IN THE SUPREME COURT OF MONTANA
CAUSE NO. DA 08-0483

BARBARA L. MANIACI,
Respondent-Appellant,

v.

MICHELLE KULSTAD,
Petitioner-Appellee.

On Appeal from the Fourth Judicial District Court
Cause No. DR-07-34
Hon. Edward P. McLean

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion in awarding partial custody of the minor children to Ms. Kulstad?

2. Does § 40-4-228, MCA, constitutionally recognize that the rights of children to maintain parent-child relationships formed with the consent and encouragement of their natural parent must be balanced against the rights of the natural parent?

3. Did the District Court abuse its discretion in its evidentiary rulings?

4. Did the District Court abuse its discretion in finding that Ms. Maniaci had been unjustly enriched and awarding a constructive trust?

STATEMENT OF THE CASE

On January 19, 2007, Petitioner-Appellee, Michelle Kulstad filed a petition against Respondent-Appellant, Barbara Maniaci, seeking, among other things, an award of a "parental interest" under § 40-4-228, MCA, with respect to LM and AM, the two children who were adopted during the course of the couple's relationship, and equitable distribution of Ms. Kulstad's share of the parties' assets and debts. D.C. Doc. 1.[1]

Ms. Maniaci moved to dismiss, arguing that Ms. Kulstad could not maintain an action for a parental interest absent a termination of Ms. Maniaci's parental interest, and that a claim of unjust enrichment and equitable distribution of the property was improperly pled. D.C. Doc. 9 at 2, 4. The parenting claims were briefed first by the parties, and the District Court issued its order denying the motion to dismiss with respect to those claims on February 13, 2007. D.C. Doc. 15 at 2.

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[1] Ms. Kulstad's original petition was captioned "Petition for Dissolution of Marriage and Parenting." D.C. Doc. 1. In her Petition, Ms. Kulstad alleged that she and Ms. Maniaci, had agreed to assume toward one another all of the responsibilities of married people, exchanged rings, opened a joint checking account and held themselves out to people close to them as married. Id. at 2. The District Court rejected this claim on the grounds that "same sex marriage is not recognized in Montana," but allowed the remaining claims to go forward. D.C. Doc. 59 at 1-2.

Ms. Kulstad sought an Interim Parenting Plan. D.C. Doc. 16. The transcript of that hearing, held March 20, 2007, is part of the record on appeal. D.C. Doc. 62.[2] Extensive evidence was received concerning the parent-child relationship between Ms. Kulstad and the two young children. The evidence was so compelling that the District Court ruled from the bench: "This Court recognizes Michelle Kulstad as having a parental interest." Tr. 3/20/2007 at 256. On March 22, 2007, the District Court issued its Findings of Fact, Conclusions of Law and Order on the interim parenting plan, finding that the parties shared parenting duties and each had a parent-child relationship with the children. D.C. Doc. 46, Findings of Fact, Conclusions of Law and Order at 3. The Court thereafter adopted an interim parenting plan maintaining the relationship between the children and Ms. Kulstad. Id. at 7-10.

On April 23, 2007, the District Court issued its Opinion and Order, allowing the parties to move forward on the following two issues:

> 1. Have the parties commingled assets that require the Court to equitably divide the assets; and
> 2. Do both parties have a parental relationship with the children.

D.C. Doc. 59 at 3.

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[2] References to "Tr. 3/20/2007 __" are to the hearing held on March 20, 2007.

On May 22-23, 2008, a two-day final dispositional hearing was held on these issues. The District Court subsequently issued a 48-page decision on September 29, 2008, awarding Ms. Kulstad joint custody of the children and an equitable interest in the property developed and shared through the course of their domestic partnership. D.C. Doc. 368. Ms. Maniaci now appeals from that decision.

STATEMENT OF THE FACTS

I. Ms. Kulstad's Parental Relationship with LM and AM.

Ms. Kulstad and Ms. Maniaci met in 1995, and moved in together in 1996. In February 2001, Ms. Maniaci and Ms. Kulstad had the opportunity to adopt a son, LM. Tr. 68.[3] Ms. Maniaci knew the child's grandmother, who had suggested that they adopt the child. Tr. 70-71. Ms. Kulstad suggested that they set up a meeting and discuss the adoption. Tr. 74. The couple met the baby and both felt "very, very connected" to him. Tr. 75. Ms. Kulstad testified: "We both decided that we wanted [LM] in our family." Tr. 76.

Shortly thereafter, the grandmother called to say she believed the baby was in danger. Id. The baby needed medical care when Ms. Kulstad and Ms. Maniaci took custody. Tr. 77-78. He was severely asthmatic and had projectile vomiting. Tr. 78. His clothes smelled of vomit and smoke. Tr. 77. They soon took the child to the hospital. In filling out the forms for the baby's admission, the couple listed the child's last name as hyphenated "Maniaci-Kulstad." Pl. Ex. 10 (hospital admission form); Tr. 78-81.

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[3] References to "Tr. __" are to the transcript of the May 22-23, 2008 hearing.

The couple hyphenated LM's name at the time of admission to the hospital because they believed they would both be adopting LM together. Tr. 82. After Ms. Maniaci spoke with an attorney who advised them that same-sex couples could not both legally adopt,[4] they together decided that Ms. Maniaci would be the adoptive parent, because she would be the child's primary caregiver during the day while Ms. Kulstad worked outside of the home to support the family. Tr. 85. Ms. Kulstad was told she could be the baby's guardian and she believed that gave her some rights as a parent. Tr. 84. They together decided that LM would call Ms. Maniaci "Mom" and Ms. Kulstad "Shelly," not to differentiate their relationship with their son, but to protect him because they did not want "our family to be in kind of a retaliation– sort-of-thing with homophobic people." Tr. 86-87.

A home study was done for LM's adoption by Cindy Garthwait in June 2001. Tr. 87, 143; Pl's Exs. 22 and 23. Ms. Garthwait concluded after her investigation that Ms. Kulstad was "involved in the parenting of [LM] and planned to continue." Tr. 151. Ms. Garthwait testified at the hearing in this matter that although she knew she was doing the adoption homestudy "[l]egally . . . for Barbara...it was clear to me that it was considered a committed couple. And, so, I was interviewing and doing background on both of them." Tr. 141. Ms. Garthwait

[4] Ms. Kulstad is not suggesting that is the actual legal situation in the state, only that this was the representation made to the couple by an attorney.

assumed based on statements made by both parties that both Ms. Kulstad and Ms. Maniaci would be parents to the baby. Id. Ms. Maniaci admitted at trial that she had told Ms. Garthwait she and Ms. Kulstad would both be parenting the baby, although she attempted to characterize her prior statements as a "lie." Tr. 525. As part of Ms. Garthwait's investigation, she confirmed that the prospective parents had made "their commitment for a lifetime" and had made plans if one of the parents died. Tr. 151. Ms. Garthwait affirmed that Ms. Kulstad was committed to LM both emotionally and financially. Tr. 152.

