

7-2010

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### Recommended Citation

Aaron M. Neilson, *A Look at Kulstad v. Maniaci in Light of Changing Cultural Norms*, 71 Mont. L. Rev. 449 (2010).

Available at: <https://scholarworks.umt.edu/mlr/vol71/iss2/8>

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## A LOOK AT *KULSTAD V. MANIACI* IN LIGHT OF CHANGING CULTURAL NORMS

Aaron M. Neilson\*

### I. INTRODUCTION

Parenting disputes are never easy, but they become all the more complicated when the parties are former lesbian partners who both claim a parental interest. Like other jurisdictions, Montana is dealing with the realities of changing family structures. In handling these changes, courts and policy makers across the country must decide the proper balance between (1) a natural parent's fundamental constitutional right to decide how to raise her children, (2) the same-sex partner's equitable claim to remain a part of a child's life, and (3) a child's constitutional rights. In 2009, the Montana Supreme Court had an opportunity to strike this balance in *Kulstad v. Maniaci*.<sup>1</sup>

Barbara Maniaci ("Maniaci") legally adopted L.M. and A.M., the two children central to this case. Michelle Kulstad ("Kulstad"), Maniaci's same-sex partner, petitioned for a parental interest in the children after her relationship with Maniaci ended. The Montana Supreme Court granted Kulstad a parental interest in the two children because she established a parent-child relationship with them, and the Court determined that maintaining the relationship was in the best interest of the children.<sup>2</sup> This case is significant not only because of its impact on future third party parenting cases, but also because of the heavy hitters involved: the American Civil Liberties Union<sup>3</sup> and the Alliance Defense Fund.<sup>4</sup> This note analyzes *Kulstad v. Maniaci* in light of past Montana parental rights cases and concludes with a brief discussion of the case's future implications.

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

2. *Id.* at 606, 609.

3. See ACLU, *Kulstad v. Maniaci—Background and Timeline*, [http://www.aclu.org/lgbt-rights\\_hiv-aids/maniaci-v-kulstad-background-and-timeline](http://www.aclu.org/lgbt-rights_hiv-aids/maniaci-v-kulstad-background-and-timeline) (accessed Oct. 17, 2009).

4. See Alliance Defense Fund, *Fact Sheet: Maniaci v. Kulstad*, <http://www.alliancedefensefund.org/UserDocs/ManiaciFactSheet.pdf> (accessed Oct. 17, 2009). The ADF is an organization that works to preserve liberties and fight for family values.

II. FACTUAL BACKGROUND<sup>5</sup>

Maniaci moved to Montana in 1994. Her life was shaken shortly thereafter when her 25-year-old son was killed by a drunk driver.<sup>6</sup> She decided to purchase property in Turah and start a new life.<sup>7</sup> In December 1995, Maniaci met Kulstad.<sup>8</sup> Kulstad lived in Seattle, Washington at the time. As their friendship grew they became more intimate, and eventually Kulstad moved to Montana to reside with Maniaci.<sup>9</sup> The couple lived together for many years, but in 2000 the relationship began deteriorating.

Maniaci claimed that Kulstad became obsessed about trivial things like unplugging lights and appliances, and as a result their relationship suffered.<sup>10</sup> Because their relationship was unstable, Maniaci considered Kulstad more of a roommate than a romantic partner.<sup>11</sup> By the summer of 2001, they maintained more resources separately, and Kulstad began reimbursing Maniaci for expenses.<sup>12</sup> Maniaci wanted to ask Kulstad to move out and stop using her vehicles, but she did not do so because Kulstad regularly threatened that she would “sue” Maniaci<sup>13</sup>—presumably for a parental interest—if she kicked her out of the house.

Even with their relationship troubles, the couple decided in 2001 to adopt a son, L.M.<sup>14</sup> Maniaci owned a chiropractic practice, and one of Maniaci’s patients inquired whether the women would be interested in adopting L.M.<sup>15</sup> At first, Kulstad did not want to adopt L.M. because she believed it would hurt her relationship with Maniaci.<sup>16</sup> The couple nonetheless decided to adopt L.M. Maniaci was questioned about her relationship with Kulstad during the interview phase of the adoption. She told those in charge of approving the adoption that it was a healthy relationship but later claimed she felt pressured to lie to ensure the adoption would be approved.<sup>17</sup> Kulstad noted the convenience of such a story.<sup>18</sup> After the

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5. The facts are taken from Kulstad’s and Maniaci’s Montana Supreme Court briefs. The briefs can be accessed on the Montana State Law Library Website. State Law Library of Montana, *Montana Supreme Court Cases*, [http://fnweb1.isd.doa.state.mt.us/idmws/custom/sll/sll\\_fn\\_home.htm](http://fnweb1.isd.doa.state.mt.us/idmws/custom/sll/sll_fn_home.htm); *select* Party Name Search, *search* “Kulstad” or “Maniaci.” (accessed Oct. 17, 2009).

6. Br. of Appellant at 4, *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009).

7. *Id.*

8. *Id.*

9. *Id.* at 4–5.

10. *Id.* at 7.

11. *Id.* at 8.

12. Br. of Appellant, *supra* n. 6, at 7.

13. *Id.* at 8.

14. *Id.*

15. *Id.*

16. *Id.* at 9.

17. *Id.*

18. Br. of Appellee at 7, *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009).

adoption was approved, Maniaci and Kulstad visited a counselor to determine how to overcome their relational troubles. Maniaci contended their relationship was on the rocks.<sup>19</sup>

The family dynamic was unique from the very beginning. L.M.'s adoption was finalized in April 2002, with L.M. only taking Maniaci's last name. Maniaci paid 100% of the costs and expenses of L.M.'s adoption, and the women agreed that L.M. would call Maniaci "Mommy" and Kulstad "Shelly."<sup>20</sup> While Maniaci retained the legal rights as L.M.'s parent, Kulstad was named the guardian of L.M. in Maniaci's will.<sup>21</sup>

