

Appeal No. DA 08-0483

# Montana Supreme Court

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Michelle Kulstad, *Plaintiff and Appellee*,

v.

Barbara Maniaci, *Defendant and Appellant*.

FILED

MAR 27 2009

*Ed Smith*

CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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ON APPEAL FROM THE MONTANA FOURTH JUDICIAL DISTRICT,  
MISSOULA COUNTY  
DEPT. No. 1  
CASE No. DR-07-34

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**BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF SOCIAL WORKERS,  
NATIONAL ASSOCIATION OF SOCIAL WORKERS, MONTANA CHAPTER, AND  
AMERICAN ACADEMY OF PEDIATRICS**

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## ARGUMENT<sup>1</sup>

Many children in our society today are being raised in non-traditional families. And many of these families include parents, like Ms. Kulstad, who have no biological or legal connections with their children but who nevertheless function on every level as genuine parents. Recognizing the importance of these relationships, Montana law makers have declared that these parents – parents who have established true, fully-developed parent-child relationships, with the support and encouragement of the child’s legal parent<sup>2</sup> – have legally-recognizable “parental interests” and, accordingly, may be granted custody or visitation rights in accordance with the child’s best interest. *See* 40-4-228, MCA. As the District Court found, Ms. Kulstad has established such a “parental interest” here, and this Court should, therefore, uphold her legal, parental rights.

More than two decades of peer-reviewed social science research conclusively establishes the following principles: (1) children form significant attachment bonds to parental figures early in life, bonds that are central to the well-being and development of the child; (2) strong parent-child attachments develop regardless of whether there exists a defined legal or biological relationship between parent and child; (3) when a non-biological, non-adoptive parent and a legal parent work together to parent a child, the child will consider both individuals as true

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<sup>1</sup> *Amici* accept and adopt the Statement of the Case, Statement of Questions Presented, and Statement of Facts as set forth in the brief of Plaintiff-Appellee.

<sup>2</sup> The term “legal” parent includes biological and adoptive parents.



parents; and (4) when a child’s attachment relationship with any parent – including a non-biological, non-adoptive parent – is severed, the emotional and psychological harm to the child can be significant. As these empirical findings demonstrate, the existence of a biological or legal link is not a significant factor in determining the strength, significance, or integrity of the parent-child relationship. Therefore, an individual who has established a “parental interest,” as defined by Montana Code § 40-4-228, should be granted standing to seek to preserve the relationship he or she has developed with a child and should be given a chance to demonstrate that recognizing and maintaining that relationship is in the best interests of the child.

**I. The *de Facto* Parent Doctrine is Critical to Protect the Best Interests of Children**

**A. Montana Law Recognizes the Rights of *de Facto* Parents**

Montana law recognizes that parent-child relationships are critical to children’s development and well-being and are protected under Montana’s constitution. Under Montana law, a non-legal parent develops a legally-recognizable “parental interest” when: (a) the natural parent has engaged in conduct that is contrary to the child-parent relationship<sup>3</sup>, (b) the nonparent has established a child-parent relationship with the child and (c) the continuation of that relationship is in the best interest of the child. Mont. Code Ann. § 40-4-

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<sup>3</sup> The Code notes that a natural parent need not be found unfit before a parental interest is awarded to a *de facto* parent. Mont. Code Ann. § 40-4-228(5).

228(1)-(2). For example, a parental interest is established when a legal parent voluntarily permits 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.” Mont. Code Ann. § 40-4-228(4). Such non-legal parents who have developed a “parental interest” have essentially become the child’s *de facto* parent.

As explained in the preamble to Montana “parental interest” statute, not only does Montana’s constitution recognize the rights of parents, it also “recognizes the constitutional rights of children” and “finds that there are times when the rights of parents must be balanced against the rights of children.” (Mont. Code Ann. § 40-4-228, preamble). To determine when this balancing is appropriate, courts consider whether the non-parent has established a parent-child relationship with the minor, as defined in § 40-4-211:

“child-parent relationship” means a relationship that exists, or did exist, in whole or in part . . . 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.