In 2003, Ms. Maniaci suggested adopting another child. Ms. Kulstad was initially opposed. Tr. 96-97; Tr. 3/20/2007 at 218. However, Ms. Maniaci told her she "had to get on board," Tr. 95, and Ms. Kulstad helped complete the paperwork required for that adoption. Tr. 95-96. As part of Ms. Maniaci's research into adopting another child, she sought advice from an organization that advocates for rights for same-sex couples. Pl's Ex. 36. In her inquiry, Ms. Maniaci referred to Ms. Kulstad as her "partner", and stated that they together completed a private adoption of their previous child and together, "we" would like to adopt a baby girl. Id.

In connection with the second adoption, a home study was done by Dennis Radtke in April 2003. Tr. 268; Pl's Ex. 40. The home study report shows that

both Ms. Maniaci and Ms. Kulstad were intended parents to AM. See Pl. Ex. 40 at 1 ("An Adoptive Home Study was conducted on behalf of Barbara Maniaci and Michelle Kulstad."); id. at 6 ("Assessment of Barbara Maniaci's and Michelle Kulstad's Ability to Provide an Adoptive Home"). AM was adopted from Guatemala in May 2004. Despite her initial hesitation, Ms. Kulstad soon formed a close parent-child bond with AM, just as she had with LM. Tr. 95-96.

In his testimony at trial, Mr. Radtke stated that Ms. Kulstad and Ms. Maniaci were deeply committed to the welfare of LM. Tr. 273. He believed they demonstrated unequivocally that they were able to organize their lives and priorities around their children's well being. Id. As such, Mr. Radtke found Ms. Kulstad and Ms. Maniaci to be an "ideal family to adopt." Id. Ms. Maniaci testified at trial, however, that she had "lied" to Mr. Radtke, in the same way that she had "lied" to Ms. Garthwait during the first home study. Tr. 526.

Unfortunately, after deterioration in the couple's relationship, the parties began to separate in the fall of 2006, after LM had been in the family for five years and AM for over two years. This action was filed in January 2007. During the proceedings below, Ms. Kulstad and other witnesses confirmed that she was a parent in every way to the children, that the children viewed her as a parent, and that Ms. Maniaci held Ms. Kulstad out as a parent to LM and AM.

The March 20, 2007 Hearing on an Interim Parenting Plan

The District Court held an initial hearing on Ms. Kulstad's petition for a temporary parenting plan on March 20, 2007. D.C. Doc. 62. At that hearing, Ms. Kulstad presented extensive testimony about her parental relationship with her son and daughter, as did a friend of both parties, and two of LM's teachers.

Ms. Kulstad described her day-to-day parental relationship with the children at this hearing. She noted that she worked during the day to support the family, and cared for the children in the evening, when Ms. Maniaci would see her chiropractic patients. Tr. 3/20/2007 at 190-191. She was often the primary caregiver on weekends. Id. at 191-192. Ms. Kulstad confirmed, "I absolutely have a promise to those children that I will look after them for as long as I live... I'm totally committed to those children." Id. at 213.

One of LM's teachers, Carrie Brunger, from the Clark Fork School, testified that the people she understood to be part of LM's family were "Barbara and Shelly (Michelle)." Id. at 101. Ms. Brunger said that when LM was asked to draw a picture of his favorite summer experience, he drew a picture of "his moms, Shelly and Barbara, and [AM] down in the lower corner of the piece." Id. at 102. Another teacher, Laura Loveland, confirmed LM perceived his family to be "Barbara, Shelly and [AM]." Id. at 164. Both Ms. Kulstad and Ms. Maniaci

picked up LM after school, and Ms. Kulstad often would drop off LM and stay with him to help him in school. Id. at 166. Ms. Maniaci was a parent driver on a field trip and came to family activities at the school. Id. at 167.

Kelly Chadwick, long-time friend and neighbor of both parties, confirmed that they represented themselves as a couple, and had intended to raise both of the children together. Id. at 170. Ms. Chadwick testified that she frequently saw Ms. Kulstad caring for the children as a parent would. Id. at 176.

At the conclusion of this hearing, the District Court ruled from the bench that Ms. Kulstad had a parental interest, and established an interim parenting plan granting Ms. Kulstad regular visitation with the children. Id. at 256-58.

The final dispositional hearing

Additional testimony about the close parental relationship between Ms. Kulstad and the children was heard during the two-day hearing in May 2008. Ms. Kulstad testified in greater detail about her relationship with the children. Tr. 74-96, 103-07, 440-42. Dr. Cindy Miller, the court-appointed parenting expert who had performed a parental evaluation of the family in accordance with the order of the District Court (D. C. Doc. 230), testified that the children had a "strong relationship and attachment to Ms. Kulstad, and enjoyed and appreciated their time with her." Tr. 316-17. She confirmed that Ms. Kulstad was a "psychological

parent" to the children both before and after the separation from Ms. Maniaci. Tr. 320. Dr. Miller stressed that Ms. Kulstad was a "stabilizing force in the children's lives." Tr. 323.

Dr. Miller also testified about the extensive psychological harm the children could suffer if Ms. Maniaci were allowed to sever their relationship with Ms. Kulstad. Tr. 318. She believed it would negatively affect their model of relationships and impair their ability to have stable and healthy relationships in the future. Tr. 319. Dr. Miller confirmed that separation of the children from Ms. Kulstad could "have profound effects down the road" that were likely "permanent." Tr. 344-45.

Dr. Paul Silverman, the court-appointed therapist who began seeing LM in April 2007 and AM in October 2007, testified that Ms. Kulstad had a parent-child relationship with both children and provided a secure base for them. Tr. 469, 477. He confirmed that Ms. Maniaci shows a great deal of animosity toward Ms. Kulstad, which she communicates to the children. Tr. 473-75. Dr. Silverman further testified that he believed the children should have continued contact with Ms. Kulstad and that terminating the relationship "would be detrimental to them." Tr. 477.

In reaching this conclusion, the Court relied upon testimony and exhibits from Ms. Kulstad that showed she had spent funds acquired prior to the relationship to support herself and Ms. Maniaci. FOF at ¶ 7; Pl's Ex. 13. Deducting a family loan, and dividing the pre-relationship funds in half to account for expenditures Ms. Kulstad had made for her own support, the Court concluded that Ms. Maniaci owed Ms. Kulstad an amount equal to $101,824.43, and placed a judgment lien on the real property in that amount. COL at ¶¶ 38-39.

SUMMARY OF ARGUMENT

Michelle Kulstad and Barbara Maniaci lived together in a committed relationship from 1996 until 2006, when they separated. During the course of the relationship, they brought two children, LM and AM, into their home. While Ms. Maniaci was the adoptive parent to the children, Ms. Kulstad is every bit as much their mother. As the District Court found, with Ms. Maniaci's consent, Ms. Kulstad functioned as a parent to the children and was–and is–viewed by them as a parent. Ms. Maniaci cannot now change her mind, and separate the children from the person they know as their other parent, just because her relationship with Ms. Kulstad has ended.

The District Court properly found that Ms. Kulstad has satisfied the statutory requirements to seek a parental interest under §§ 40-4-211, 228, MCA. By allowing Ms. Kulstad to be a parent to these children, and to form a committed parent-child relationship over many years, Ms. Maniaci engaged in conduct inconsistent with her parental interest, within the meaning of § 40-4-228(2)(a), MCA. Alternatively, the District Court correctly held that equitable principles would prevent Ms. Maniaci from denying the *de facto* parent-child relationship that she created. The District Court's award of joint custody to Ms. Kulstad is fully supported by the

evidence, which included extensive expert testimony about the harm to the children that would ensue if they lose their relationship with Ms. Kulstad.