In May 2004, Maniaci adopted her second child, A.M.<sup>22</sup> Kulstad acknowledged that even though she was initially hesitant to adopt A.M., a girl, she soon formed a strong parent-child bond with both children.<sup>23</sup> As proof of this, she noted that she worked during the day to provide for the children and cared for them at night when Maniaci attended to her chiropractic patients.<sup>24</sup> Maniaci, on the other hand, argued that even though Kulstad was involved with the children, Maniaci never intended her to have equal parental rights. As proof of this, Maniaci pointed out that A.M., like L.M., carried only Maniaci's last name.<sup>25</sup> As with L.M., Maniaci paid 100% of the costs and expenses of A.M.'s adoption. The parties again agreed that Maniaci would be called "Mommy" and Kulstad "Shelly."<sup>26</sup> The parties continued to grow apart throughout this period, and in 2006 Maniaci eventually asked Kulstad to move out of her home.<sup>27</sup>

Kulstad refused to move out because she did not want L.M. and A.M. out of her life.<sup>28</sup> When Kulstad was asked to leave, emotions escalated. Maniaci contended that Kulstad threatened her life with a gun.<sup>29</sup> Kulstad was ultimately evicted from the home.<sup>30</sup> Shortly thereafter, in January 2007, Kulstad filed a petition to receive a parental interest in the children.<sup>31</sup>

Maniaci drew attention to Kulstad's will, executed just ten months before Kulstad's petition, as proof of Kulstad's parental intentions. The

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19. Br. of Appellant, *supra* n. 6, at 9–10.

20. *Id.* at 10.

21. *Id.* at 11.

22. *Id.*

23. Br. of Appellee, *supra* n. 18, at 8.

24. *Id.* at 9.

25. Br. of Appellant, *supra* n. 6, at 11.

26. *Id.*

27. *Id.*

28. *Id.* at 12.

29. *Id.*

30. *Id.*

31. *Kulstad*, 220 P.3d at 599.

will reads, “I have no children, natural or adopted, living or deceased.”<sup>32</sup> Kulstad painted a much different picture of events than Maniaci.

Even though she admitted having reservations about adopting the children, Kulstad argued that a number of facts suggest the couple intended to co-parent L.M. and A.M.<sup>33</sup> Specifically, she identified hospital records on which the couple hyphenated L.M.’s last name: “Maniaci-Kulstad.”<sup>34</sup> Kulstad claimed that they hyphenated L.M.’s last name because the couple mistakenly assumed that they could both adopt L.M.<sup>35</sup> Maniaci, on the other hand, revealed that Kulstad identified L.M. as Maniaci’s son on a life insurance application and identified other documents like birth certificates and adoption records designating Maniaci as the children’s mother.<sup>36</sup> An attorney later informed Kulstad that under Montana law same-sex couples cannot jointly adopt children.<sup>37</sup>

Kulstad also drew attention to Dr. Silverman—a psychologist who provided therapeutic services for the children, Maniaci, and Kulstad—who determined that Kulstad served as a parent to the children.<sup>38</sup> Dr. Silverman testified that it would be to the children’s detriment if their relationship with Kulstad ended.<sup>39</sup> Similarly, Dr. Miller, a court-appointed parenting expert, testified that both children had a close relationship with Kulstad.<sup>40</sup> Dr. Miller concluded that the children’s ability to have stable and healthy relationships in the future would be affected if Kulstad was no longer a part of their lives.<sup>41</sup>

### III. A DIVIDED COURT

The Montana Supreme Court had to decide whether (1) to uphold Maniaci’s fundamental constitutional right to determine how her children are raised or (2) to find Montana Code Annotated §§ 40–4–228 and 40–4–211(6) constitutional and grant Kulstad a parental interest in the chil-

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32. Br. of Appellant, *supra* n. 6, at 12.

33. Br. of Appellee, *supra* n. 18, at 7–8.

34. *Id.* at 5.

35. *Id.* at 6.

36. Br. of Appellant, *supra* n. 6, at 10 n. 6.

37. See Mont. Code Ann. § 42–1–106 (2009) (“The following individuals who otherwise meet the requirements of this title are eligible to adopt a child: (1) a husband and wife jointly or either the husband or wife if the other spouse is a parent of the child; (2) an unmarried individual who is at least 18 years of age; or (3) a married individual at least 18 years of age who is legally separated from the other spouse or whose spouse has judicially been declared incompetent.”); Mont. Code Ann. § 40–1–103 (“Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential.”).

38. Br. of Appellee, *supra* n. 18, at 11.

39. *Id.*

40. *Id.* at 10.

41. *Id.* at 11.

dren. Montana Code Annotated § 40–4–228 governs parenting disputes between a natural parent and a third party, whereas § 40–4–211(6) enumerates what must be established for a court to find that a third party has a “child-parent” relationship with a particular child. Together the statutes authorize a court to award a third party a parental interest in a legal parent’s children. The statutes read:

**40–4–228. Parenting and visitation matters between natural parent and third party.** (1) In cases when a nonparent seeks a parental interest in a child under 40–4–211 or visitation with a child, the provisions of this chapter apply unless a separate action is pending under Title 41, chapter 3.

(2) A court may award a parental interest to a person other than a natural parent when it is shown by clear and convincing evidence that:

(a) the natural parent has engaged in conduct that is contrary to the child-parent relationship; and

(b) the nonparent has established with the child a child-parent relationship, as defined in 40–4–211, and it is in the best interests of the child to continue that relationship.

(3) For purposes of an award of visitation rights under this section, a court may order visitation based on the best interests of the child.

(4) For purposes of this section, voluntarily permitting a child to remain continuously in the care of others for a significant period of time so that the others stand in loco parentis to the child is conduct that is contrary to the parent-child relationship.

(5) It is not necessary for the court to find a natural parent unfit before awarding a parental interest to a third party under this section.

(6) If the parent receives military service orders that involve moving a substantial distance from the parent’s residence or otherwise have a material effect on the parent’s ability to parent the child for the period the parent is called to military service, as defined in 10–1–1003, the court may grant visitation rights to a family member of the parent with a close and substantial relationship to the minor child during the parent’s absence if granting visitation rights is in the best interests of the child as determined by 40–4–212.

**40-4-211. Jurisdiction—commencement of parenting proceedings.**

...

(6) . . . “child-parent relationship” means a relationship that:

(a) exists or did exist, in whole or in part, preceding the filing of an action under this section, in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education, and discipline;

(b) continues or existed on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child’s psychological needs for a parent as well as the child’s physical needs; and

(c) meets or met the child’s need for continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home.