As such, Montana Code § 40-4-228 codifies the principle that in certain situations, the best interest of the child can be protected only by allowing the child to continue her relationship with the adult who has acted as that child’s parent.

Montana courts have similarly recognized the changing nature of the American family and the fact that many children are now being successfully raised by *de facto* parents. In *In re Marriage of K.E.V.* (1994), 267 Mont. 323, the Montana Supreme Court refused to allow a mother to argue that her husband did not have a father-child relationship with her son, even though the husband was not the child's biological father and had not legally adopted the child. *Id.* at 334. The court explained:

[W]e have seen an increase in the number of families which are not the 'traditional' family composed of mother, father and their biological children. Family law courts have used several theories to reach an equitable result when there are children involved and where there are established parent-child relationships including persons other than their biological parents. These include equitable estoppel, equitable parentage, *in loco parentis*, *de facto* parent, and "psychological parent" theories. *Id.* at 330.

Finding that the mother's husband had established a legally-recognizable parent relationship with the child, notwithstanding the fact that the husband was not a biological or adoptive parent, the court explained that the husband "has a close, loving relationship with [the child] that is a very positive part of both of their lives which he wants to continue."

Montana is not alone in recognizing that an overly narrow definition of a parent can cause real harm to a child's healthy development. Many other states also recognize the concept of a *de facto* or psychological parent. For example, courts in New Jersey, Rhode Island, Colorado, Washington, Massachusetts,

Wisconsin and Pennsylvania have found the existence of parental interests in similar cases, either through the *de facto* parent standard or through an equivalent standard. See, e.g. *Holtzman v. Knott (In re Custody of H.S.-H.K.)* (1995), Wis., 533 N.W.2d 419, 423 (quoting Dane County Circuit Court Judge George A.W. Northrup) (“Lack of love and guidance in the lives of children is a major problem in our society. Does it make any sense for the law to worsen this sad fact by denying a child contact with the one they have come to accept as their parent, especially when it clearly appears to be in the best interest of the child?”); *V.C. v. M.J.B.* (2000), N.J., 748 A.2d 539, 550 (“At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.”); *Rubano v. DiCenzo* (2000), R.I., 759 A.2d 959, 974; *Clark v. McLeod (In re Interest of E.L.M.C.)* (2004).

Given the emotional and developmental harm that can result when a relationship between a parent and child is severed, it is critical that this Court recognize the constitutionality of Mont. Code Ann. § 40-4-228 and the right of Ms. Kulstad and other *de facto* parents to protect the parental interests they have

developed, so that the best interests of children continue to be appropriately considered in custody decisions.

**B. The United States Constitution Recognizes the Rights of Children and Their *de Facto* Parents**

Not only does Montana state law protect the rights of *de facto* parents, the United States Constitution also protects these rights. For example, *Prince vs. Massachusetts* is often cited for the proposition that a parent has a fundamental right to provide care, to maintain custody, and to nurture their children. *Prince vs. Massachusetts* (1943), 321 US 158, 166. Yet the parent in *Prince* was neither the child's biological nor the child's adoptive mother; instead she was the child's "custodian" and aunt – a *de facto* parent. *Id.* at 159. Similarly, in *Moore v. City of East Cleveland* (1977), 431 U.S. 494, the Court found that a relationship between a grandmother and two grandsons who lived with her was constitutionally protected. 431 U.S. 494, 502 (1977). And, in *Smith v. Organization of Foster Families for Equality and Reform*, the Court recognized that, under some circumstances, constitutionally-protected parental rights extend beyond "natural parents" and foster children may have constitutionally-protected relationships with their foster parents. *Smith v. Organization of Foster Families for Equality and Reform* (1977), 431 U.S. 816, 843 and 849. The Court explained that the parental interests of *de facto* parents are essentially the same and are equally as important as those of legal parents:

[T]he importance of the familial relationship to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promoting a way of life’ through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.

*Id.* at 844 (quoting *Wisconsin v. Yoder* (1972), 406 U.S. 205, 231-233). *See also Lehr v. Robertson* (1983), 463 U.S. 248, 261.

