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### *In re Conservatorship of Minor Children: When Dad is the Defendant, Who Gets to Parent?*

Caitlin S. Williams

*Alexander Blewett III School of Law*

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**CASENOTE; *In re Conservatorship of Minor Children*: When Dad is the Defendant, Who Gets to Parent?**

**Caitlin S. Williams**

**I. INTRODUCTION**

The right of a parent to raise his child is fundamental, and courts are reluctant to impede on that right when determining the best interests of a child.<sup>1</sup> In *In re Conservatorship of Minor Children*,<sup>2</sup> the Montana Supreme Court was faced with deciding whether to appoint a guardian ad litem on behalf of three children for the purpose of potentially pursuing litigation against their father.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

In January 2012, Michael and Jennifer Soule, parents of J.S., K.S., and R.S., were involved in a car accident that resulted in Jennifer's death.<sup>3</sup> Michael was charged with both vehicular homicide and driving under the influence, although the charges were ultimately dismissed for various reasons.<sup>4</sup> Despite the charges, Michael maintained he could not recall who was driving the vehicle at the time of the accident.<sup>5</sup> Safeco insured the vehicle involved in the accident and disbursed the policy limit of \$300,000 to the Soule's three children.<sup>6</sup> The children's maternal grandfather was appointed as conservator only to the extent of overseeing the settlement disbursement, and the district court appointed an attorney, Benjamin Alke, to represent the children in respect to the settlement.<sup>7</sup> In his role as the children's advocate, Mr. Alke recognized a potential lawsuit against their father as well as his business, which carried an insurance policy limit of \$1,000,000.<sup>8</sup> Mr. Alke then petitioned for the appointment of a guardian ad litem to determine if pursuing further litigation was in the children's best interests.<sup>9</sup> Michael Soule objected to the appointment, as he argued that additional litigation would further traumatize his children.<sup>10</sup> Prior to the hearing regarding the appointment of a guardian ad litem, the eldest of the Soule children attempted suicide.<sup>11</sup> The district court then appointed retired Judge Dorothy McCarter as guardian ad litem to determine if

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<sup>1</sup> *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000).

<sup>2</sup> *In re Conservatorship of Minor Children*, 362 P.3d 76 (Mont. 2015).

<sup>3</sup> *Id.* at 78.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

further litigation was in the children's best interests, and appointed Mr. Alke as the children's attorney for the purpose of pursuing any such claims.<sup>12</sup> Michael Soule then appealed to the Montana Supreme Court regarding the district court's appointment of a guardian ad litem.<sup>13</sup>

### III. MAJORITY HOLDING

The Montana Supreme Court reviewed the district court's holding both for abuse of discretion and in consideration of the children's best interests.<sup>14</sup> The Court divided the issue before it into three parts: "whether the appointment of a guardian for the purpose of considering and possibly pursuing litigation was an abuse of discretion, whether authorizing the guardian to undertake certain duties was an abuse of discretion, and whether the appointment was in the children's best interests."<sup>15</sup>

#### A. Abuse of Discretion

The Court first analyzed the statutes under which guardians can be appointed, including Mont. Code Ann. § 25-5-301, which allows appointment of a guardian when litigation is in contemplation and the minor is a plaintiff,<sup>16</sup> and Mont. Code Ann. § 41-1-202, which affords minors the same rights as adults when acting through a guardian.<sup>17</sup> The Court reconciled the two statutes by analyzing the statutory construction and adhering to the principle that "[a]n interpretation of a statute which gives it effect is preferred to one which makes it void."<sup>18</sup> The Court reasoned that in order for a minor to have the same rights as an adult, and in order for a minor to be a plaintiff in litigation, the minor must be able to commence litigation through a guardian ad litem.<sup>19</sup> The Court held that since the guardian ad litem in the instant case was indeed appointed in contemplation of litigation, the district court did not abuse its discretion.<sup>20</sup> The Court further identified that not only was litigation against their father a possibility, but if the children were to pursue those claims, they could only do so through a guardian ad litem.<sup>21</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 79.

<sup>15</sup> *Id.*

<sup>16</sup> MONT. CODE ANN. § 25-5-301 (2015).

<sup>17</sup> MONT. CODE ANN. § 41-1-202.

<sup>18</sup> *In re Minor Children*, 362 P.3d at 79, citing MONT. CODE ANN. § 1-3-232.

<sup>19</sup> *Id.* at 79-80.

<sup>20</sup> *Id.* at 79.