Applying the facts of this case to these statutes, the district court determined that Kulstad established a parent-child relationship with L.M. and A.M.<sup>42</sup> The court awarded Kulstad a parental interest in the children and gave her equal decision-making authority with regard to the children's upbringing.<sup>43</sup> Maniaci appealed the court's decision, arguing that the district court was not constitutionally authorized to grant Kulstad a parental interest before finding that Maniaci was an unfit parent.<sup>44</sup>

#### A. *The Montana Supreme Court's Holding*

The Montana Supreme Court held Montana Code Annotated §§ 40-4-211 and 40-4-228 constitutional and granted Kulstad a parental interest in the two children, finding: (1) that Kulstad established a parent-child relationship with them under § 40-4-211(6) and that it was in the best interest of the children to maintain that relationship and (2) that Maniaci acted contrary to her parent-child relationship by allowing Kulstad to co-parent the children.<sup>45</sup>

The Montana Supreme Court relied on the district court's determinations regarding expert credibility in affirming the court's holding. The district court found persuasive the experts testifying on Kulstad's behalf. Dr. Paul Silverman and Dr. Cindy Miller helped establish the existence of a parent-child relationship. Dr. Silverman is a child psychotherapist who met with both parties as well as the children and concluded that both parties acted as a parent to the children.<sup>46</sup> Dr. Miller likewise concluded that the children were close to both women and both acted as a parent to the children.<sup>47</sup>

On the other hand, the district court did not find Maniaci's expert persuasive. Dr. Doty Moquin, Maniaci and L.M.'s therapist, concluded that Kulstad did not have a parent-child relationship with the children.<sup>48</sup> The court found that Dr. Moquin's testimony was not credible for two reasons: she was only Maniaci's therapist and she did not interview enough people to determine the strength of Kulstad's relationship with the children.<sup>49</sup> The district court also relied on the testimony of a court-appointed guardian ad litem who concluded that Kulstad's relationship with the children should be

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42. *Kulstad*, 220 P.3d at 602.

43. *Id.*

44. *Id.* at 602-603.

45. *Id.* at 606, 609.

46. *Id.* at 600-601.

47. *Id.* at 600.

48. *Kulstad*, 220 P.3d at 599.

49. *Id.*

preserved by the court.<sup>50</sup> The district court, relying on the testimony of Dr. Silverman and Dr. Miller, determined that removing Kulstad from L.M. and A.M.'s lives would cause them harm.<sup>51</sup>

Maniaci was also determined to have acted contrary to her parent-child relationship with L.M. and A.M. by allowing Kulstad to co-parent the children.<sup>52</sup> The Court cited to the fact that Maniaci told the adoption authorities she and Kulstad would co-parent the children and allowed the partnership to continue for several years.<sup>53</sup>

Affirming the district court, the Montana Supreme Court focused on the 1999 Amendments to the nonparental statutes—which recognize a child's constitutional rights in third party parenting cases.<sup>54</sup> When analyzed together, Montana Code Annotated §§ 40–4–228 and 40–4–211(4)(b) allow a third party to obtain a parental interest if the third party first establishes a parent-child relationship with the child.<sup>55</sup> Courts must weigh both the child's and the parents' constitutional rights in such cases.<sup>56</sup>

Maniaci contended the district court had no basis for granting Kulstad a parental interest in L.M. or A.M. because it never found that Maniaci abused or neglected the children. The Montana Supreme Court disagreed, concluding that a Title 41 proceeding<sup>57</sup> is not a prerequisite to granting a third party a parental interest if the party can establish a parent-child relationship under § 40–4–211(6). The Court came to this conclusion by refuting Maniaci's contention that *In re Parenting of J.N.P.*, a Montana case decided after the 1999 Amendments, stands for the rule that a Title 41 proceeding remains a constitutionally required prerequisite to a parenting action initiated by a third party.<sup>58</sup>

*J.N.P.* involved a mother who left her child with her aunt and uncle for a period of two months while she left town to search for employment.<sup>59</sup> After taking care of the child for a few months, the aunt and uncle filed a petition to be the child's custodians and limit the mother's parental rights to supervised visitation.<sup>60</sup> The Court distinguished *Kulstad* from *J.N.P.*, stressing that the aunt and uncle in *J.N.P.* sought custody of the child, not a

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50. *Id.*

51. *Id.* at 602, 610.

52. *Id.* at 606.

53. *Id.* at 607.

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

55. *Id.*

56. *Id.* at 604 (citing Mont. Code Ann. § 40–4–227).

57. Mont. Code Ann. §§ 41–3–401 et seq. (requiring a showing of abuse, dependency, or neglect before a court may terminate parental rights). See also *In re Parenting of J.N.P.*, 27 P.3d 953, 958 (Mont. 2001).

58. *Kulstad*, 220 P.3d at 604.

59. *In re Parenting of J.N.P.*, 27 P.3d at 954.

60. *Id.* at 953.



parental interest like *Kulstad*.<sup>61</sup> Relying on this distinction, the *Kulstad* Court held that a Title 41 proceeding is unnecessary, as long as the third party petitioner does not petition for full custody of the child.<sup>62</sup> Maniaci strongly contested this holding based on previous Montana parental rights cases, which are discussed in section V of this paper.

The Court also cited *Troxel v. Granville*,<sup>63</sup> a 2000 United States Supreme Court case, to bolster its conclusion that Montana's third party parenting statutes are constitutional. *Troxel* dealt with a State of Washington statute that authorized courts to award visitation to *any person* based on the best interest of the child.<sup>64</sup> In other words, there was no need to first establish a parent-child relationship before a petitioner could obtain visitation rights. The U.S. Supreme Court found the statute unconstitutional because it was too broad and no special weight was given to the parent's determination of the child's best interest.<sup>65</sup> Because Montana Code Annotated §§ 40-4-228 and 40-4-211 require a showing of a parent-child relationship and consideration of the natural parent's wishes, the *Kulstad* Court determined that the statutes avoided constitutional infirmity under the *Troxel* standard.<sup>66</sup>

### B. Justice Nelson's Concurrence

Unlike the majority, who did not much discuss the parties' sexuality, Justice Nelson focused his concurrence on what he believes a homosexual's constitutional rights include. Justice Nelson believes homosexuals are not afforded their full constitutional rights in the family law arena, and advocates constitutional interpretations that provide homosexuals more rights. Justice Nelson framed the issue of the case as follows: "Whether homosexuals in an intimate domestic relationship each have the right to parent the children they mutually agree that one party will adopt."<sup>67</sup> His focus was thus on the constitutional inequity inherent in same-sex adoption cases that result in a breakup after the adoption. Expressing his strong disgust with the current state of the law, Justice Nelson wrote:

I am convinced that until our courts, as a matter of law, accept homosexuals as equal participants with heterosexuals in our society, each person with exactly the same civil and natural rights, lesbian and gay citizens will continue to suffer homophobic discrimination. Regrettably, this sort of discrimination is both socially acceptable and politically popular. Naming it for the evil it is,

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61. *Kulstad*, 220 P.3d at 604.

