IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0483

MICHELLE KULSTAD,
***Plaintiff-Appellee*,**

v.

BARBARA L. MANIACI,
***Defendant-Appellant*.**

On Appeal from the Fourth Judicial District

BRIEF *AMICUS CURIAE* OF THE MONTANTA FAMILY FOUNDATION IN SUPPORT OF PETITIONER BARBARA L. MANIACI

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Montana Family Foundation ("MFF"), is a non-profit, research and education organization dedicated to supporting, protecting, and strengthening Montana families. MFF believes the family is a fundamental institution in a civil society and government should promote and protect its formation and well being. MFF further believes that the family is defined as people who are related by blood, marriage, or adoption and should be founded on a life-long marriage of one man and one woman, which creates the best environment in which to raise children.

SUMMARY OF THE ARGUMENT

This Brief expands on one argument made by the Defendant-Appellant (hereinafter the "Dr. Maniaci"). *Amicus* argues that § 40-4-228 of the Montana Code (the "Statute") is facially unconstitutional, in violation of the Fourteenth Amendment of the United States Constitution and Article II, § 17 of the Montana Constitution.

The Brief explains that because parents can be deprived of visitation rights of their children without an adjudication of fitness, the Statute violates the Due Process Clauses of both the United States and Montana Constitutions.

ARGUMENT

I. SECTION 40-4-228 OF THE MONTANA CODE IS FACIALLY UNCONSTITUTIONAL BECAUSE IT GRANTS PARENTAL INTERESTS TO LEGAL STRANGERS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE II, § 17 OF THE MONTANA CONTSTITUTION.

It is difficult to overstate what the court below has done. Simply put, and contrary to precedent from this Court and the United States Supreme Court, the court below created new law grounded in nothing more than a passing reference by this Court—a reference noting that *some courts* have found an equitable interest in custody and visitation matters on a *de facto* or psychological parenting theory.[1] Dr. Maniaci has adequately argued why this Court should reverse the court below even with § 40-4-228 intact, and your *Amicus* agrees with her reasoning. The Statute is problematic in its own right, however, in that it is facially unconstitutional under both the federal and state constitutions. For the Statute to permit standing and

[1] Dr. Maniaci has more thoroughly briefed this error (*see* Appellant's Br. at 37-40), to which your *Amicus* will simply add one note. Not only did this Court in *K.E.V.* not recognize *de facto* or psychological parenting under Montana law, it went on to note that the equitable doctrine at issue (equitable estoppel) *was* well rooted in Montana law and, therefore, applicable to a custody matter. *In re the Marriage of K.E.V.* (1994), 267 Mont. 323, 330-31, 883 P.2d 1246, 1251 ("As with the presumption of legitimacy, equitable estoppel has long been recognized in Montana and is used to prevent injustice and to promote justice, honesty and fair dealing."). It is beyond peradventure that *de facto* and psychological parenting have not similarly been "long . . . recognized in Montana." *Id.*

judicial intervention into parenting and visitation matters involving a fit parent and a third party legal stranger is to, in effect, declare the parent unfit without the benefit of due process of law.

A. Parental rights are deeply rooted in this nation's jurisprudence and carry a presumption of fitness protecting parents' decisions from the second-guessing courts and third parties.

The United States Supreme Court has long noted the firmly rooted legal stature of parental rights. "[I]t remains '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.'" *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Kennedy, J., concurring in judgment in part, dissenting in part) (citations omitted). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established *beyond debate* as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (emphasis added). The Court has further noted that

> [o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally

> "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . ."
>
> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979) (citations omitted).

These statements of parental rights are not simply high-sounding *dicta* that get quickly discarded by the Court. Rather the Court's rhetoric usually matches its holdings. *See, e.g.,Troxel v. Granville*, 530 U.S. 57, 63, 66, 69 (2000) (plurality); *Parham*, 442 U.S. at 602-04; and *Stanley v. Illinois*, 405 U.S. 645, 649, 651 (1972). This Court has been no less vigilant in protecting the rights of parents from the second-guessing of third parties or the courts. *See, e.g., In re Parenting of J.N.P.*, 2001 MT 120, ¶¶ 17, 26, 305 Mont. 351, 355-56, 359, 27 P.3d 953, 956, 958; *In re A.R.A.* (1996), 277 Mont. 66, 74, 919 P.2d 388, 393 (Nelson, J., concurring); and *Matter of Guardianship of Doney* (1977), 174 Mont. 282, 286, 570 P.2d 575, 577.

