

*KULSTAD v. MANIACI*¹

In *Kulstad v. Maniaci*, the Montana Supreme Court affirmed Montana’s commitment to protect the constitutional rights of children. The Court upheld Montana Code Annotated § 40–4–228 by granting a former lesbian partner a parental interest in the two adopted children she helped raise. This statute balances the rights of children with the rights of parents in determining who may be awarded a parental interest. The framework protects the right of children to continue relationships with a nonparent, even in cases where a fit natural parent is present.

In affirming the statute, the Court asserted that a finding of abuse or neglect is not necessary to grant a parental interest to a nonparent.² Also, the nonparent does not need to stand in the place of the parent (*in loco parentis*³) to the exclusion of the natural parent to establish a child-parent relationship.⁴ Rather, the nonparent must establish, through clear and convincing evidence that: (1) the natural parent engaged in conduct contrary to the child-parent relationship, (2) the nonparent established a child-parent relationship with the child, and (3) continuing that relationship furthered the best interest of the child.⁵

Michelle Kulstad and Barbara Maniaci began living together in 1996.⁶ The couple celebrated their domestic relationship by exchanging rings, which they wore until 2006.⁷ The two considered co-parenting a child, and the opportunity to adopt L.M. presented itself in 2001.⁸ One of Maniaci’s chiropractic patients asked if the couple would adopt her great-grandson.⁹

¹ *Kulstad v. Maniaci*, ___P.3d___, 2009 MT 326, 2009 WL 3179441 (Mont.).

² *Id.* at ¶ 58.

³ *Black’s Law Dictionary* defines *in loco parentis* as: “[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.” *Black’s Law Dictionary* (Bryan A. Garner ed., 8th ed., West 2004).

⁴ *Id.* at ¶ 86.

⁵ Mont. Code Ann. § 40–4–228(2)(a)–(b) (2009).

⁶ *Kulstad*, 2009 MT 326 at ¶ 6.

⁷ *Id.* at ¶ 7.

⁸ *Id.* at ¶ 9.

⁹ *Id.* at ¶ 9.

After L.M.'s natural mother relinquished custody of L.M. to them, the couple took him to the hospital and entered his name as L.L. Kulstad-Maniaci.¹⁰ The couple's attorney informed them only one of the women could legally adopt L.M.¹¹ The parties agreed Maniaci would be the adoptive parent, but they would function equally as parents to L.M.¹² A few years later, Maniaci adopted a baby girl from Guatemala and brought A.M. into their family.¹³

During the adoption process for both children, the couple participated in a home study and in the case of L.M., an adoptive post-placement report.¹⁴ At all times Maniaci represented that she and Kulstad were in a committed relationship and they would co-parent and support the children.¹⁵

The couple shared responsibility for the children and jointly provided for their physical, psychological, and developmental needs.¹⁶ Maniaci cared for the children during the day while Kulstad worked, and Kulstad cared for the children most afternoons, evenings, and weekends.¹⁷ Kulstad named Maniaci and the children in her will and her life insurance policy.¹⁸ Kulstad also claimed L.M. as a dependant on her tax returns with Maniaci's full knowledge and consent.¹⁹

Kulstad initiated dissolution and parenting proceedings January 19, 2007.²⁰ The court refused to adjudicate a dissolution between the couple because same-sex marriages are not recognized under Montana law.²¹ However, the parties moved forward on the issues of whether Kulstad had a parental interest in the children and whether her relationship with the children

¹⁰ *Id.* at ¶¶ 9–10.

¹¹ *Id.* at ¶ 10.

¹² *Kulstad*, 2009 MT 326 at ¶ 10.

¹³ *Id.* at ¶¶ 12–13.

¹⁴ *Id.* at ¶¶ 11, 13.

¹⁵ *Id.*

¹⁶ *Id.* at ¶ 14.

¹⁷ *Id.*

¹⁸ *Kulstad*, 2009 MT 326 at ¶ 15.

¹⁹ *Id.*

²⁰ *Id.* at ¶ 22.