62. *Id.*

63. 530 U.S. 57, 67 (2000).

64. *Id.*

65. *Id.* at 63.

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

67. *Id.* at 610.

discrimination on the basis of sexual orientation is an expression of bigotry. . . . Lesbian and gay Montanans must not be forced to fight to marry, to raise their children, and to live with the same dignity that is accorded heterosexuals. That lesbian and gay people still must fight for their fundamental rights is antithetical to the core values of Article II and speaks, in unfortunate clarity, of a prevalent societal cancer grounded in bigotry and hate.<sup>68</sup>

While the Court's holding is more limited than what Justice Nelson hoped, it will likely influence future constitutional rights cases involving homosexuals. Juxtaposing heterosexual versus homosexual rights, Justice Nelson commented:

[T]his case represents yet another instance in which fellow Montanans, who happen to be lesbian or gay, are forced to battle for their fundamental rights to love who they want, to form intimate associations, to form family relationships, and to have and raise children—all elemental, natural rights that are accorded, presumptively and without thought or hesitation, to heterosexuals.<sup>69</sup>

Cultural norms seem to be shifting, and soon the Montana Supreme Court will have to address the difficult constitutional questions raised by Justice Nelson. Whatever the reason, the Court passed on a golden opportunity to address such questions in *Kulstad v. Maniaci*.

### C. Justice Rice's Dissent

Justice Rice's dissent focused on the tenet that a parent's right to determine her child's upbringing is "constitutionally required" and demands "careful protection and is not merely a matter of legislative grace . . . ."<sup>70</sup> He focused on several Montana cases that hold a state-initiated Title 41 proceeding is the "jurisdictional prerequisite for any court-ordered transfer of custody from a natural parent to a third party."<sup>71</sup> By departing from the Title 41 proceeding requirement, he argued, the Court is opening wide the door to claims by third parties against fit parents.<sup>72</sup>

Justice Rice strongly disagreed with the Court's conclusion that the "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 . . . ."<sup>73</sup> Instead, he asserted, "Contrary to the Court's analysis, it was not the pre-1999 statutes that limited the claims of third parties but the *Montana Constitution*."<sup>74</sup>

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68. *Id.* at 611.

69. *Id.*

70. *Id.* at 612 (citing *In re A.R.A.*, 919 P.2d 388, 391 (Mont. 1996)) (internal quotations omitted).

71. *Id.* (citing *In re Parenting of J.N.P.*, 27 P.3d 953).

72. *Kulstad*, 220 P.3d at 612.

73. *Id.* (citing the majority opinion at ¶ 56).

74. *Id.* (emphasis added).

For example, the Montana Supreme Court has repeatedly held that the Montana Constitution precludes a statute that permits courts to award a custodial right to third parties before a parent's parental right had been terminated by a Title 41 proceeding.<sup>75</sup> Justice Rice argued that a court's decision whether to limit a parent's constitutional rights must be based on constitutional considerations since this right surfaced before § 40-4-228 and 40-4-211 were even codified.<sup>76</sup>

Rice also argued that the Court misunderstood the holding in *J.N.P.* The Majority stated that the third party petitioners in *J.N.P.* "could not rely upon the nonparental statutes in seeking custody of J.N.P. . . . in light of their failure to comply with the statutory pre-requisites of first establishing a child-parent relationship through a petition filed under § 40-4-211, MCA."<sup>77</sup> Rice revealed that the petitioner's claim in *J.N.P.* was not rejected for failing to satisfy the parent-child statutory prerequisite. Rather, it was rejected because a parent's constitutional rights trump a statute that dictates no Title 41 proceeding is necessary.<sup>78</sup> Simply, "[A] natural parent cannot be denied custody of his or her child absent termination of that person's parental rights for abuse or neglect . . . ."<sup>79</sup>

Identifying how Maniaci's parental rights had already been affected since the district court's ruling, Justice Rice wrote:

In its post-judgment orders, the District Court has ordered professional care to be given to Maniaci's children without notice to or involvement by Maniaci. It has restricted Maniaci's access to the children and to their records. Lastly, even if shared custody is ordered, the loss of custodial rights to a child is nonetheless extremely invasive and a violation of a fit natural parent's constitutional rights. As we have held, we apply strict scrutiny to "any infringement" upon a person's right to parent his or her child.<sup>80</sup>

Maniaci's parental rights have already been greatly affected since the court's ruling. In fact, the court gave Kulstad equal decision-making authority with regard to significant matters affecting the children.<sup>81</sup>

Justice Rice contended that the Court's holding wrongfully infringes on Maniaci's fundamental constitutional right to decide how to raise her children regardless of whether Maniaci's custodial rights are taken in whole or in part. His concern was that a parent's constitutional rights deserve more deference than the majority gave them. Nelson argued that the Court side-stepped its own precedent that "clearly stand[s] for the proposition that

75. *Id.* (citing *In re Parenting of J.N.P.*, 27 P.3d 953).

76. *Id.* (clarifying where this right originated, Justice Rice highlighted that "A.R.A. [was] based on constitutional considerations"—not statutory considerations).

77. *Id.* (citing the majority opinion at ¶ 63).

78. *Kulstad*, 220 P.3d at 612–613.

79. *Id.* at 612 (citing *In re Parenting of J.N.P.*, 27 P.3d 953).

80. *Id.* at 613 (citing *Polasek v. Omura*, 136 P.3d 519, 520–521 (Mont. 2006)).