B. Section 40-4-228 fails to provide a parent procedural due process because it abrogates parental rights without a showing of unfitness.

The Statute states as follows:

> 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."

Mont. Code Ann. § 40-4-228 (2007). But its broad scope and judicial discretion fail to adequately provide procedural due process to fit natural parents, subjecting them to invasion of those parental rights by third parties and courts.

In order to support a claim of a due process violation, a Plaintiff must demonstrate an "entitlement" or "liberty interest" arising to a level "accorded due process protection" under either the state or federal constitution. *Dorwart v. Caraway*, 1998 MT 191, ¶ 68, 290 Mont. 196, 226-27, 966 P.2d 1121, 1139 (overruled in part on other grounds). Here, as set

out more fully above, parental rights have always risen to the level of an entitlement or liberty interest "accorded due process protection." *See, e.g., Stanley*, 405 U.S. at 649; *Doney*, 174 Mont. at 286.

Procedural due process is "not a technical conception with a fixed content unrelated to time, place and circumstances," but is "flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citations omitted). "[R]esolution of the issue whether the . . . procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Id.* Procedural due process inquiry, therefore, has become a three-factor test, as follows:

> First, the private interest[s] that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Furthermore, this Court has adopted the *Mathews* balancing test[2] when analyzing procedural due process concerns under the Montana constitution as well. *Dorwart v. Caraway*, ¶ 83.

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[2] It is worth noting the confusion present regarding the United States Supreme Court calling the *Mathews* test a balancing test. The confusion arises because there are two types of tests that use factors—balancing tests and factors tests. A balancing test, properly so called, balances the competing interests and makes a judgment as to which one (or perhaps more) of the competing interests "wins out" because it is the more weighty interest. The way the court determines which interest "wins" is by placing the factors against one another in the manner of the old fashioned balance with pans. With the factors of the competing interests placed in their respective pans, whichever side the balance tilts towards wins. One such example is the *Pickering* balancing test which "balance[s] . . . the interests of [a public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ. of Township High Sch.*, 391 U.S. 563, 568 (1968). *See also, The Associated Press, Inc. v. Mont. Dep't of Revenue*, 2000 MT 160, ¶ 26, 300 Mont. 233, 241, 4 P.3d 5, 11 (balancing right to know with right of privacy concerns). Such balancing tests are in contrast to "factors tests" which aggregate various pieces of information or evidence, which are called factors, in order to come to a just conclusion (a type of totality of the circumstances analysis). An example of a factors test, properly so called, is the test for what constitutes "reasonable" force under the Fourth Amendment. To determine what is reasonable, the Court considers the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The *Mathews* test, similar to *Graham*, does not balance interests, but rather aggregates factors in guiding a court to determine whether procedural due process concerns have been met. Confusion could arise because the *Mathews* test uses the word "interest" to describe two of its *factors*. *Amicus* understands that this Court naturally has decided to call it the "*Mathews* balancing test" because that is the name given it by the United

Under Montana precedent, the instant facial challenge to the Statute clearly "affect[s]" an important "private interest" of Dr. Maniaci. *See Mathews*, 424 U.S. at 335. For instance, this Court has noted that under *Mathews*, suspension of a driver's license implicated a "substantial" "personal interest" because a "the use of a motor vehicle affects the ability of a person to make a living." *State v. Pyette*, 2007 MT 119, ¶ 18, 337 Mont. 265, 271, 159 P.3d 232, 236. Similarly, this Court found significant private interests vested in both judgment creditors and debtors in determining the process due a judgment debtor upon the sheriff's levy upon the debtor's personal property. *Dorwart*, ¶¶ 13, 84-86. How much more would parental rights concerning visitation decisions be substantial under *Mathews*, especially upon consideration that parental rights are among the most protected and cherished under American law. For a court to force a child's visitation to a legal stranger *against a parent's wishes* is no small matter. On the other hand, the private interest of a third party, in this case

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States Supreme Court. It is, however, a test much more akin to the four-factors test used by this Court in evaluating a lower court's granting of a motion to dismiss for failure to prosecute. *Westland v. Weinmeister* (1993), 259 Mont. 412, 415-16, 856 P.2d 1374, 1376 (evaluating "1) the plaintiff's diligence in prosecuting his claims; 2) the prejudice to the defense caused by the plaintiff's delay; 3) the availability of alternate sanctions; and 4) the existence of a warning to plaintiff that his case is in danger of dismissal.").