Thus, like the Montana Code, the United States Constitution recognizes that children can form deep emotional bonds with adults other than their legal parents, and that in certain circumstances those relationships must be protected. This is one such circumstance—LM and AM have formed parent-child bonds with Ms. Kulstad, and these critical relationships must be protected.

## **II. Social Science Research Confirms That, in Appropriate Cases, the Bond Between Children and Their Non-Biological, Non-Adoptive Parents Should be Protected and Maintained**

### **A. The Formation Of Attachment Bonds Is Critical To A Child’s Healthy Development**

Decades of child development research demonstrates that children form important attachment bonds to parental figures early in life, and that these bonds strengthen and develop as the children grow older. *See, e.g.*, John Bowlby, Attachment (2d ed. 1982), 1-3, 177, 265-68; Melvin Konner, Childhood (1991), 84-87. Attachment bonds/relationships are the “reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver.” Beverly James,

Handbook for Treatment of Attachment-Trauma Problems in Children (1994), 2. These bonds are distinguished from other bonds in that they involve the persons with whom “the child seeks security and comfort.” Jude Cassidy, *The Nature of the Child’s Ties*, in Handbook of Attachment: Theory, Research and Clinical Applications (Jude Cassidy & Phillip R. Shraver, eds. 1999), 3, 12. Attachment relationships constitute the most important relationships in the child’s life – “Attachment figures are one’s most trusted companions.” Mary D. Ainsworth, *et al.*, Patterns of Attachment: A Psychological Study of the Strange Situation (1978), 20. It is through attachment bonds that “children form their concepts of self, others and the world.” Beverly James, Handbook for Treatment of Attachment-Trauma Problems in Children (1994), 2.

Social science and medical research illustrate that attachment relationships have profound neurological effects and are among the major environmental factors shaping children’s brains during the period of maximal growth, creating the central foundation of a child’s development. *See, e.g.*, Daniel J. Siegel, The Developing Mind: Toward a Neurobiology of Interpersonal Experience (1999), 67-68, 81-87, 116-120; *see also* American Academy of Pediatrics: Committee on Early Childhood, Adoption, and Dependent Care, *Developmental Issues For Young Children in Foster Care* (2000), 106 Pediatrics 1145 (stating that “emotional and

cognitive disruptions in the early lives of children have the potential to impair brain development”).

These relationships shape the child’s social, emotional, and behavioral development. Specifically, “Attachment to a primary caregiver is essential to the development of emotional security and social conscience.” Am. Acad. of Pediatrics: Comm. on Early Childhood, Adoption, and Dependent Care, *Developmental Issues For Young Children in Foster Care* (2000), 106 Pediatrics 1145, 1146. “[W]hat young children learn, how they react to the events and people around them, and what they expect from themselves and others are deeply affected by their relationships” with their caregivers. Deborah Tharinger & Greg Wells, *An Attachment Perspective on the Developmental Challenges of Gay and Lesbian Adolescents: The Need for Continuity of Caregiving from Family and Schools* (2000), 29 Sch. Psychol. Rev. 158, 164. Secure attachment bonds lead to “the development of self-awareness, social competence, conscience, emotional growth[, and] emotion regulation.” Nat’l Research Council & Inst. of Med., From Neurons to Neighborhoods: The Science of Early Childhood Development, (Jack P. Shonkoff & Deborah A. Phillips eds., 2000), 22. These bonds provide children with protection against harm, a sense of emotional security, the ability to cope with stress, increased self-reliance and increased ability to “meet challenges and demands in a flexible manner.” Nat’l Research Council & Inst. of Med., *supra*, at



226; James G. Byrne, *et al.*, *Practitioner Review: The Contribution of Attachment Theory to Child Custody Assessments* (2005), 46 *J. of Child Psychol. and Psychiatry*, 115, 118.