81. *Id.* at 602.

a natural parent cannot be denied custody of his or her child absent termination of that person's parental rights." Though his dissent raises some difficult questions, perhaps none is more difficult than the following: What exactly distinguishes this case from past Montana third party parenting cases? This issue is analyzed in the following section, but for an insightful summary on how other jurisdictions are deciding this issue see Robin Cheryl Miller, J.D., *Child Custody and Visitation Rights Rising from Same-sex Relationship*, 80 A.L.R.5th 1 (2000).

#### IV. ANALYZING *KULSTAD V. MANIACI*

A review of past Montana case law demonstrates Justice Rice's dissent more accurately reflects past pronouncements from the Montana Supreme Court. In *Kulstad v. Maniaci*, the Montana Supreme Court ruled that Montana Code Annotated §§ 40-4-211 and 40-4-228<sup>82</sup> supported the district court's holding that Kulstad was entitled to a parental interest in L.M. and A.M.<sup>83</sup> In coming to its holding, the Court struck a balance between three different interests: (1) a parent's fundamental constitutional right to decide how to raise her children, (2) the equity inherent in a same-sex partner's interest in remaining part of the lives of children she helped raise, and (3) the children's constitutional rights.<sup>84</sup>

The remainder of this paper analyzes three issues: First, whether Montana's third-party custody statute is constitutional in light of earlier Montana Supreme Court opinions; second, whether the Court properly balanced the right of the legal parent, the children, and the legal parent's former same-sex partner; and third, what *Kulstad v. Maniaci* may mean for future Montana third party parental interest cases. Ultimately, the Court's decision is a stark change from past pronouncements dictating that "a finding of abuse, neglect, or dependency is the jurisdictional prerequisite for a court-ordered transfer of custody from a natural parent to a third party."<sup>85</sup>

##### A. *Montana's Third Party Parenting Statute*

Montana Code Annotated § 40-4-228 governs parenting and visitation between the natural parent (here, Maniaci) and a third party (here, Kulstad). Maniaci challenged the statute's constitutionality, arguing that the court must first find that she is an unfit parent before awarding Kulstad a parental interest in L.M. and A.M.<sup>86</sup>

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82. See Section III of this paper for a full reading of the pertinent parts of these statutes.

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

84. *Id.* at 604.

85. *In re Parenting of J.N.P.*, 27 P.3d 953.

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

Concluding that this statute is constitutional, the Court stated that “[t]he 1999 Montana Legislature amended the nonparental statutes to recognize specifically a child’s constitutional rights in nonparental parenting proceedings.”<sup>87</sup> In other words, courts must balance the parent’s and the children’s constitutional rights to determine whether to grant a parental interest to a third party under Montana law. Unfortunately, at no point in the opinion did the Court clarify what a child’s constitutional rights include in this context. Because little clarity was provided in this regard, much is left to argue in future parental interest cases between legal parents and third parties such as grandparents, aunts and uncles, and other caretakers.

In his dissent, Justice Rice highlights the Amendment sponsor’s intent in enacting Montana Code Annotated § 40–4–228. The sponsor commented: “A court is never going to take a parent’s right away without a significant period of just absolute disregard and abandonment of their children.”<sup>88</sup> This expression of the high burden required to overcome the constitutional parental right is in accordance with a long line of Montana cases that hold that a finding of abuse, neglect, or dependency is required before a court may transfer one’s parental rights to a third party. The Montana Supreme Court awarded Kulstad a parental interest under Montana Code Annotated § 40–4–228, which requires that the court find by clear and convincing evidence all of the following: (1) that Maniaci engaged in conduct contrary to the parent-child relationship; (2) that Kulstad established a parent-child relationship with the children under § 40–4–211(6); and (3) that it is in the best interest of the children to continue that relationship.<sup>89</sup> Under Montana Code Annotated § 40–4–228(5), the court need not find that Maniaci was an unfit mother for it to award a parental interest to Kulstad. For this reason, Maniaci contended § 40–4–228(5) is unconstitutional based on Montana cases that have found similar statutes unconstitutional.<sup>90</sup>

Before *Kulstad*, the leading Montana case on parental interests was *In re the Parenting of J.N.P.*, a case decided after the 1999 amendments.<sup>91</sup> In *J.N.P.*, an aunt and uncle petitioned the district court to grant them full parental rights to their niece under a statute that, much like § 40–4–228, authorized a third party to petition for a parental interest under the best interest of the child test.<sup>92</sup> The Montana Supreme Court concluded that the statute was unconstitutional.<sup>93</sup> Stressing the fundamental principle gleaned

87. *Id.*

88. *Id.* at 615.

89. *Id.* at 606–607.

90. See Br. of Appellant, *supra* n. 6, at 49; Appellant’s Reply Br. at 1, *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009).

91. *In re Parenting of J.N.P.*, 27 P.3d 953.

92. *Id.* at 957.

93. *Id.*

from Montana parental interest cases involving a third party and the child's natural parent, the Court wrote: "A natural parent cannot be denied custody of his or her child absent termination of that person's parental rights for abuse or neglect pursuant to Title 41, Chapter 3 of the Montana Code."<sup>94</sup> Explaining why a parent's right to decide how to raise her child cannot be taken from her without a finding of abuse or neglect in a Title 41 proceeding, the Court wrote:

Our case law does not permit destruction of a natural parent's fundamental right to the custody of his or her child based simply on the subjective determination of that child's best interest. Were we to allow such a result, the implications are obvious. Is it in a child's best interest that he or she be raised in an affluent family as opposed to an impoverished family? Would it be better that a child be raised by extremely intelligent parents rather than people of average intelligence? Is a child better off if that child is raised in a conventional life style rather than an unconventional life style? All of these factors could arguably be considered in determining the child's best interest. However, none even remotely justify denying a parent's constitutional and fundamental right to the custody of his or her child.<sup>95</sup>

In other words, persuasive policy justifications support Maniaci's contention that subjective determinations concerning a child's upbringing are better left to the child's legal parent, not the courts.

The Montana Supreme Court erroneously granted Kulstad a parental interest in L.M. and A.M. because a legal parent's fundamental constitutional right to decide how to raise her children cannot be limited without a showing of abuse or neglect in a state initiated Title 41 proceeding. This conclusion is further supported by the fact that before *Kulstad v. Maniaci*, the Montana Supreme Court was hesitant to find abuse, neglect, or conduct contrary to the parent-child relationship. In the following cases, unlike in *Kulstad v. Maniaci*, the Court upheld a party's parental rights even though the parent clearly acted contrary to the parent-child relationship and even though granting a parental interest to the third party was likely in the child's best interest.