While the rights of parents to control the upbringing of their children are constitutionally protected, they are not unlimited. Section 40-4-228, MCA, balances the rights of parents against the competing constitutional rights of children to maintain important parent-child relationships, and requires a showing that an award of custody or visitation under the statute be supported by clear and convincing evidence. Contrary to Ms. Maniaci's assertions, this Court's prior cases have never held that a person who allows another person to jointly parent her children with her, as one of their two parents, has a constitutional right to sever the parental ties that she herself helped forge.

Similarly, the District Court's rulings that Ms. Kulstad is entitled to a constructive trust to prevent unjust enrichment of Ms. Maniaci are fully supported by the record, and the findings are not an abuse of discretion. Ms. Kulstad spent her life-savings supporting Ms. Maniaci and herself, including making extensive improvements to the home they lived in together, in reliance on promises made by Ms. Maniaci that the property would be equally divided in the event that the couple broke up. Rather than honor her promise, Ms. Maniaci now attempts to argue that she is owed "rent" by her

former partner. The District Court properly rejected Ms. Maniaci's claims and the constructive trust award should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING MS. KULSTAD PARTIAL CUSTODY OF THE CHILDREN.

A. The District Court Properly Found That Ms. Kulstad Satisfied The Statutory Requirements To Establish A Parental Interest In The Children.

The general standard for review of child custody decisions is whether the trial court abused its discretion. In re the Marriage of Graham, 2008 MT 435, ¶ 8, 347 Mont. 483, 484, 199 P.3d 211, 213. When the findings are supported by substantial credible evidence, this Court will affirm the district court's decision unless a clear abuse of discretion is shown. Toavs v. Buls, 2006 MT 68, ¶ 7, 331 Mont. 437, 438, 133 P.3d 202, 203. In deciding whether the trial court abused its discretion, this Court reviews whether the trial court "acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." Albrecht v. Albrecht, 2002 MT 227, ¶ 7, 311 Mont. 412, 415, 56 P.3d 339, 342.

Section 40-4-228, MCA, requires that a petitioner seeking a parental interest demonstrate three elements by clear and convincing evidence: (1) that the natural parent engaged in conduct contrary to the parent-child relationship; (2) that the petitioner has established a parent-child relationship

as defined in § 40-4-211, MCA; and (3) that it is in the child's best interests for the relationship to continue. § 40-4-228, MCA.

Although § 40-4-228 requires a showing of clear and convincing evidence, that does not alter *this Court's* standard of review of the District Court's decision. See, e.g., Czapranski v. Czapranski, 2003 MT 14, ¶¶ 17, 19, 314 Mont. 55, 61-62, 63 P.3d 499, 503-04 (rejecting argument that there is a higher standard for appellate review in parental termination cases, which also require a showing of clear and convincing evidence before the district court, and applying abuse of discretion standard in appellate review). Thus, the only question here is whether the District Court abused its discretion in finding clear and convincing evidence of a parental relationship and awarding joint custody to Ms. Kulstad.

The findings challenged here are soundly supported by the evidence in the record, and there is no indication that the District Court misapprehended or otherwise erred in weighing that evidence. Cf. Columbia Grain Intern. v. Cereck (1993), 258 Mont. 414, 418, 852 P.2d 676, 678 (describing clear error standard of review). Accordingly, there is no basis for Ms. Maniaci's claim that the District Court abused its discretion.

1. Ms. Maniaci engaged in conduct contrary to the parent-child relationship.

With respect to the first element, showing the natural parent engaged in conduct contrary to the child-parent relationship, the District Court held that Ms. Maniaci acted contrary to the parent-child relationship by allowing Ms. Kulstad to form a parent-child relationship with the children and assume a full parental role. The District Court acknowledged that Ms. Maniaci was granted the right to be the children's exclusive legal parent when she adopted them, and found that Ms. Maniaci's own actions, from the time the children entered the home and were later adopted, were entirely inconsistent with an exclusive parent-child relationship because she and Ms. Kulstad co-parented the children as a family unit. COL at ¶¶ 15-20. The District Court's interpretation of the statute and its application of it are reasonable and supported by the record, and certainly cannot be characterized as "clearly erroneous."Ms. Maniaci admittedly represented to both people performing the home studies that she would co-parent with Ms. Kulstad.[5] The children were brought into the home that she and Ms. Maniaci shared. Ms. Kulstad cared for the children on a daily basis as any parent would. She

[5] While Ms. Maniaci argued at the hearing in this action that those statements were "lies," Tr. at 526-26, the District Court was well within its discretion to disbelieve her self-serving recharacterization of her previous statements.

worked outside the home to support the family, and took care of the children in the evenings and on weekends. In short, it was the clear intention of Ms. Maniaci and Ms. Kulstad that they would both be parents to the children, and both did indeed form a shared parental relationship with the children consistent with that intent. Such conduct is, as the District Court found, contrary to the exclusive parental interest that Ms. Maniaci acquired at the time of the adoptions.

Ms. Maniaci argues on appeal that the District Court erred because, she claims, there are only two ways of showing conduct contrary to her parental interest: under § 40-4-228(2)(a), MCA, which Ms. Maniaci contends is restricted to a showing of abuse and neglect, and under § 40-4-228(4), MCA, which she claims requires a showing that she allowed another person to stand *in loco parentis* to the exclusion of the parent. Ms. Maniaci's arguments are without merit.

Section 40-4-228, MCA, provides, in subsection (2), that a court may award parental interest to a person other than a natural parent when

> (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 . . .

Id. Nothing in this section contains any suggestion that it is limited to a finding of abuse or neglect.[6] This Court may not insert its own limitations into the plain wording of the statute. See § 1-2-101, MCA (The "office of the judge is simply to ascertain and declare what is...contained therein, not to insert what has been omitted or to omit what has been inserted."); State v. Merry, 2008 MT 288, ¶ 12, 345 Mont. 390, 392, 191 P.3d 428, 430. Accordingly, the District Court properly interpreted the statute to include a situation where a parent acts contrary to her exclusive parental interest by consenting to and encouraging the development of a parent-child relationship between another and her children.[7]

Ms. Maniaci also argues that subsection 4, 40-4-228, MCA, is the only way to establish conduct contrary to a parental interest. Subsection 4 states that "[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." § 40-4-228(4), MCA (emphasis added). By

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[6] Indeed, § 40-4-228(5), MCA, states "[i]t is not necessary for the court to find a natural parent unfit before awarding a parental interest to a third party under this section."

[7] As discussed below, infra 35-36, 44-45, a number of other state courts have recognized that consenting to parent with another person is contrary to an exclusive parent-child relationship.

its plain language, subsection (4) merely illustrates *one example* of actions that would satisfy the requirements of subsection 2(a). If subsection (4) were intended to describe the *only way* in which a parent can act contrary to the parent-child relationship, there would be no reason to include it as a subsection of the statute separate from subsection 2(a), and it would clearly indicate that it was intended to be exhaustive. Moreover, even if § 40-4-228(4), MCA, could be construed as not illustrative but mandatory, it is clear that this record meets that standard. The record uncontrovertedly shows that Ms. Kulstad was a parent to the children for the same period of time as Ms. Maniaci. They were brought into the home that she and Ms. Maniaci shared. Ms. Maniaci allowed Ms. Kulstad to care for the children on a daily basis as any parent would. And, the children view Ms. Kulstad as one of their two parents.