<sup>21</sup> *Id.*

### *B. Duties of the Guardian ad Litem*

Since the statute authorizing appointment of a guardian in contemplation of litigation involving a minor does not list the duties of said guardian, the Court looked instead at the duties of a guardian in reference to child custody and support proceedings.<sup>22</sup> The statute governing guardians in those instances identifies the guardian's duties as: (a) to conduct investigations that the guardian ad litem considers necessary to ascertain the facts . . . ; (b) to interview or observe the child or who is the subject of the proceeding; . . . (d) to appear and participate in all proceedings to the degree necessary to adequately represent the child and make recommendations to the court . . . ; and (e) to perform other duties as directed by the court.<sup>23</sup>

The Court reasoned that a guardian ad litem representing minor children in potential litigation against their father would utilize “[s]imilar investigatory and representative functions”<sup>24</sup> as a guardian in a child support or custody proceeding, and thus those duties would be considered in analyzing the district court's appointment of a guardian.<sup>25</sup> The district court appointed the guardian to determine if pursuing further litigation was in the children's best interests, to communicate with the children's family members regarding such claims, and to access the children's information to the extent necessary to pursue litigation.<sup>26</sup> The Supreme Court held that those duties were consistent with those listed in the aforementioned statute, and thus the district court's authorization of the guardian to perform such duties was not an abuse of discretion.<sup>27</sup>

### *C. The Children's Best Interests*

The final consideration in analyzing whether the district court abused its discretion was to determine if the appointment of a guardian ad litem was in the best interests of the children.<sup>28</sup> The guardian was appointed pursuant to Mont. Code Ann. § 25-5-301, which offers no guidance as to what the best interests of the children are.<sup>29</sup> As a result, the Court again looked to another title within the Montana Code Annotated for instruction, namely the Uniform Probate Code (“UPC”).<sup>30</sup> The UPC states that “[t]he court may appoint as guardian any person whose

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<sup>22</sup> *Id.* at 80.

<sup>23</sup> *Id.*, citing MONT. CODE ANN. § 40-4-205(2).

<sup>24</sup> *In re Conservatorship of Minor Children*, 362 P.3d at 80.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> MONT. CODE ANN. § 25-5-301.

<sup>30</sup> *Id.*

appointment would be in the best interests of the minor.”<sup>31</sup> The Court interpreted that provision in *In re Krause*<sup>32</sup> to mean “that the person appointed must not have interests adverse to those of the child.”<sup>33</sup> In the instant case, the Court had to determine whether the decision to pursue further litigation on behalf of the children should be made by the children’s father or by a guardian ad litem.<sup>34</sup> Michael Soule objected to the appointment of the guardian, arguing that as the children’s father he was in the best position to determine what the best interests of the children were.<sup>35</sup> However, the Court recognized that because Michael and his business would be the adverse parties if further litigation was pursued, his decisions may stem more from protecting his interests than considering the best interests of his children.<sup>36</sup> For that reason, the Court upheld the district court’s decision to appoint a guardian ad litem over Michael’s objection.<sup>37</sup>

#### IV. JUSTICE MCKINNON’S DISSENT

Justice McKinnon dissented from the majority opinion, stating she would have held the District Court abused its discretion by appointing a guardian ad litem.<sup>38</sup> The majority interpreted Mont. Code Ann. § 25–5–301 as allowing a minor to commence litigation through a guardian so as to give effect to Mont. Code Ann. § 41–1–202, which affords minors the same rights as adults when acting through a guardian.<sup>39</sup> Justice McKinnon, on the other hand, argued that the plain language of Mont. Code Ann. § 25–5–301 only allows appointment of a guardian when a minor is a party to a case.<sup>40</sup> She further argues that “[t]here is no authority for a court to appoint a guardian ad litem for minor children, against the wishes of the children’s only surviving parent, when no proceeding is pending before the court.”<sup>41</sup> Justice McKinnon also acknowledged the novelty of the majority’s holding, noting “[w]e have never appointed a guardian ad litem absent a pending proceeding simply for the purpose of allowing the guardian ad litem to investigate potential claims against a parent who is fit.”<sup>42</sup> Justice McKinnon also disagreed with the scope of the guardian’s duties, arguing the guardian ad litem’s initial duties were related to “a

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<sup>31</sup> MONT. CODE ANN. § 72–5–223.

<sup>32</sup> 19 P.3d 811 (Mont. 2001).

<sup>33</sup> *In re Minor Children*, 362 P.3d at 80 (citing *In re Krause* at 814).

<sup>34</sup> *Id.* at 78.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 80–81.

<sup>37</sup> *Id.* at 81.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 79.

<sup>40</sup> *Id.* at 81

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

limited conservatorship proceeding<sup>43</sup> for the purpose of overseeing the Safeco settlement disbursement.<sup>44</sup> McKinnon argues any role beyond those related to the Safeco settlement unnecessarily intrudes into the private lives of Michael Soules and his children.<sup>45</sup> Additionally, she argues that since the Court did not deem Michael Soules as an unfit parent, “there is no justification for appointment of a guardian ad litem to usurp a father’s decisions regarding what is in his children’s best interests.”<sup>46</sup> McKinnon also recognized the potential impact that further litigation will have on the children, noting they will likely be involved in the discovery process “as they are peculiarly situated to know the habits and customs of their parents, particularly as they relate to who might have been driving.”<sup>47</sup> Justice McKinnon concluded her dissent by acknowledging that parents are often faced with making difficult decisions on behalf of their children that result in a conflict of interest.<sup>48</sup> She cited to two United States Supreme Court decisions that clarify and enforce an individual’s fundamental right to parent his children, and the states’ reluctance to infringe upon that right.<sup>49</sup>

## V. ANALYSIS

While the majority offered a detailed walk-through of the statutory authority used to reach its decision, the dissent identified several flaws and consequences of the ultimate outcome. Additionally, there are three underlying issues in this case that were not fully explored in the opinion: (1) the father was not deemed unfit and therefore unable to make decisions on behalf of his children; (2) the majority uses guardianship statutes from several different titles within the Montana Code Annotated; and (3) the opinion did not discuss how the minor children actually wished to proceed.