²¹ *Id.* at ¶ 24.

necessitated an interim parenting plan.²² The court found, by clear and convincing evidence, that: (1) a child-parent relationship existed between Kulstad and the two children, (2) an interim parenting plan served the best interest of the children, and (3) Montana Code Annotated § 40-4-228 applied to the adjudication of a final parenting plan.²³

On appeal, Maniaci argued Montana Code Annotated § 40-4-228 violated her fundamental rights as a natural parent by failing to determine “fitness” before granting a nonparent (Kulstad) a parental interest based on the best interest of the child.²⁴ She asserted “adopted children have no constitutionally protected rights, absent a showing of abuse, neglect, or dependency.”²⁵ On examination of the amended statutes, the Court concluded the application of Montana Code Annotated § 40-4-228 was not confined cases of abuse or neglect.²⁶ Rather the amended statutes require the party seeking a parental interest to establish the existence of a child-parent relationship.²⁷

To bolster her contention, Maniaci offered several cases where the Montana Supreme Court upheld a natural parent’s rights over the claim of a third party: *Matter of Guardianship of Doney*, *In re A.R.A.*, and *Girard v. Williams*.²⁸ The Court specifically distinguished Kulstad’s circumstances from the precedent relied on by Maniaci on the grounds that “[a] third party in each of these cases attempted to secure custody of the minor children to the exclusion of the biological parent. The parties, in essence, sought to terminate the parental rights of the biological parent based upon the best interests of the child.”²⁹ Kulstad did not seek to terminate

²² *Id.* at ¶ 25.

²³ *Id.* at ¶ 28.

²⁴ *Kulstad*, 2009 MT 326 at ¶ 54.

²⁵ *Id.*

²⁶ *Id.* at ¶ 58.

²⁷ *Id.*

²⁸ *Id.* at ¶ 55; *Matter of Guardianship of Doney*, 570 P.2d 575 (Mont. 1977); *In re A.R.A.*, 919 P.2d 388 (Mont. 1996); *Girard v. Williams*, 966 P.2d 1155 (Mont. 1998).

²⁹ *Id.* at ¶ 56.

Maniaci's parental rights.³⁰ Instead, Kustad sought a parental interest so she could continue her relationship with the children. Moreover, the Court refused the precedent because the cases predated the 1999 amendments to the statute.³¹

Maniaci offered *In re Parenting of J.N.P.*³² as proof that the Court rejected the constitutionality of the 1999 amendments.³³ In *J.N.P.* the Court affirmed the district court's ruling that a natural parent could not be denied custody without a finding of abuse or neglect.³⁴ Here again, the parties wanted actual custody of the child, not a parental interest.³⁵ Failing to meet the pre-requisite of establishing a child-parent relationship barred the parties from seeking custody under the nonparental statutes.³⁶

The Court also rejected Maniaci's proposition that the Court should follow *Troxel v. Granville*³⁷ and declare the statutory scheme unconstitutional.³⁸ "Montana's legislature has chosen to enact the nonparenting statutes. Maniaci has failed to carry her burden of proving beyond a reasonable doubt that the statutes she challenges impermissibly infringe on her constitutional right to parent her children."³⁹ Furthermore, the statutory scheme advances the policy of Montana by attempting to "balance the parent's rights with the constitutionally protected rights of the child to determine the best interests of the child."⁴⁰

³⁰ *Kulstad*, 2009 MT 326 at ¶ 22.

³¹ *Id.* at ¶ 56.

³² *In re Parenting of J.N.P.*, 27 P.3d 953 (Mont. 2001).

³³ *Kulstad*, 2009 MT 326 at ¶ 60.

³⁴ *In re Parenting of J.N.P.*, at 958.

³⁵ *Kulstad*, 2009 MT 326 at ¶ 62.

³⁶ *Id.* at ¶ 63.

³⁷ *Troxel v. Granville*, 530 U.S. 57 (2000).

³⁸ *Kulstad*, 2009 MT 326 at ¶ 72.

³⁹ *Id.* (citing *In re Custody and Parenting Rights of D.S.*, 122 P.3d 1239, 1242–1243 (Mont. 2005)).

⁴⁰ *Id.* at ¶ 58.