Contrary to Ms. Maniaci's suggestion, the term *in loco parentis* does not require that the children be cared for when Ms. Maniaci is absent, and no such limitation is in § 40-4-228(4), MCA, or any other Montana statute. "*In loco parentis*" means simply "in the place of a parent." Ms. Kulstad certainly acted "in the place of a parent" in this case by co-parenting the children. See, e.g., T.B. v. L.R.M., 567 Pa. 222, 232-33, 786 A.2d 913, 919 (2001) (in determining whether a non-legal parent stood *in loco parentis*,

"whether or not [the child] was left in the 'sole' care of [the non-biological parent] is not controlling as [she] has demonstrated that she assumed a parental status and discharged parental duties").

Ms. Maniaci's reliance on Peterson v. Kabrich (1984), 213 Mont. 401, 691 P.2d 1360, in support of her claim that a person must act as a parent to the exclusion of the natural parent to satisfy the definition of *in loco parentis*, is unavailing. Peterson contains no such requirement or suggestion:

> In order to stand *in loco parentis* to another, a person must intentionally assume the status of a parent by accepting those responsibilities and the obligations incident to the parental relationship without the benefit of legal adoption. [citations omitted].

Id. at 408, 691 P.2d at 1364. As the District Court's found, this is exactly what Ms. Kulstad did here by acting as a parent to LM and AM for the last eight and five years, respectively.[8]

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[8] In Peterson, the question before the Court was whether a transfer of real property from an aunt to her nephew was a gift or a loan. The Court held that the aunt did not stand *in loco parentis* (which would create a presumption that the transfer was a gift), because while she was admittedly close to him, there was no evidence that she had ever acted as his parent. Id. at 408, 691 P.2d at 1364. Similarly, Nieman v. Howell (1988), 234 Mont. 471, 764 P.2d 854, also relied on by Ms. Maniaci, involved the issue of whether payments made by a stepfather were gifts. The Court rejected the argument that he stood *in loco parentis* to his stepson because there was "no evidence in the record which establishes [that] fact." Id. at 475, 764 P.2d at 856. Here, in contrast, the District Court found clear and convincing

Accordingly, the District Court's findings that Ms. Maniaci acted contrary to her parental interests by creating and fostering a co-parenting relationship between Ms. Kulstad and the children, and allowing that relationship to continue for many years, are grounded in the plain language of the statute and are fully supported by the record.

2. Ms. Kulstad has a parent-child relationship with LM and AM.

The second factor in § 40-4-228, MCA, requires a finding that the petitioner established a parent-child relationship as defined in § 40-4-211, MCA. Section 40-4-211, MCA, defines parent-child relationship as:

> a relationship that 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 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 the District Court recognized, the parties understood that "they would function equally as parents. FOF at ¶¶ (B)(4) and (6). Moreover, the Court found, Ms. Kulstad has "provided for the children's physical, psychological,

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evidence of a parental relationship, including the assumption of the responsibilities and obligations of parenting.

and developmental needs on a day-to-day basis much like with any other two-parent family." Id. at ¶ (B)(7).

Notwithstanding the extensive evidence of a parent-child relationship in the record, Ms. Maniaci contends that Petitioner's testimony and the history of her relationship with the children was insufficient, and that the District Court erred in reaching some of its specific factual conclusions. The testimony presented below, however, was more than enough to show a parent-child relationship between Ms. Kulstad and the children.

Ms. Kulstad's testimony was credible and compelling. The testimony of Ms. Garthwait and Mr. Radtike, who performed the home studies for the adoptions of LM and AM, was also credible and persuasive. Dr. Miller's evaluation and testimony showed unequivocally the close parental ties with Ms. Kulstad. All this evidence was more than sufficient to support the findings of the District Court. See, e.g., In re Marriage of Baer, 1998 MT 29, ¶ 22, 287 Mont. 322, 329, 954 P.2d 1125, 1129 (noting that it was up to the District Court to judge the credibility of the witnesses and the weight given to their testimony).

Additional evidence of a parent-child relationship was presented at the hearing on the temporary parenting plan on March 20, 2007 to establish Ms. Kulstad's standing to proceed in her claim for a parental interest.[9] The District Court incorporated evidence from this hearing into its Findings of Fact, in which it referred to testimony of friends and teachers to support a finding of a parental interest. See, e.g., FOF at ¶ B(6) (noting that Ms. Kulstad's mother was referred to as "Grandma Evelyn" and her sister as "Aunt Cindy," to which Ms Kulstad testified on March 20, 2007 (Tr. 3/20/2007 at 188)); FOF at ¶ B(8) (noting that "[LM]'s teachers in 2005 and 2006 testified that [LM] understood Ms. Kulstad to be part of his family and

[9] Ms. Maniaci has not challenged the admissibility of the March 20, 2007 hearing transcript and related documents in her opening brief, and therefore has waived her right to do so. It was well within the District Court's discretion to consider the transcript of that hearing in making its factual findings. See, e.g., In re A.H.D., 2008 MT 57, ¶ 38, 341 Mont. 494, 506-07, 178 P.3d 131, 139 (evidence of prior hearings is incorporated into parental termination hearings). It is well-established in custody cases that the District Court maintains on-going jurisdiction and must continue to evaluate the nature of the custodial interest. See § 40-4-219, MCA (amendment of parenting plan). Indeed, failure to consider prior facts and circumstances surrounding an original parenting plan has been held to be error. In re Marriage of Johansen (1993), 261 Mont. 451, 455-56, 863 P.2d 407, 410. To hold otherwise would require district courts to ignore what they learned at prior hearings in the same proceedings, and waste judicial resources by requiring parties to repeatedly present the same evidence. Here, the District Court restricted the parties to only six hours each at the final hearing, presumably because it had already held an extensive hearing on whether Ms. Kulstad had a parental interest.

one of his mothers," based on testimony from Carrie Brunger and Laura Loveland at the March 2007 hearing (Tr. 3/20/2007 at 101-102; 164-165)).[10]

Ms. Maniaci argues specifically that the District Court abused its discretion in finding Ms. Kulstad provided for the physical and psychological needs of the children *before* the lawsuit was filed, citing testimony from Dr. Silverman. The fact that Dr. Silverman, who did not begin treating the children until after the parties had separated, could not specify when precisely the parent-child relationship began has no bearing on the ultimate findings reached by the District Court, which were supported by ample testimony from other witnesses.