**B. Attachment Relationships Develop Despite the Absence of a Biological or Legal Connection between the Parent and Child**

Attachment bonds develop between the child and a parental figure, regardless of whether the parent and child are biologically or legally linked. *See* Joseph Goldstein, *et al.*, *Beyond the Best Interests of the Child* (2d ed. 1979), 27; *see also* Leslie M. Singer, *et al.*, *Mother-Infant Attachment in Adoptive Families* (1985), 56 *Child Dev.* 1543, 1550. Attachment bonds are not determined by genetic material or legal papers. Instead these bonds develop from the “provision of physical and emotional care, continuity or consistency in the child’s life, and emotional investment in the child.” Nat’l Research Council and Inst. of Med., *supra*, at 234. A child is likely to develop an attachment relationship with any adult who:

on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent, as well as the child’s physical needs. The psychological parent may be a biological, adoptive, foster, or common-law parent,<sup>4</sup> or any other person.

Goldstein, *supra*, at 98.

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<sup>4</sup> The authors use the term “common law parent” to describe someone in Ms. Kulstad’s position, namely an adult whose parental role developed outside of adoption, legal custody, or biology.

The science overwhelmingly shows that it is the quality and nature of the interaction between parent and child, not a biological or legal connection, that create and sustain the attachment relationships that so critically impact a child's development. See Susanne Bennett, *Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies within Lesbian Adoptive Families* (2003), 20 *Child & Adolescent Soc. Work J.* 159, 161 (“[T]he nature of the interaction . . . is more important than the person’s legal or biological tie to the child.”); see also The American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents* (2002), 109 *Pediatrics* 341, 341 (finding that “[c]hildren’s optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes”); Raymond W. Chan, *et al.*, *Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers* (1998), 69 *Child Dev.* 443, 454 (“[O]ur results are consistent with the general hypothesis that children’s well-being is more a function of parenting and relationship processes within the family [than] household composition or demographic factors.”).

Ms. Kulstad has engaged in precisely the sort of day-to-day parenting activities described above. She provided “for the children’s physical, psychological, and developmental needs on a day-to-day basis much like with any

other two parent family.” *Kulstad v. Maniaci* (Sept. 29, 2008), No. DR-07-34, at p.8, ¶ 7. The District Court found, based on extensive testimony, that Ms. Kulstad cared deeply for LM and NM and that “the children have a strong attachment to ... Ms. Kulstad.” *Kulstad* at p. 10, ¶ 12.

### **C. Sexual Orientation Is Irrelevant To The Development Of Strong Attachment Bonds**

Studies have also concluded that a parent’s sexual orientation is immaterial to the formation and importance of children’s attachments, and that children are just as likely to form close bonds with gay and lesbian parents as with heterosexual parents. See The Am. Acad. of Pediatrics, *Family Pediatrics: Report of the Task Force on the Family* (2003), 111 Pediatrics 1541, 1550 (“[R]esearch has found that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships.”); A. Brewaeys, *et al.*, *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families* (1997), 12 Hum. Reprod. 1349, 1354 (“the quality of the parent-child interaction [does] not differ significantly between the biological and the [non-biological] mother.”); see *Bennett, supra*, at 159, 168 (finding that that the “quality of care was the salient factor in the establishment of an attachment hierarchy,” and “the nature of the interaction ... [was] more important than the person’s legal or biological tie to the child.”). See also *Bennett, supra*, at 167-68; S. Golombok, *et al.*, *The European Study of Assisted Reproduction Families: Family Functioning and Child*

*Development* (1996), 11 Hum. Reprod. 2324, 2330; Barbara M. McCandlish, Against All Odds: Lesbian Mother Family Dynamics, in Gay and Lesbian Parents (1987), 30-31 (Frederick W. Bozett, ed.) (finding that, in lesbian couples, when both women in the relationship care for a child, the child becomes attached to both).

Where both same-sex parents participate in the child's upbringing, the child will form a significant attachment relationship with each parent. A study evaluating child development in lesbian families found that:

[b]oth women in the lesbian mother family were actively engaged in child care and a strong mutual attachment had developed between [the non-biological] mother and child. It seems therefore at odds with reality to consider a lesbian household as a single mother family unit.

Brewaeys, *supra*, at 1356. Likewise, a clinical evaluation of preschool children of lesbian couples determined that when both women in the relationship care for a child, the child becomes attached to both. *See also* McCandlish, *supra*, at 30-31.