In *J.N.P.*, parental rights were not forfeited even when a mother abandoned her children for two months.<sup>96</sup> There, the mother left her daughter with the mother's aunt and uncle until she was financially able to provide for her children.<sup>97</sup> The mother then moved to a different town in search of employment.<sup>98</sup> Two months later, the aunt and uncle petitioned the court, seeking to limit the mother's visitation and parental rights.<sup>99</sup> The mother

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94. *Id.* at 958.

95. *Id.* (emphasis added).

96. *Id.*

97. *In re Parenting of J.N.P.*, 27 P.3d at 954.

98. *Id.*

99. *Id.*

filed a motion to dismiss the petition, arguing that a mother's parental rights may only be terminated by a Title 41 proceeding.<sup>100</sup> The aunt and uncle argued, similar to *Kulstad*, that § 40-4-211 authorized the court to grant them a parental interest in the child.<sup>101</sup> That the mother lived completely apart from her children did not change the Court's conclusion that the statute was unconstitutional because a mother's parental rights may not be terminated absent a Title 41 proceeding.<sup>102</sup>

In *Guardianship of D.T.N.*, grandparents sought all the parental rights to their grandchild over the objections of the mother.<sup>103</sup> The Montana Supreme Court emphasized that forfeiture of parental rights requires a showing of abuse, neglect or dependency. In *D.T.N.*, the mother temporarily abandoned her child and left the child with the mother's sister, who eventually passed the child along to the grandparents.<sup>104</sup> The grandparents filed for permanent parenting of the child under a Montana statute authorizing third persons to seek a parental interest in a minor child absent a Title 41 proceeding.<sup>105</sup> Citing the long-held Montana standard, the Court stressed:

*[W]here third parties seek custody, it has long been the law in Montana that the right of the natural parent prevails until a showing of forfeiture of this right.* (citations omitted). The Uniform Marriage and Divorce Act does not change this law. This forfeiture can result only where the parent's conduct does not meet the minimum standards of the child abuse, neglect and dependency statutes.<sup>106</sup>

A mother does not easily forfeit her parental rights, and as the above excerpt indicates, courts must first find that the mother forfeit these rights before it may grant a third party a parental interest in the mother's children. This remains true even if Montana's Marriage and Divorce Act says otherwise. Even though the mother temporarily abandoned her child, the *D.T.N.* Court nonetheless reversed the district court because there was no showing that she forfeited her parental rights.<sup>107</sup>

Whether Maniaci forfeited her parental rights should have prevailed as the determinative issue in *Kulstad v. Maniaci*. As *D.T.N.* expressly states, a Title 41 proceeding "brought by the county attorney pursuant to Title 41, Chapter 3, of the Montana Code Annotated" is how this issue must first be discussed—not in a civil suit between the legal parent and her former same-sex partner.<sup>108</sup> A Title 41 proceeding is a procedural prerequisite to a judi-

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100. *Id.*

101. *Id.*

102. *Id.* at 957–958.

103. *In re Guardianship of D.T.N.*, 914 P.2d 579 (Mont. 1996).

104. *Id.* at 579–580.

105. *Id.* at 580.

106. *Id.* at 582 (citing *Aschenbrenner*, 597 P.2d 1156, 1162–1163 (Mont. 1979)).

107. *Id.* at 583.

108. *Id.*

cial transfer of parental rights because such a procedure “insure[s] that minors involved received the full protection of these laws,” and only when such procedures are followed “will the fundamental rights and relationship existing between parent and child be fully realized or, when necessary, properly severed.”<sup>109</sup> This procedure must be “rigorously followed.”<sup>110</sup> Thus, in balancing a parent’s constitutional rights with the child’s constitutional rights, courts “must” follow the well-established legal procedure: a Title 41 proceeding.

In *Kulstad v. Maniaci*, a Title 41 proceeding never occurred, nor did Kulstad even allege that Maniaci abused or neglected her children. As such, Maniaci’s fundamental constitutional parental rights should have prevailed. Holding otherwise, the Montana Supreme Court disregarded clearly defined Montana law.

*B. A Crucial Prerequisite: That Maniaci Act Contrary to Her Parent-child Relationship*

In addition to ignoring the Title 41 proceeding prerequisite, the Court erred in concluding that Maniaci engaged in conduct contrary to a parent-child relationship.<sup>111</sup> The holding in *D.T.N.* supports the conclusion that Maniaci did not act contrary to her parent-child relationship by allowing Kulstad to help raise her children. In *D.T.N.*, even though the mother left her child with the grandparents for seven months, she did not forfeit her right to parent her child.<sup>112</sup> Unlike the mother in *D.T.N.*, Maniaci never abandoned her children and was never accused of being anything but a loving parent. It is hard to believe, based on this comparison and past Montana parenting cases, that the Court determined that Maniaci acted contrary to her parent-child relationship by allowing Kulstad to help raise the children. If allowing someone to help raise your children amounts to a forfeiture of parental rights, then many single parents and parents who rely heavily on others to care for their children are in a precarious position.

Two additional cases support the contention that Maniaci did not forfeit her parental rights by allowing Kulstad to help parent her children. In both cases the Montana Supreme Court refused to grant parental rights to third parties absent evidence of abuse, dependency, or neglect. *In re A.R.A.* is a Montana Supreme Court case in which the Court held part of a statute unconstitutional because it allowed a third party to obtain a parental interest in a child before the parent’s constitutional rights were terminated.<sup>113</sup> In

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109. *In re Guardianship of D.T.N.*, 914 P.2d at 583.

110. *Id.* at 582.

111. *Kulstad*, 220 P.3d at 606–607; *See also* Mont. Code Ann. § 40–4–228(2)(a).

112. *In re Guardianship of D.T.N.*, 914 P.2d at 583.