Lastly, Ms. Maniaci claims that the District Court erred by failing to consider evidence from her witnesses that the children did not regard Ms. Kulstad as a parent. Appellant's Brief ("App. Brf.") at 33-37. This contention should be readily dismissed as it effectively requests this Court to invade the province of the District Court in evaluating the weight and

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[10] Ms. Maniaci also now challenges the District Court's finding that LM made drawings of his family that included Ms. Kulstad, but contrary to Ms. Maniaci's assertion, this finding was supported by the record. Ms. Brunger testified that when asked to draw a picture of his favorite summer experience with his family, L.M. "drew a picture of his moms, Shelly and Barbara." Tr. 3/20/2007 at 102.

credibility of the evidence. Here, the District Court was entitled to credit the witnesses it found credible, and, having considered the evidence presented throughout the proceedings below, properly found a parent-child relationship between Ms. Kulstad and the children. On this record, that finding cannot be said to be an abuse of discretion.

3. Maintaining the parent-child relationship between Ms. Kulstad and her children is in their best interest.

The final element under § 40-4-228, MCA, is whether continuation of the parent-child relationship is in the best interests of the children. The District Court found that Ms. Kulstad was a "loving and stable force in the children's lives," FOF at ¶ B(21), and that "[t]erminating or reducing Ms. Kulstad's contact with the children presents a risk of harm to their healthy development, especially given their developmental histories before they came to live with the parties." Id. at ¶ B(18). The District Court further found that "Ms. Maniaci has introduced no credible evidence to show that continuing the children's relationship with Ms. Kulstad is not in their best interest." Id. at ¶ B(22). While Ms. Maniaci challenges the District Court's reliance on certain evidence, the Court's findings are amply supported by the overwhelming evidence in the record, including the testimony of Drs. Miller and Silverman, and must therefore be accepted on appeal. Cf. Albrecht v.

Albrecht, 2002 MT 227, ¶ 7, 311 Mont. 412, 56 P.3d 339 (describing standard of review).[11]

Ms. Maniaci asserts that the District Court improperly relied on evidence that was not in the record in determining the children's best interests. App. Brf. at 40-42. The findings she challenges, however, were based on evidence from the March 20, 2007 hearing, which was properly considered by the District Court. See supra note 10.

Ms. Maniaci also challenges the District Court's reliance on the reports of Ms. Cowley, the guardian *ad litem* for the children who, according to Ms. Maniaci, was dismissed[12] before Ms. Maniaci had the opportunity to cross-examine her. Ms. Cowley reported to the Court at the March 20, 2007 parenting hearing, and was available for cross-examination. Tr. 3/20/2007 at 254-60. After Ms. Maniaci objected to the introduction of Ms. Cowley's

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[11] Accordingly, while, as discussed below, Ms. Kulstad disagrees with Ms. Maniaci's specific evidentiary arguments, the factual findings she challenges were not required to reach the determination that preserving the relationship is in the children's best interest.

[12]Ms. Maniaci again mischaracterizes the record when she asserts that Ms. Cowley was dismissed "because of an irreconcilable conflict of interest." App. Brf. at 40. When she attempted at trial to characterize Ms. Cowley's dismissal as stemming from a conflict, the District Court expressly disagreed. Tr. Vol I-A at pp. 72-73 ("Well, I don't know I agree with that statement, at all . . . your preliminary statement [that she is being dismissed due to a conflict] is not the opinion of the court").

reports at trial, she was told by the Court to call Ms. Cowley for cross-examination if she wished. Tr. 266-67. She did not. Ms. Maniaci cannot now complain simply because she failed to take advantage of her right to cross-examine Ms. Cowley.

Ms. Maniaci also asserts that the District Court improperly concluded that she played a tape recorder nightly for each child stating that Ms. Kulstad was "not their mommy." This evidence was properly before the District Court through the testimony of Dr. Miller. Tr. 310-12. Ms. Maniaci's complaint that the District Court "overlooked" the testimony of Dr. Silverman on this subject, App. Brf. at 42, is unfounded. There is no evidence that the District Court failed to consider Dr. Silverman's testimony. The court was within its discretion in evaluating the testimony before it to conclude that Ms. Maniaci had played the tape recorder. Further, the court's finding that maintaining the parent-child relationship between Ms. Kulstad and the children is in the children's best interest has ample support in the record, regardless of this particular finding.

B. Alternatively, The District Court Properly Found Ms. Kulstad Is Entitled To Seek Visitation As A *De Facto* Parent To Her Children.

In addition to holding that Ms. Kulstad had satisfied the requirements of § 40-4-228, MCA, to seek a parenting plan, the District Court also held

that she was entitled to recognition as a *de facto* parent under equitable principles. COL at ¶¶ 21-27. These equitable principles provide another basis to uphold the District Court's decision and protect the child-parent relationship between the children and Ms. Kulstad.

In In re Marriage of K.E.V. (1994), 267 Mont. 323, 883 P.2d 1246, this Court recognized that equitable principles may properly be invoked to protect children:

> [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, 883 P.2d at 1251. As the District Court noted, a *de facto* parent is "'an individual who, in all respects, functions as a child's actual parent . . .'" COL at ¶ 25 (quoting In re Parentage of L.B., (2005), 155 Wn.2d 679, 687-688, n.6, 122 P.3d 161, 166, n.6).

In the leading case of In re Custody of H.S.H.-K. (Holtzman v. Knott), 533 N.W.2d 419 (Wis. 1995), the Wisconsin Supreme Court recognized a lesbian *de facto* parent's "parent-like relationship" with a child whom she had raised since birth with her former partner. The Wisconsin Supreme Court held that while she did not meet the statutory requirements, that did

not "supplant or preempt the courts' long-standing equitable power to protect the best interest[s] of [the] child by ordering visitation in circumstances not included in the statute." Id. at 425. The court set forth the test for establishing a "parent-like" relationship that has become the foundation for several later decisions:

> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Id. at 435-36; see also In re Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005); T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001).

Consistent with these equitable principles, the District Court held that Ms. Kulstad had shown that she was a *de facto* parent to the children by clear and convincing evidence. See COL at ¶ 27. Specifically, the court noted that Ms. Maniaici had fostered the parent-child relationship; that Ms. Kulstad had "participated in [the children's] daily lives as a co-equal parent without restriction"; that Ms. Kulstad had taken on the responsibilities of

Here too, Ms. Maniaci assured Ms. Kulstad and others – including even the individuals responsible for conducting homestudies before the children were adopted – that Ms. Kulstad would be a parent to the children. Ms. Kulstad relied on these representations and provided emotional and financial support for the children, and formed a parental bond with them. Because Ms. Maniaci fostered a child-parent relationship between the children and Ms. Kulstad, equity prevents her from now acting to sever that relationship to the detriment of the children and Ms. Kulstad.[14] Accordingly, equitable principles provide an alternative means of protecting the parental relationship between Ms. Kulstad and the children.

II. RECOGNIZING THE PARENT-CHILD RELATIONSHIP BETWEEN MS. KULSTAD AND THE CHILDREN APPROPRIATELY BALANCES THE RIGHTS OF THE PARTIES AND IS CONSISTENT WITH THE STATE AND FEDERAL CONSTITUTION.