**D. Children Experience Severe Emotional and Psychological Harm When Their Attachment Relationships Are Severed**

Continuity of the parent-child attachment relationship is essential to a child's healthy development and overall well-being. "[T]he quality of the attachment . . . has profound effects on the child's social adjustment." Goldstein, *supra*, at 31-33; *see also* Ana H. Marty, *et al.*, *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver* (2005), 175 *Early Childhood Dev. and Care*

271, 274. Secure attachments in childhood are a necessary element to a child's ability to develop close relationships later in life, as they shape the child's attachment style, which in turn shapes how the child will form bonds with others. W. Andrew Collins & L. Alan Sroufe, *Capacity for Intimate Relationships: A Developmental Construction*, in The Development of Romantic Relationships in Adolescence (Wyndol Furman, *et al.*, eds. 1999), 125, 126-27. Collins & Sroufe found that "security of attachment in infancy strongly predicted preschool characteristics of self-reliance, effective peer relationships (including empathy and affective engagement), and positive relationships with teachers." *Id.* at 128 (citations omitted). In contrast, children without secure attachment styles "not only were significantly less competent in all of these respects, but also showed distinctive patterns of maladaptation." *Id.* at 128.

When a child's attachment relationship with a parent has been forcibly severed, the psychological impact on the child can be astounding. Children assume that they can depend on both parents, and "[w]hen that assumption proves incorrect, a child may question many other assumptions about the world; for example, whether he or she can count on the availability of *any* parent." William Hodges, Interventions for Children of Divorce: Custody, Access, and Psychotherapy (2d. ed. 1991), 8-9. When separated from an attachment figure, the child experiences a predictable sequence of four phases: denial, protest, despair,

and detachment. Rayford W. Thweatt, *Divorce: Crisis Intervention Guided By Attachment Theory* (1980), 34 *Am. J. of Psychotherapy* 240, 241. Ultimately, children may even “conclude that a parent’s absence is due to their own unlovability. Thus, abandonment by a noncustodial parent is a particularly devastating experience.” Hodges, *supra*, at 8-9.

Breaking an attachment bond can be so traumatizing as to completely change the child’s attachment style, leading to “insecure or avoidant attachment [in future relationships], interference with healthy object relations, and reorganization of cognitive understandings.” Hodges, *supra*, at 8-9. This can have devastating effects for the child, as “[A]ttachments buffer young children against the development of serious behavior problems, in part by strengthening the human connections and providing the structure and monitoring that curb violent or aggressive tendencies.” Nat’l Research Council and Inst. of Med., *supra*, at 265.

Thus, in the short-term, severing an attachment can lead to fear/anxiety, aggression, academic problems and elevated psychopathology. Marty, *supra*, at 271, 274; Byrne, *supra*, at 118. Other behavioral difficulties that may develop due to a disrupted attachment include “hiding or hoarding food, excessive eating or drinking, rumination, self-stimulating and repetitive behavior, and sleep disturbance.” Mark Simms, *et al.*, *Health Care Needs of Children in the Foster Care System* (2000), 106 *Pediatrics* 909, 912. The long-term effects of the

destruction of a child's relationship with his caregiver are equally devastating. Severing an attachment bond can result in the child developing an insecure or avoidant attachment style, leading to an inability or a reluctance to trust others in future relationships. Goldstein, *supra*, at 33; Hodges, *supra*; Collins & Sroufe, *supra*. Breaking a strong attachment bond can transform a securely attached child into “[a]n insecurely attached person [who] will anticipate rejection, unpredictability, or even cruelty . . . [e]ven when reality does not indicate these outcomes.” James X. Bembry & Carolyn Ericson, *Therapeutic Termination with the Early Adolescent Who Has Experienced Multiple Losses* (1999), 16 *Child & Adolescent Soc. Work J.* 177, 182-83. See also Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee* (2004), 10 *Psychol. Pub. Pol’y & L.* 5, 11 (Numerous empirical findings “provide a solid research basis for predictions of long term harm associated with disrupted attachment [relationships].); Am. Acad. of Pediatrics: Comm. on Early Childhood, Adoption, and Dependent Care, *supra*, at 1146 ((finding that interruptions in a child's care are often detrimental)); Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children* (2000), 38 *Fam. & Conciliation Courts Rev.* 297, 303 (explaining that “there is a substantial literature documenting the adverse effects of disrupted parent-child relationships on children's development and adjustment”).