Ms. Kulstad, is purely speculative, with no presumption beforehand that she has any right whatsoever to bring an action.

As for the second *Mathews* factor, the risk of "erroneous deprivation" is also significant. Here, again, Montana case law is instructive. In *M.C. v. Dep't of Insts.* (1984), 211 Mont. 105, 106-07, 683 P.2d 956, 957, a juvenile in the custody of the Department of Institutions was transferred without a hearing to a state mental hospital under a statute permitting a transfer for up to ten days without a hearing. The district court granted the juvenile *habeas corpus* relief and declared the statute unconstitutional. *Id.* at 107, 683 P.2d at 957. Although this Court eventually reversed the district court's ruling after reviewing the *Mathews* test in its entirety, it did find that a transfer into a mental hospital without a prior finding of serious mental illness did create a risk of erroneous deprivation. *Id.* at 109-10, 683 P.2d at 958.

This Court in *Dorwart* also recognized the risk of erroneous deprivation when a judgment debtor is not notified that "property will be, or has been, seized under a writ of execution," noting that "exempt property could be levied on and sold before the debtor was aware of the seizure, particularly if the property were not in the debtor's direct possession." *Dorwart*, ¶ 89.

Here, in line with the standards of *M.C.* and *Dorwart*, without a determination of parental fitness, the risk of erroneously depriving a parent of full parental rights is almost palpable. A third party plaintiff in a case arising under the Statute need not ever show that the parent is unfit to raise the child; rather, the plaintiff need only convince a judge that it would be a good thing for the child to have the plaintiff involved and assisting with the care of the child.

The facts of the instant case very quickly demonstrate the truth of the *risk* of erroneous deprivation. Without an allegation that Dr. Maniaci is an unfit parent incapable of making decisions for her children, she has been required to share with Ms. Kulstad "joint decision-making authority regarding all significant matters affecting the children, including but not limited to education, activities, day care, health care (including medical, dental and psychological) and spiritual development." (Appellant's Br. at 3 (quoting the district court's opinion).) As their mother, Dr. Maniaci was always the person making the ultimate parenting decisions, regardless of whether she was physically present with the children at the time. (Appellant's Br. at 25-26.) Without adjudication of fitness for parenting, the risk of simply second-guessing the wisdom of a parent's decisions concerning schooling, hobbies, religion, and the like is great, and thus the

risk for erroneous deprivation is similarly great. *See Mathews*, 424 U.S. at 335.

The final *Mathews* consideration is a consideration of the "[g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" with *Id.* Significantly, in *Dorwart*, this Court noted that the State's interest was multi-fold. *Dorwart*, ¶ 98. Although the State's interest included its own concerns about the "post-judgment execution process, including the fiscal and administrative burdens which may be imposed on the state by requiring additional procedural safeguards," this Court also noted that the State's interest *included* the interests of the judgment *debtor's* "entitlement to statutory exemptions from execution . . . in order to avoid favoring one party's legal rights over those of the other." *Id.* (emphasis added).

Similarly here, the State's interests are not simply its own advocacy on behalf of children or its desire for judicial economy. In fact, Montana's interest in the *care of a child* is *de minimis* in a situation involving a fit parent. *See Stanley*, 405 U.S. at 657 (emphasis added). Rather, Dr. Maniaci, as a *legal natural parent* and as argued more fully above, has significant rights to be guarded by the State. Furthermore, the Statute already requires

judicial intervention for a third party to have a parental right recognized. Requiring a specific finding of fitness provides no extra burden on a court and continues to satisfy Montana's interest in protecting the best interests of children. What it does do, however, is put back in place a clear presumption of fitness and rightly shields a fit parent from third party intervention challenging a parent's decisions. Such a requirement of unfitness before the Statute takes effect would provide natural parents with the strong presumption that they are acting in the child's best interests—a presumption that the law has previously long recognized. *See Parham*, 442 U.S. at 602.