The District Court found that recognition of Ms. Kulstad's parental relationship with the children under § 40-4-228, MCA, or equitable

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[14] Contrary to Ms. Maniaci's suggestion, see App. Brf. at 39, the fact that Montana may not allow unmarried couples to jointly adopt a child has no bearing on whether or not Ms. Kulstad may be considered a *de facto* parent. This equitable principle must be invoked precisely because no adoptive relationship exists between the children and Ms. Kulstad. Moreover, *de facto* parent-child relationships are based on the relationship between the adult and the child, not the relationship between two adults.

principles, was fully consistent with balancing the constitutional rights of all the parties involved in these proceedings. Ms. Maniaci, however, argues that this Court should strike down § 40-4-228, MCA, as unconstitutional.

"Statutes enjoy a presumption of constitutionality; therefore the party making the constitutional challenge bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional, and any doubt must be resolved in favor of the statute." State v. Michaud, 2008 MT 88, ¶ 15, 342 Mont. 244, 247, 180 P.3d 636, 639. As discussed below, § 40-4-228, MCA, reflects a conscious balancing of the rights of all parties to parenting proceedings – the natural parent as well as the children. Because it is constitutional as applied here, Ms. Maniaci's facial challenge must be rejected. Cf. United States v. Salerno, 481 U.S. 739, 745 (1987). Thus, this Court need not — and should not — address whether there might be some other contexts in which its application might approach the limits of constitutionality. Any determination of the full permissible breadth of § 40-4-228, MCA, should be answered in a case that squarely presents the issue. See, e.g., Wolfe v. State, Dep't of Labor & Industry (1992), 255 Mont. 336, 339, 843 P.2d 338, 340 (noting principle of avoiding ruling on constitutional issues where possible).

A. Recognition Of A Child-Parent Relationships Formed With The Consent And Encouragement Of The Legal Parent Is Constitutionally Permissible.

Both this Court and the U.S. Supreme Court have recognized that parents have a fundamental right to the care and custody of their children. See, e.g., In re Parenting of J.N.P., 2001 MT 120, 305 Mont. 351, 27 P.3d 953; Polasek v. Omura, 2006 MT 103, ¶ 15, 332 Mont. 157, 162, 136 P.3d 519, 522-23; Troxel v. Granville, 530 U.S. 57 (2000). Consistent with those rights, this Court has held that "the state's ability to intrude upon the parent/child relationship must be guarded." In re A.R.A. (1996), 277 Mont. 66, 71-72, 919 P.2d 388, 391-92.

"[B]ecause Montana law recognizes the importance of the rights involved in the natural parent-child relationship, the legislature has enacted a variety of statutory schemes pertaining to custody of children and the manner in which a third party, non-parent, may intercede in the parent-child relationship." In re Parenting of D.A.H., 2005 MT 68, ¶ 8, 326 Mont. 296, 298, 109 P.3d 247, 249. These procedural requirements must be followed to protect parents and children, and ensure that the appropriate balance is struck between potentially competing interests. See Girard v. Williams, 1998 MT 231, ¶ 24, 291 Mont. 49, 58, 966 P.2d 1155, 1160 ("District Courts must identify and adhere to the proper procedure and standards to be

used in the proceedings before them. Only then will the fundamental rights and relationship existing between the parent and child be fully realized, or when necessary, properly severed.") (quoting Guardianship of Aschenbrenner (1979), 182 Mont. 540, 553, 597 P.2d 1156, 1164.[15] Here, Ms. Kulstad followed the procedures set forth in the statute, and, as discussed above, the District Court's findings that she satisfied the statutory requirements and that an award of joint custody is in the children's best interests are supported by ample evidence.

In In re Parenting of J.N.P., heavily relied on by Ms. Maniaci, this Court struck down the precursor to §§ 40-4-211, 228, MCA, which had allowed anyone with physical custody of a child standing to seek a parenting plan, which would then require determining custody on the basis of the child's best interests. The Court held that "[o]ur 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." J.N.P., ¶ 26. The statute at issue here, however, works no such

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[15] In *D.A.H.*, this Court emphasized that because of the importance of the rights at stake, "a party claiming entitlement to custody must comply with the procedural requisites," and dismissed the grandparents' emergency petition under this statute because a petition for a parenting plan was never filed. D.A.H., ¶¶ 10-13. The Court again stressed the importance of following the procedural requirements established by the Legislature, and in no way suggested that the statute itself was unconstitutional. Id.

constitutional infringement. Unlike the overbroad language of the precursor statute, it now grants standing to seek a parenting plan only after the court makes a finding that a child-parent relationship exists, and an award of parental interest requires a further showing of conduct inconsistent with the legal parent's child-parent relationship. See §§ 40-4-211(4)(b), 40-4-228, MCA.

In re J.N.P. and the other cases cited by Ms. Maniaci, in which this Court has held that a natural parent's right to custody may not be overridden by a third party absent a finding of parental unfitness, all involved a fundamentally different situation and very different statutory schemes. See App. Brf. at 16-26. First, none of those cases involved the version of § 40-4-228, MCA, that is currently enacted, which – in contrast to the preceding statutes – requires a threshold showing of an existing child-parent relationship, and requires a showing of conduct inconsistent with the child-parent relationship. This alone provides a basis for distinguishing the previous caselaw.

More fundamentally, in every one of those cases, this Court was faced with a conflict between a natural parent and a third-party nonparent. The nonparent – typically grandparents or other relatives – had assumed some responsibilities for the child for a period of time, and then sought to continue

to maintain custody of the child, over the natural parent's objections. See, e.g., In re Parenting of J.N.P., 2001 MT 120 (statute allowing aunt and uncle to petition for custody of their niece, who was left in their care for approximately six months, over the mother's objection, was unconstitutional); Girard, 1998 MT 231 (holding that individuals who believed they were the aunt and uncle of the children and had physical custody of the children lacked standing to seek custody under the statute in effect at the time because the biological parent, who was imprisoned, had not voluntarily relinquished his right to custody of the children);[16] In re A.R.A. 1996, 277 Mont. 66, 919 P.2d 388 (statute allowing a non-legal stepfather to seek custody over the objections of the biological father, after the mother's death, was unconstitutional); In re Guardianship of D.T.N. (1996), 275 Mont. 480, 914 P.2d 579 (holding that paternal grandparents who had cared for child temporarily could not petition for permanent guardianship over the mother's objection where the statutory prerequisites

[16] This Court in Girard also noted that the question of the children's constitutional rights to maintain a familial relationship with their aunt and uncle had not been presented to the trial court and thus did not reach that issue. See Giarard, ¶ 55. Here, in contrast, the District Court expressly found that maintaining a parental relationship with Ms. Kulstad is necessary to protect the children's constitutional rights. COL at ¶¶ 12-13. As discussed below, the children's rights must be balanced against Ms. Maniaci's parental interest.

had not been met); In re Guardianship of Aschenbrenner, 182 Mont. at 549-550, 597 P.2d at 1162-63 (mother who left her children temporarily in the care of their paternal grandparents could not be deprived of custody absent a showing of abuse or neglect); In re Guardianship of Doney (1977), 174 Mont. 282, 570 P.2d 575 (father who granted brief, temporary guardianship of his children to his deceased wife's sister and brother could not be deprived of permanent custody absent finding of neglect, abuse or abandonment).