Maniaci presented the issue of whether Kulstad could establish a child-parent relationship under the *in loco parentis* doctrine.⁴¹ She argued Kulstad needed to demonstrate that “Maniaci voluntarily had permitted her children to remain continuously in the exclusive care of Kulstad for a significant period of time in order for Kulstad to have established a child-parent relationship.”⁴² Maniaci further insisted that the Court has defined *in loco parentis* as a “person who acts as a parent to the exclusion of the natural parent.”⁴³ The Court rejected Maniaci’s limited interpretation of *in loco parentis* by asserting “[n]one of the decisions of this Court have defined *in loco parentis* status to require a third party acting as a parent to the exclusion of the natural parent. We decline to read this requirement in § 40–4–228(4), MCA.”⁴⁴ In addition the Court stated that a finding of *in loco parentis* was not mandatory to meet the requirements of the statute, but rather an example of one of many ways a natural parent may act contrary to the child-parent relationship.⁴⁵

The Court affirmed the findings that Maniaci acted contrary to her child-parent relationship by relinquishing her exclusive parenting authority to Kulstad.⁴⁶ The Court also agreed with the district courts findings that Kulstad established a child-parent relationship by functioning as parent to the children from the day they came into the family and that the children would “suffer irreparable harm should the court deny parenting to Kulstad.”⁴⁷ Having met all of the requirements, the Court granted Kulstad a parental interest.

Dissenting, Justice Rice claimed the decision weakened the constitutional rights of parents and would “open a Pandora's Box of potential attacks upon the right of fit and capable

⁴¹ *Id.* at ¶ 81.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Kulstad*, 2009 MT 326 at ¶ 86.

⁴⁵ *Id.*

⁴⁶ *Id.* at ¶ 78.

⁴⁷ *Id.* at ¶ 91.

parents to raise their own children.”⁴⁸ Rice’s parade of horrors suggests fit parents will be forced to defend against weak claims of third parties⁴⁹ and claims from numerous adult parties and “[m]ultiple-party clusters raising children, or polyamorous ‘families,’”⁵⁰ are “inevitable.”⁵¹ The statutory scheme, however, safeguards children against unsubstantiated claims of third parties by requiring proof of a child-parent relationship through clear and convincing evidence.⁵² Likewise, the statute protects against environments which would be detrimental to the well-being of the child, by requiring the parental interest be in the best interest of the child.⁵³

In his concurring opinion, Justice Nelson chose to address the “elephant in the room.”⁵⁴ He asserted gays and lesbians should not have to battle for the same fundamental rights, such as raising children and establishing a family, which Montana’s heterosexual citizens enjoy without question.⁵⁵ Nelson spoke passionately against the deplorable legal status of Montana’s gays and lesbians by stating:

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Naming it for the evil it is, discrimination on the basis of sexual orientation is an expression of bigotry. And, whether rationalized on the basis of majoritarian morality, partisan ideology, or religious tenets, homophobic discrimination is still bigotry. It cannot be justified; it cannot be legalized; it cannot be constitutionalized.⁵⁶

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The Montana practitioner should be aware that after establishing the existence of a child-parent relationship, a third party need not demonstrate abuse or neglect to petition for a parenting interest. Also note the Court refused to define *in loco parentis* as requiring the voluntary

⁴⁸ *Id.* at ¶ 106 (Rice, J., dissenting).

⁴⁹ *Id.* at ¶ 131.

⁵⁰ *Kulstad*, 2009 MT 326 at ¶ 134.

⁵¹ *Id.*

⁵² Mont. Code Ann. § 40-4-228(2)(a)-(b) (2009).

⁵³ Mont. Code Ann. § 40-4-228(2009).

⁵⁴ *Kulstad*, 2009 MT 326 at ¶ 99 (Nelson, J., concurring).

⁵⁵ *Id.* at ¶ 100.

⁵⁶ *Id.* at ¶ 103.

relinquishment of a child to the exclusion of the natural parent. More importantly, *Kulstad v. Maniaci* recognizes, through application of strict statutory requirements, the right of children to maintain child-parent relationships with those whom they love regardless of their nontraditional legal status.

—*Jain Walsh*