Children, like LM and AM, who experienced the loss of an attachment relationship at an early age are even more in need of secure, continuing attachment relationships and are at greater risk from a subsequent loss. “[W]here continuity of such relationships is interrupted more than once . . . the children’s emotional attachments become increasingly shallow and indiscriminate.” Goldstein, *supra*, at 33. *See also* Am. Acad. of Pediatrics: Comm. on Early Childhood, Adoption and Dependent Care, *supra*, at 1146. LM already suffers from “reactive attachment disorder,” and AM “forms indiscriminate attachments.” *Kulstad* at ¶ 308. Therefore, “repeated separations of attachment relationships are likely to have a cumulative negative effect on [their] long-term psychological outcomes.” *Id.* at ¶ 42.

Studies of children of divorced parents confirm that these children are at risk of psychological harm if the child is separated from a parent to whom he or she is attached. *See, e.g.,* E. Mavis Hetherington, *et al.*, *What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children’s Adjustment* (1998), 53 *Am. Psychol.* 167, 169 (children who do not maintain contact with parents suffer a continuing sense of loss and sadness); Judith Wallerstein & Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (1980), 307 (finding that self-image of children from divorced families is “firmly tied to their relationship with both parents” and that children



“thought of themselves as children with two parents who had elected to go their separate ways”).

The research demonstrates that the distress experienced by a child upon termination of an attachment figure’s regular and customary role as a parent will occur even where there is no biological or legal connection between parent and child. See, e.g., Yvon Gauthier, *et al.*, *Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care* (2004), 25 *Infant Mental Health J.* 379, 394 (explaining that children suffer greatly when separated from non-biological parent figures); Mellisa Holtzman, *Definitions of the Family as an Impetus for Legal Change in Custody Decision Making: Suggestions from an Empirical Case Study* (2006), 31 *Law & Soc. Inquiry* 1, 2-3 (“[W]here nonbiological attachments already exist, it is not to the child’s benefit to sever either those ties . . . in order to satisfy the demands of exclusive parenthood.”).

**E. A Child’s Health And Well-Being Is Best Served By Nurturing And Maintaining Parent-Child Attachments**

In light of the importance of the parent-child bond and the primacy of that bond to the overall health and well-being of children, researchers generally agree that children benefit from continued contact with both parents following

separation.<sup>6</sup> See, e.g., Kelly & Lamb, *supra*, at 303-04; Denise Donnelly & David Finkelhor, *Does Equality in Custody Arrangement Improve Parent-Child Relationship?* (1992), 54 J. Marriage & the Fam. 837, 838 (observing that “one of the most important predictors of child adjustment following divorce appears to be the amount of contact the child has with the out-of-home parents”). Regular participation in routine, everyday activities with the nonresidential parent and frequent interaction with *both* parents in a variety of contexts has been shown to benefit children of separated parents. See Michael E. Lamb, *Placing Children’s Interests First: Developmentally Appropriate Parenting Plans* (2002), 10 Va. J. of Soc. Pol’y & the Law 98, 103, 113 (noting that “everyday activities promote and maintain trust and confidence in the parents, while deepening and strengthening child-parent attachments, and thus need to be encouraged when decisions about custody and access are made”).