The situation here is markedly different. Here, Ms. Maniaci and Ms. Kulstad together decided to bring the children into their family.[17] Although the adoptions were in Ms. Maniaci's name because they believed that only one person could adopt, this purely legal distinction is the only difference in their relationship with the children. These two women together have been the children's parents from the moment they entered the couple's home, and are their family. This is not a situation where a parent later allowed someone else to assume some caregiving responsibility for his or her child for a limited period of time – but rather a situation where, before the children

[17] As discussed above, while Ms. Kulstad acknowledged some disagreement with Ms. Maniaci at the time of AM's adoption about whether to adopt a second child, the District Court found that they agreed Ms. Kulstad would be a parent if a second child was adopted.

even were adopted into the family, the decision was made by the legal parent to jointly raise the children with her partner. See, e.g., In re Parentage of L.B., 122 P.3d at 179 ("The State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the *de facto* parent and child or children that accompany the family."). Thus, this Court's prior decisions simply do not address the issue presented here.[18]

As a number of other state courts have held, recognizing the relationship that a legal parent has fostered between her children and another person respects the legal parent's constitutional rights, because it requires a threshold showing that the legal parent consented to and encouraged the formation of the parent-child relationship. See, e.g., Rubano v. DiCenzo,

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[18] In re A.R.A. did involve an individual who functioned as a step-parent together with the consent of a natural parent (the mother). But, in that case, the constitutional objection came from the natural *father*, who had not consented to the formation of a parental relationship between his children and their stepfather. Indeed, the natural father had maintained his paternal relationship with the child through phone calls and visits. In re A.R.A., 277 Mont. at 68, 919 P.2d at 389. Here, the person objecting to the recognition of the relationship between the children and Ms. Kulstad is the very person who allowed that relationship to form at the outset, and there is no third parent to consider.

759 A.2d 959, 976 (R.I. 2000) (when a legal parent "agree[s] to and foster[s]" a *de facto* parental relationship and allows that person to "assume an equal role as one of the child's two parents," she renders her own parental rights with respect to the minor child "less exclusive and less exclusory"); Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. 2006) (same).[19]

Similarly, the North Carolina Court of Appeals recently found that the actions by the biological parent to hold a co-parent out as a parent serves to alter the constitutional rights to "care, custody, and control" of a child. The court reasoned that, "after choosing to forego as to [the *de facto* parent] her constitutionally-protected parental rights, [the biological parent] cannot now assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent." Mason v. Dwinnell, 660 S.E.2d 58, 70 (N.C. Ct. App. 2008).

The United States Supreme Court's decision in Troxel v. Granville, 530 U.S. 57 (2000), does not alter the analysis here. In Troxel, the Supreme Court held that a state statute according courts unlimited discretion to award

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[19] This high bar protects a parent from claims by other individuals who may have close relationships with children, such as babysitters, family friends or relatives, but who are not parents. See, e.g., In re Parentage of L.B., 122 P.3d at 179; Rubano, 759 A.2d at 974; V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000); In the Interest of E.L.M.C., 100 P.3d 546, 560 (Colo. Ct. App. 2004).

visitation rights to "[a]ny person . . . at any time" violated parents' constitutional right to rear their children because it did not require judges to accord any deference to the parental judgments about the best interests of the child. Id. at 61. The petitioners in Troxel were grandparents who sought and obtained from the trial court the right to visit their grandchild. Id. at 60. As far as the Court's decision reveals, the grandparents had never lived with their grandchild, and the grandparents did not argue that they occupied parental roles.

In Polasek v. Omura, 2006 MT 103, 332 Mont. 157, 136 P.3d 519 (2006), this Court held that the Montana grandparent visitation statute, § 40-4-109(2), MCA, could be constitutionally applied consistent with Troxel and this Court's prior cases. This Court emphasized that the parents' rights are not absolute, and that Troxel requires only that parents' wishes must be given "special weight." Id. ¶ 13. The Court concluded that a visitation award was permissible despite the parent's objection, because the statute provided a presumption in favor of a fit parent's wishes, which could be overcome only by showing by clear and convincing evidence that visitation was nonetheless in the child's best interest. Id. ¶ 15. Notably, the Court did *not* hold that awarding grandparents visitation over the objection of a fit parent was unconstitutional. Id. Here, "special weight" is given to Ms.

Maniaci's wishes because § 40-4-228, MCA, has an exacting burden of proof by clear and convincing evidence, and by recognizing the familial relationships she consented to and encouraged.

More fundamentally, Troxel, like this Court's prior decisions, simply has no application in this context. The issue before the Court in Troxel was the extent of a court's discretion to upset a parent's determination of a child's best interest in light of a non-parent's claim for visitation. Under § 40-4-228 (or equitable principles), Ms. Kulstad has shown that she has a parental interest. Troxel and this Court's prior decisions are about protecting parents from outsiders; the opinion says nothing about how states may determine who is entitled to *parental* rights and responsibilities.[20]

B. The Constitution Protects The Parent-Child Relationship Between Ms. Kulstad And The Children.

This Court has long recognized that while parents have constitutional rights to the control and custody of their children, "the right is not absolute.

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[20] See, e.g., In re Parentage of L.B., 122 P.3d at 178 (rejecting argument that Troxel bars recognition of *de facto* parents because "Troxel did not address the issue of state law determinations of 'parents' and 'families'"); Rubano, 759 A.2d at 967, 972-76 (distinguishing de facto parent's petition for visitation from Troxel because of the parent-like relationship); Robinson v. Ford-Robinson, 196 S.W.3d 503, 506-07 (Ark. App. 2004) (rejecting argument that Troxel overturned *in loco parentis* cases on the basis that "*in loco parentis* relationship is different from the grandparent relationships found in Troxel ... because it concerns a person who in all practical respects was a parent").

. . . [T]he paramount and controlling question by which the court must be guided is the welfare of the child." In re Bourquin (1930), 88 Mont. 118, 290 P. 250. In enacting § 40-4-228, MCA, the Legislature recognized that children may form parent-child relationships with individuals absent a biological or adoptive relationship, and it sought to protect children by balancing a legal parent's rights with the child's rights to maintain those relationships. See § 40-4-227-2(c), MCA ("a parent's constitutionally protected interest in the parental control of a child should yield to the best interests of the child when the parent's conduct is contrary to the child-parent relationship"); see also Mont. Const. art. II, Sec. 15 ("The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.").

The U.S. Supreme Court has explained that the Due Process Clause of the U.S. Constitution protects parent-child relationships because of the important bonds that form between parents and children as a result of their daily life together as a family, not because of biology or legal relationship:

> [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 "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.

Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977); see also Lehr v. Robertson, 463 U.S. 248, 261 (1983); Prince v. Massachusetts, 321 U.S. 158 (1944) (aunt who was custodian for her niece had constitutionally protected relationship with her); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 504 (1977) (grandmother who lived with and raised her grandsons as her own children had a constitutionally protected relationship with them).

"[C]hildren 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." V.C., 748 A.2d at 550 (citing Smith, 431 U.S. at 844). Thus, while a parent's decision about whether to permit another person to develop a parent-child relationship with her child must be respected, once a parent has made that decision and encouraged a parental bond to form, the child has his or her own constitutional rights to consider. See, e.g., In re Parentage of L.B., 122 P.3d at 178 ("if, on remand, [the petitioner] can establish standing as a *de facto* parent, [she and the biological mother] would *both* have a 'fundamental liberty interest[ ]' in the 'care, custody, and control' of L.B.") (quoting Troxel, 530 U.S. at 65).