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



A.R.A., the child's legal parents divorced in 1989 and the father moved out of state.<sup>114</sup> The mother raised the child and remarried in 1990.<sup>115</sup> The stepfather parented the child from 1990 until the mother's tragic death in an airplane crash in December 1992.<sup>116</sup> Even though the mother named the stepfather as the child's guardian and the stepfather served as a parent to the child for several years, the Court refused to grant the stepfather parental rights because there was no showing of abuse, dependency, or neglect on the part of the child's natural father.<sup>117</sup> The Court highlighted the protection Montana courts are "constitutionally required" to give mothers whose parental rights are in jeopardy because of petitions by third parties:

This careful protection of parental rights is not merely a matter of legislative grace, but it is *constitutionally required*. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). . . . Consequently, the state's ability to intrude upon the parent/child relationship must be guarded. *Schultz v. Schultz* (1979), 184 Mont. 245, 247, 602 P.2d 595, 596; *Doney*, 570 P.2d at 577. For that reason, "[a] finding of abuse, neglect, or dependency is the *jurisdictional prerequisite* for any court-ordered transfer of custody from a natural parent to a third party." *Babcock*, 885 P.2d at 524. Therefore, where a surviving parent does not voluntarily relinquish custody, the best interest of the child test can be used only after a showing of dependency, or abuse and neglect by the natural parent. *MGM*, 654 P.2d at 998; *Aschenbrenner*, 587 P.2d at 1162.<sup>118</sup>

Even though the stepfather acted as a parent for several years while the natural father lived in a different state and exercised no parenting duties, the Court still refused to grant the stepfather any parental rights. It is difficult to reconcile the *Kulstad* decision with Montana law that holds that no parental rights are forfeited when a father lives in a different state and abdicates his parental responsibilities. If Montana law says that a parent does not forfeit parental rights by living apart from and allowing a third party to help raise one's children, how can merely allowing a sexual partner to help care for a child constitute a forfeiture of parental rights?

In *Girard*, the Court concluded that neither incarceration nor a parent's failure to pay child support constitutes voluntary relinquishment of a parent's right to parent his child.<sup>119</sup> In *Girard*, the children's natural father was imprisoned for a period of five years—from 1988 to 1993.<sup>120</sup> In 1990, the natural mother was killed, and the children went to live with the stepfather's brother and sister-in-law because the stepfather was also in prison at

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114. *Id.* at 389.

115. *Id.* at 390.

116. *Id.*

117. *Id.* at 392.

118. *Id.* at 391 (emphasis added).

119. *Girard v. Willaims*, 966 P.2d 1155, 1164–1165 (Mont. 1998).

120. *Id.* at 1157.

the time.<sup>121</sup> When the father and stepfather were released from prison, a parenting battle ensued. Even though the stepfather had parented the children for three years, the Court refused to grant him parental rights because no Title 41 proceeding had taken place.<sup>122</sup> If incarceration and failure to pay child support do not constitute forfeiture of a legal parent's right to parent his child, then how does allowing Kulstad to help raise the children result in the partial forfeiture of Maniaci's right to parent her children? Under past Montana law, the answer is simple: it cannot.

### C. *This Nation's Oldest Fundamental Constitutional Right*

While we must respect our courts, it is also our duty to question decisions they hand down when they touch upon fundamental constitutional rights. The Montana Supreme Court's decision in *Kulstad* greatly impacted a parent's fundamental constitutional right to decide how to raise her children. The Court overstepped this jurisdiction's well articulated procedural requirements because Maniaci has never abused nor neglected her children, nor has she forfeited her right to determine how to raise L.M. and A.M. This point is stressed in *Girard*, where the Court cautioned: "[T]he ability of a third party—whether an individual or an entity such as a state agency—to interfere with the natural parent-child relationship must be closely monitored."<sup>123</sup>

Montana Code Annotated § 40-4-228 is a derogation of this long-held, constitutionally required protection of a fit parent's right to decide how to raise her children in that the statute allows a judicial transfer of parental rights absent a Title 41 proceeding. In 2000 the U.S. Supreme Court explained that if the parent is fit, a presumption arises in favor of the parent's wishes because "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childbearing decisions simply because a state judge believes a 'better' decision could be made."<sup>124</sup> In *Troxell v. Granville*, paternal grandparents sought visitation with their grandchildren after their son (the father) committed suicide and the children's mother refused to allow them to visit their grandchildren as much as they desired.<sup>125</sup> The U.S. Supreme Court ultimately denied the grandparents' petition because the Washington State statute on which they relied was unconstitutional.<sup>126</sup> The Court found it unconstitutional for several reasons, one being that the statute contravened a parent's fundamental con-

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121. *Id.*

122. *Id.* at 1159–1161.

123. *Id.* at 1158–1159.

124. *Troxel*, 530 U.S. 57, 72–73.

125. *Id.* at 60–61.

126. *Id.* at 75.

stitutional right to decide how to raise her children. Stressing this point, the Court wrote: “The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interest recognized by this Court.”<sup>127</sup> The cost of recognizing a third party’s parental or visitation right when a legal parent has a constitutionally protected right to raise her child is a “substantial burden on the traditional parent-child relationship.”<sup>128</sup>

The Court went on to analyze the scope of this fundamental right and the protection it is afforded under the Due Process Clause of the Fourteenth and Fifth Amendments.

The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property without due process of law.” We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, “guarantees more than fair process.”<sup>129</sup> . . . The Clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>130</sup> . . . The “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.”<sup>131</sup> . . . [T]he “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”<sup>132</sup> . . . 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.”<sup>133</sup>

In other words, courts should be very reluctant to interfere with a parent’s determinations concerning the upbringing of her children. This protection was recognized by the Washington Supreme Court, which cautioned that “[p]arents have a right to limit visitation of their children with third persons, and that between parents and judges, the parents should be the ones to choose whether to expose their children to certain people or ideas.”<sup>134</sup>

In *Troxel*, the statute at issue allowed any person to petition for visitation of a legal parent’s child at any time, using as its standard the best interest of the child test.<sup>135</sup> Because the statute was “breathtakingly broad,” the U.S. Supreme Court found it unconstitutionally infringed on the mother’s fundamental rights as a parent.<sup>136</sup> The Court highlighted a number of factors that support the conclusion that a legal parent’s liberty rights

127. *Id.* at 65.

128. *Id.* at 64.

129. *Id.* at 65 (citing *Wash. v. Glucksberg*, 521 U.S. 702, 719 (1997)).

130. *Troxel*, 530 U.S. at 65 (citing *Glucksberg*, 521 U.S. at 720).

131. *Id.* (citing *Meyer v. Neb.*, 262 U.S. 390, 399 (1923)).