### A. *Fitness of the Father*

The majority effectively argued appointing a guardian ad litem was necessary because the father’s interests “are by definition potentially adverse to those of his children because he and his business would be named defendants in a lawsuit filed on their behalf.”<sup>50</sup> However, as noted both by the majority and in Justice McKinnon’s dissent, there was no evidence offered or determination made that Michael Soule was an unfit parent.<sup>51</sup> The fact that Michael Soule is considered a fit parent is

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 81–82.

<sup>46</sup> *Id.* at 82.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Troxel*, 530 U.S. 57.

<sup>50</sup> *Id.* at 80.

<sup>51</sup> *Id.* at 80–81.

significant because fit parents are presumptively able to make decisions that serve the best interests of their children.<sup>52</sup> So although Michael Soule is considered a fit parent who can make decisions on behalf of his minor children in every other respect, in these proceedings his fitness as a parent was insufficient when deciding whether to subject his children to further litigation. Although the majority acknowledged Michael Soule was a fit parent, it did not reconcile the inconsistency arising from the conclusion that he is not able to make a decision on behalf of his children that is truly in their best interests. This case poses an interesting exploration into when the state can impose its own judgment as to the best interests of a child in lieu of that child's parent. And as noted in Justice McKinnon's dissent, this case also marks the Montana Supreme Court's first appointment of a guardian ad litem to represent minor children in the contemplation of litigation as opposed to when proceedings are actually pending. Given the state's typical reluctance to impede upon the fundamental right of a fit parent to raise his children, it is interesting that this Court did not trust the father to put the interests of his children above his own interests in light of a conflict of interest.

#### B. Concerns Regarding Title-Hopping

Although the majority effectively explained its reasoning for utilizing guardianship statutes from various titles within the Montana Code Annotated, there remains an underlying concern when an appointment of a guardian relies on statutory authority that does not directly stem from the statute used to appoint the guardian in the first place. The guardian was initially appointed under Mont. Code Ann. § 25–5–301,<sup>53</sup> which lies under the “Civil Procedure” title of the Code. However, since the statute did not specifically address whether a minor can *commence* litigation through a guardian, the Court then turned to Mont. Code Ann. § 41–1–202,<sup>54</sup> which lies under the “Minors” title of the Code. Since neither of the aforementioned statutes listed the duties of a guardian, the Court then looked to Mont. Code Ann. § 40–4–205,<sup>55</sup> which falls under the “Family Law” title of the Code, and more specifically, the chapter concerning child custody and support. Lastly, in order to identify what the best interests of the children were, the Court cited Mont. Code Ann. § 72–5–223<sup>56</sup> under the “Estates, Trusts, and Fiduciary Relationships” title of the Code. The latter statute falls under the chapter governing “persons under disability guardianship and conservatorship” under the Uniform Probate Code. The Court ultimately used statutes from

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<sup>52</sup> *Troxel*, 530 U.S. at 68–69.

<sup>53</sup> *In re Conservatorship of Minor Children*, 362 P.3d at 79.

<sup>54</sup> *Id.* at 79–80.

<sup>55</sup> *Id.* at 80.

<sup>56</sup> *Id.*

four different titles of the Montana Code Annotated in reaching its decision. Although the Court sufficiently explained its reasoning in tying the different statutes together, there is an inescapable conclusion that no one statute was sufficient on its own to justify the holding. The elements identified and utilized by the Court were drafted and intended to be interpreted within its specific title, so applying the statute to a context outside of that title carries a risk that it will be misconstrued.

*C. The Children's Actual Best Interests*

Despite the care and attention given to determining who best will represent the children's best interests, at no point in the opinion are the children's actual, stated wishes addressed. Although an attorney was appointed to advocate for the children's stated interests, and a guardian ad litem was appointed to advocate for the children's best interests, neither the Court nor the district court directly discussed the children's opinions as to whether they wished to pursue legal claims against their father or his business. Although the children now have an attorney and a guardian ad litem advocating for them, one would think the children's actual stated wishes as to pursuing litigation against their father would at the very least be addressed in the opinion, especially in light of the eldest child's recent attempt on his own life. The voices of minors in proceedings that directly impact their lives have historically been muffled by adults who seek to advocate for them. This holding lies consistent with that trend. Given the tragic circumstances that brought this case to court and the peculiar circumstances that may pit the children against their father, one can only hope the adults that have been entrusted with deciding how to proceed will do so with the children's opinions in mind.