These findings are no different for children whose parents are in same-sex relationships. See Charlotte J. Patterson, *Children of Lesbian and Gay Parents* (1992), 63 Child Develop. 1025, 1037 (concluding that when lesbian parents who have jointly raised a child since birth separate “it is reasonable to expect that the best interests of the child will be served by preserving the continuity and stability

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<sup>6</sup> The concept that children should have contact with both parents, in appropriate circumstances, is recognized throughout the world. For example, the United Nations Convention on the Rights of the Child specifies that nations “shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.” United Nations General Assembly, Resolution 44/25, November 20, 1989, Article 9, ¶ 3, Convention on the Rights of the Child.

of the child's relationship with *both* parents.”) (emphasis added). As such, the American Academy of Pediatrics advocates that children of gay and lesbian parents need and deserve the same permanence and security in parental relationships as the children of heterosexual parents. Committee on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, *Policy Statement: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 339 (February 2002).<sup>7</sup> Similarly, the American Psychoanalytic Association and the National Association of Social Workers have each concluded that gay and lesbian parents are capable of meeting the best interest of the child and should be afforded the same rights as heterosexual parents. See Am. Psychoanalytic Assoc., *Position Statement on Gay and Lesbian Parenting* (May 16, 2002) available at: <http://www.apsa.org/ABOUTAPSAA/POSITIONSTATEMENTS/GAYANDLESBIANPARENTING/tabid/471/Default.aspx>; Nat'l Assoc. of Soc. Workers, “Policy Statement: Lesbian, Gay, and Bisexual Issues” in *Social Work Speaks* (2006), 245, 247.

Social science research overwhelmingly shows that the best interests of children are served by protecting and maintaining a child's established attachment relationships. It is critical to children's development, psychological health, and general well-being to foster and promote, rather than destroy, parental attachments,

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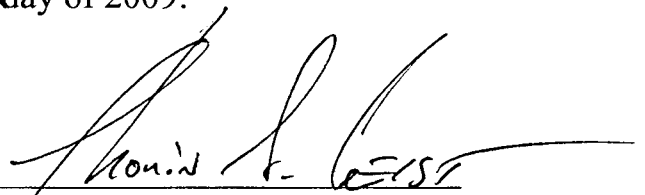
<sup>7</sup> Although the Academy's policies were formulated in the context of its recommendation for second-parent adoption, their reasoning is equally applicable to the issues presented in this case.

whether or not the parent is legally or biologically related, and whether or not the parents are same-sex or heterosexual. For this reason, any person who has a parent-child relationship that meets the demanding standard to show a “parental interest” under Montana Code § 40-4-228, must be given the opportunity to establish that a grant of custody or visitation rights in his or her favor would further the best interest of the child.

### **CONCLUSION**

Montana law recognizes that persons who have established true, fully-developed parent-child relationships, with the support and encouragement of the legal parent, have “parental interests” and therefore may be granted custody and visitation rights when it is in the best interest of the child. More than two decades of social science research confirms that (1) when two adults fully participate in raising a child, the child generally develops significant attachment bonds with *both* parents; (2) that these bonds form notwithstanding the absence of a biological or legal connection to the parent; and (3) breaking this parent-child attachment bond can be devastating to the child. Montana law appropriately recognizes the needs of children by allowing persons who have established true, fully-developed parent-child relationships, such as Ms. Kulstad, to petition for custody and visitation rights to preserve those relationships. The District Court’s decision protecting Ms. Kulstad’s parental rights should be upheld.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of 2009.



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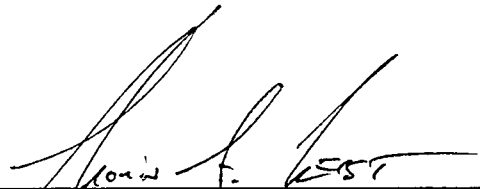
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## CERTIFICATE OF COMPLIANCE

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DATED this 22<sup>nd</sup> day of March, 2009.



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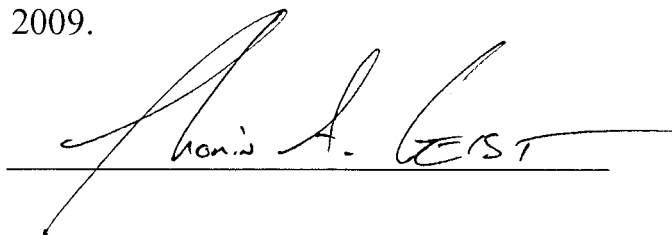
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