Thus, in light of the considerations of the three *Mathews* factors, Dr. Maniaci should have been protected from the district court's second-guessing her parenting decisions as they pertain to Ms. Kulstad, barring a showing that Dr. Maniaci was unfit to make those decisions in the first place.

C. The Statute leads to absurd results when it fails to require an adjudication of fitness prior to granting parental rights to legal strangers.

In the face of the mountain of precedent heaping caution upon caution to courts and legislatures not to interfere with childrearing decisions of a fit parent, the Statute contains one quiet, but overwhelming statement previously noted: "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." Mont. Code Ann. § 40-4-228(5) (2007). Instead, to assert and be awarded a parental interest, a third party (any third party) need simply demonstrate three things as outlined in the Statute. First, she must show that the "natural parent has engaged in conduct that is contrary to the child-parent relationship." Second, she must have established a parent-child relationship with the child as defined by § 40-4-211 of the Montana Code, and finally, that the child-parent relationship is in the child's best interest to continue. Mont. Code Ann. § 40-4-228(2)(a-b) (2007). As for what constitutes "conduct contrary to the child-parent relationship," the Statute does not require abuse, abandonment, or neglect. Rather, "[f]or 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." Mont. Code Ann. § 40-4-228(4) (2007).

It is worth considering the following acts of a fit parent that arguably satisfy subsection 2(a) as "conduct that is contrary to the child-parent relationship":

1. A fit, but distraught, parent makes a conscious decision to entrust the care of his child with a relative while he works

through his problems. *See Doney*, 174 Mont. at 283-84, 570 P.2d at 576. Due to the parent's fragile state of mind, the relative pays for all of the child's care.

2. A fit parent makes a conscious decision to entrust the care of her child with a friend while she is deployed overseas. Due to financial struggles, she pays her friend nothing for the child's care.
3. A fit parent with a demanding work schedule makes a conscious decision to have the child live with a grandparent during the school year. Due to the grandparents' apparent generosity, they ask for no money to care for the child.
4. A fit parent sends his child to a small community school where the teacher remains with the class throughout the elementary years. Because the parent is usually unable to be at home until well past the end of the school day, the child spends most evenings at the teacher's home, for which she charges nothing.

In each of the above examples, the fit parent would expect to once again assert the parental prerogative to bring the child home whenever it seems best to do so. Any one of the parents in the examples would rightly be shocked to think that the arrangements made for the child's care as an

exercise of parental discretion would turn out to be one step toward ceding parental decisions to a legal stranger. But under the Statute, that is what they have done. It would be one thing subsection (4) were merely an evidentiary consideration in a true test for *parental fitness*, inquiring whether a parent has regularly imposed upon others the extended care of the child. It is no such thing, however. It is instead an opportunity for a court to question a parent's wisdom in child-care, without ever having to hear an allegation of parental fitness.

Now consider each of the above examples under the standard set out in subsection 2(b). A third party legal stranger need then only show that a child-parent relationship was created, prior to the filing of an action,

> 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 and which relationship 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.

Mont. Code Ann. § 40-4-211(6) (2007). The relative, grandparent, teacher, or friend from the examples above all arguably would satisfy subsection six criteria for a child-parent relationship. At that point, the parent has almost lost the game. If the judge is convinced the third party legal stranger is a worthwhile influence in the child's life, the game is over and lost—and all

without one accusation that the parent was unfit or had even done anything "wrong." As mentioned before, it truly is difficult to overstate the significance of this case.

It is simply not within the purview of a court to judge whether it was wise to delegate the parental duties as described above. *See Troxel*, 530 U.S. at 69 (plurality) ("[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 into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.") Unless the parent was unfit to make the decision in the first place no statute should operate to divest parents of their lawful authority over the care and keeping of their children.

CONCLUSION

For the foregoing reasons, and for the reasons put forth in Dr. Maniaci's brief, this Court should reverse the District Court's grant of a parental interest under § 40-4-228 of the Montana Code.

Respectfully submitted,
this 23rd day of February, 2009

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated is not more than 5,000 words, excluding the Table of Contents, Table of Cases, Certificate of Compliance, and Certificate of Service.

February 23, 2009

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of Montana Family Foundation in the case of *Kulstad v. Maniaci*, No. DA 08-0483, on all required parties by depositing a copy in the United States mail, first class postage, prepaid on February 23, 2009 addressed as follows:

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