132. *Id.* (citing *Pierce v. Socy. of Sisters*, 268 U.S. 510, 534–535 (1925)).

133. *Id.* at 65–66 (citing *Prince v. Mass.*, 321 U.S. 158, 166 (1944)).

134. *Id.* at 63.

135. *Id.* at 67.

136. *Troxel*, 530 U.S. at 67.

under the Due Process Clause were violated by a court order granting visitation to a third party. They included:

- 1) *Whether the court concluded that the legal parent is an unfit parent.* “[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself in the private realm of the family to further question the ability of the parent to make the best decisions concerning the rearing of that parent’s children.”<sup>137</sup>
- 2) *Whether the court gave special weight to the legal parent’s opinion as to what would be in her child’s best interest.* The Court noted, “[I]f a fit parent’s decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent’s own determination”;<sup>138</sup> and
- 3) *Whether the legal parent will not allow the party seeking visitation to have such an interest.*<sup>139</sup>

Unfortunately, the U.S. Supreme Court did not specify how much weight each factor should be given. This provides future courts wiggle room in determining whether a statute unconstitutionally limits a fit parent’s protected parental rights. Opening the door for an appeal on a case like *Kulstad v. Maniaci*, the U.S. Supreme Court in *Troxel* clarified: “[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.”<sup>140</sup> Until the U.S. Supreme Court decides the issue or the Montana Supreme Court clarifies its holding in *Kulstad*, a Title 41 proceeding appears to no longer be a constitutionally required prerequisite to a court ordered transfer of a fit parent’s parental rights to a third party who can satisfy the statutory requirements of Montana Code Annotated § 40–4–228.

A parent’s fundamental constitutional right to decide how to raise her children is clearly given much protection by the U.S. and Montana Constitutions. Prior to *Kulstad*, the Montana Supreme Court had been reluctant to grant a third party any parental rights so long as the legal parent was not abusing or neglecting her children. So what is it about *Kulstad* that prompted the Court to steer from this precedent? Perhaps it was the well-being of the children. Perhaps, less explicitly, it was the fact that the justices did not find it fair to just cut *Kulstad* out of the children’s lives after she had helped raise them for many years. Perhaps the justices found it unfair that only one same-sex partner may legally adopt a child in Montana even though, in reality, both partners intend to serve as parents. If the latter two justifications provide the answer, then why not re-write our laws and

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137. *Id.* at 68.

138. *Id.* at 70.

139. *Id.* at 58, 71.

140. *Id.* at 73.

allow same-sex couples to adopt? Doing so would avoid the end-around that *Kulstad* allows—i.e., one same-sex partner legally adopts the child, both partners jointly parent the child, then years later when the relationship ends the partner who was not the adopting parent is permitted under Montana Code Annotated 40–4–228 to nonetheless obtain parental rights. The competing policies presented in not allowing same-sex couples to jointly adopt and, under *Kulstad*, allowing shared parental rights after the couple breaks up, do not mesh. Until Montana courts or the Montana legislature clear up this apparent inconsistency, we are left to assume that there exists a loop hole in Montana Code Annotated § 42–1–106 that does not allow same-sex couples to jointly adopt.

## V. CONCLUSION

This country is at a crossroad where courts, like the Montana Supreme Court in *Kulstad v. Maniaci*, have decided to overturn clear precedent establishing that a parent's fundamental constitutional right to decide how to raise her children cannot be limited without a judicial finding of abuse or neglect. Here, neither abuse nor neglect was alleged, so the Court took a different tact. It overcame this precedent by focusing on the constitutional rights of children and the fact that a third party must establish a parent-child relationship before she may obtain a parental interest.<sup>141</sup> Unfortunately, the Court did not clearly define how a parent and child's constitutional rights are balanced—leaving much to the discretion of the courts in future cases.

Furthermore, the Court did not limit its holding to cases where a same-sex couple decides to adopt and co-parent a child. Montana courts will now have to determine in various factual settings if (1) a parent-child relationship exists with the third party and the child, (2) if the legal parent acted contrary to her parent-child relationship by allowing a person to form a close bond with the parent's child, and (3) whether granting a parental interest to a third party is in the best interest of the child. Many parties now have standing to bring third party parenting actions: aunts, uncles, cousins, grandparents, boyfriends, girlfriends, friends, and other caretakers. The problem with this is that many Montana cases already exist that do not allow these parties to obtain a parental interest in the legal parent's children unless a finding of abuse or neglect exists.<sup>142</sup>

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141. *Kulstad*, 220 P.3d at 604 (explaining that Montana's third party custody statutory scheme balances the parent's constitutional rights with the child's constitutional rights to determine the best interest of the child).

142. See e.g. *In re Parenting of J.N.P.*, 27 P.3d 953; *In re Guardianship of D.T.N.*, 914 P.2d 579; *In re Aschenbrenner*, 597 P.2d 1156; *In re A.R.A.*, 919 P.2d 388; *In re Doney*, 570 P.2d 575 (Mont. 1977); *In re M.G.M.*, 654 P.2d 994 (Mont. 1982); *Pierce v. Pierce*, 645 P.2d 1353 (Mont. 1982); *Girard*, 966 P.2d 1155.

*Kulstad v. Maniaci* is an opinion that will affect Montana jurisprudence far into the future. No longer does a legal parent have the same degree of constitutional protection that she was once afforded. After *Kulstad v. Maniaci*, fit parents are subject to third-party petitions for visitation and parental interests to their children—a sobering reality for many hard working single parents. Whether the Court’s decision was correct is debatable considering (1) the equities of the case<sup>143</sup> and the unique factual situation presented; (2) the changing notion of “family” and the ongoing societal debate concerning homosexual rights in the realm of family law; and (3) lingering and unanswered questions, such as the extent to which courts will grant a parental interests in other third party parenting situations. Whatever direction Montana jurisprudence is heading, it is clear that the Montana Supreme Court took a creative tact in sidestepping clear precedential authority in arriving at its conclusion. In doing so, it took what may be a large step in advancing the rights of homosexuals in the family law arena. What “is perhaps the oldest of the fundamental liberty interest recognized by this Court” just took a major hit.

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143. Specifically, the chance that L.M. and A.M. would have been cut from Kulstad’s life after she helped raise them.

