, 393 (1996) (Nelson, J., concurring).

160. *See, e.g., In re* Custody of R.R.K., 260 Mont. 191, 859 P.2d 998 (1993).

161. 267 Mont. 323, 883 P.2d 1246 (1994).

opposed to the natural parent prior to terminating the natural parent's rights. However, the court did not directly overrule this case.[162] Similarly, in *In re Paternity of Adam*, the court prevented the biological father from establishing paternity or objecting to the child's adoption because the court found that it was not in the best interests of the child.[163] In that case, the court did not even address the constitutional rights of the biological father. Thus, *Erger v. Askren* raises questions regarding the validity of this precedent.

## VI. CONCLUSION

The United States Supreme Court cases defining the rights of children and parents within the context of family relations do *not* require a near absolute protection of the natural parent's fundamental rights. However, in *Erger*, the Montana Supreme Court held that any statute infringing upon a parent's rights prior to termination of parental rights is unconstitutional. The court dismissed the contention that either the child or the stepparent may also have rights in need of protection. Consequently, the court did not completely analyze the constitutional implications of section 40-4-221 of the Montana Code. The court also failed to recognize that the rights of all of the parties need to be balanced to create equitable results. Instead, the court left the impression that the only rights in need of consideration in custody disputes are the rights of the natural parents. Such an impression is dangerously narrow and jeopardizes our courts' ability to adequately protect and serve the best interests of children.

162. *See Erger*, 277 Mont. at 73, 919 P.2d at 393.
163. *See In re* Paternity of Adam, 273 Mont. 351, 903 P.2d 207 (1995).