To allow Ms. Maniaci now to unilaterally sever the familial ties that she herself fostered between Ms. Kulstad and their children, notwithstanding the District Court's finding that the children did indeed have a child-parent relationship within the meaning of § 40-4-211, MCA, would destroy the family relationship that exists between the children and Ms. Kulstad and cause serious harm to the children. The state has a compelling interest in protecting the child from the "emotional harm . . . intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent." In the Interest of E.L.M.C., 100 P.3d at 561; V.C., 748 A.2d at 550 ("[C]hildren have a strong interest in maintaining the ties that connect them to adults who love and provide for them."). The Legislature is fully within its power to determine that children's rights must be protected by ensuring their ability to maintain existing parent-child relationships.

III. THE DISTRICT COURT'S EVIDENTIARY RULINGS WERE NOT AN ABUSE OF DISCRETION AND PROVIDE NO BASIS FOR OVERTURNING THE DECISION BELOW.

Ms. Maniaci attempts to poke holes in the District Court's reasoned decision by attacking its evidentiary rulings, and specifically its decisions to accept and reject testimony regarding the parenting evaluation performed by Cindy Miller, the court-appointed expert. In so doing, she misconstrues both the record and the Court's conclusions. All

of these evidentiary attacks fail to meet the very strong showing required for this Court to overturn the District Court's evidentiary decisions.

The admissibility of evidence is left to the District Court's sound discretion. State v. Russette, 2002 MT 200, ¶ 7, 311 Mont. 188, 190, 53 P.3d 1256, 1257-58. In reviewing its discretionary rulings, "the question is not whether this Court would have reached the same decision, but, whether the district court abused its discretion in reaching the decision to deny admissibility." Simmons Oil Corp. v. Wells Fargo Bank, 1998 MT 129, ¶ 17, 289 Mont. 119, 124, 960 P.2d 291, 294. The District Court's evidentiary rulings cannot be overturned unless the court acted "arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice. In re G.M., 2009 MT 59, ¶ 11, 349 Mont. 320. Ms. Maniaci has not come close to meeting this high burden.

A. The District Court Did Not Abuse Its Discretion When It Allowed The Testimony Of Dr. Cindy Miller, The Court-Appointed Expert.

Ms. Maniaci claims that the District Court should not have accepted Dr. Miller's testimony about her parenting evaluation because she purportedly violated the ethics code of the American Psychological Association ("APA") and relied upon improper information when she

performed her evaluation. App. Brf. at 42-44. Both of these arguments ignore critical evidence that the District Court reviewed when it recognized Dr. Miller as an expert and accepted her parenting evaluation and recommendations.

Ms. Maniaci's first argument that the District Court erred in qualifying Dr. Miller as an expert because she violated the APA's ethics code is a red herring. This argument is based on the inaccurate assumption that Dr. Miller's parenting evaluation was performed using methodology arising out of the Positive Alternative for Children Team ("PACT") program, and that the PACT program was purportedly new and untested. App. Brf. at 42-43. But as the record reflects, Dr. Miller's methodology for evaluating the family had nothing to do with the PACT program.[21] Rather, her evaluation was based on other specialized training and experience.

As Dr. Miller testified, parenting evaluations require extensive training and specialized education, which she has undertaken as part of her 21 years of clinical practice. Tr. 286-88. Dr. Miller has completed approximately 80

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[21] The PACT program is a judicial program developed by Dr. Miller as an alternative to assist certain families with young children who are involved in child custody cases. Tr. 325-27, 346-47. As Dr. Miller herself pointed out, she would have used the same methodology to perform her parenting evaluation regardless of whether she recommended the PACT program as a parenting solution for this family. Tr. 379.

parenting evaluations and testified in court as an expert witness some 30 times. Tr. 287-89. Her methodology for the evaluation she performed in this case included meeting with the parents, meeting with the children, talking with the children's therapist, and observing each parent with the children. Tr. 292-93, 307. It took into account a number of factors, including the wishes and needs of the parents and the wishes and needs of the children. Tr. 302-24. Contrary to Ms. Maniaci's contentions, Dr. Miller testified that she followed the guidelines for child custody proceedings published by the APA as well as the APA ethics rules. Tr. 366-67.

Ms. Maniaci also argues that Dr. Miller violated the ethics code in performing her parenting evaluation because she relied on the opinion of a lawyer rather than the scientific conclusions of psychologists. This is a mischaracterization of Dr. Miller's testimony. Dr. Miller stated that she reviewed psychological literature provided by the APA in concluding that the sexual orientation of L.M. and A.M.'s caregivers did not have negative effects on the children's development. Tr. 320-21, 367-68. She also relied on an APA resolution stating that there are no significant differences between children raised in same-sex households and children raised in opposite-sex households. Tr. 376. Dr. Miller noted that while visiting the APA's website, she also read amicus briefs prepared by the APA that

summarized the conclusions of highly-respected mental health researchers. Tr. 320, 367-369. But nowhere did she state that she relied on the opinion of an attorney and not on sound scientific research.

For both reasons set forth above, there is no evidence that Dr. Miller violated her ethical duties or that the District Court abused its discretion in allowing her to testify.

B. The District Court Did Not Abuse Its Discretion When It Declined To Qualify Ms. Maniaci's Proposed Expert Witness, Dr. Hansen.

Ms. Maniaci argues that the District Court erred when it declined to qualify Dr. Trayce Hansen as an expert witness after having stated during trial that she was an expert. App. Brf. at 44-48. This argument fails for two reasons.

First, it is within the purview of a District Court's broad discretion to modify its rulings. This Court has repeatedly upheld District Courts' decisions to reverse their initial rulings. See, e.g., Martinell v. Montana Power Co. (1994), 268 Mont. 292, 886 P.2d 421 (trial court reversed itself on statutory ruling); State v. Norris (1984), 212 Mont. 427, 689 P.2d 243 (affirming trial court self-reversal on admissibility of evidence). The decision to qualify an expert is left to the discretion of the trial court,

regardless of original rulings. Doukas v. America on Wheels, 154 A.D.2d 426 (N.Y. 1989).

Second, the District Court's ultimate decision in its September 29, 2008 order not to qualify Dr. Hansen as an expert was correct. Dr. Hansen had less than four years' experience in the field of psychology since obtaining her degree. Tr. 694. Most importantly, she had no experience in the field in which she was offered as an expert—to opine on the parenting plan of the court-appointed expert, Dr. Miller.[22] Dr. Hansen did not work with children. She had never performed a parenting evaluation, and, in fact, testified that parenting evaluations were a "new area" for her. Tr. 655, 696.

Because Dr. Hansen lacked the requisite qualifications to evaluate Dr. Miller's parenting plan, the District Court did not abuse its discretion or act arbitrarily when it concluded that Dr. Hansen "[did] not possess the requisite knowledge, skill, experience, training, or education to assist the Court" in evaluating that plan. FOF at ¶ B(33); Falcon v. Cheung (1993), 257 Mont. 296, 302, 848 P.2d 1050, 1054 (affirming the exclusion of university doctor's testimony in a medical malpractice case because the doctor had no

[22]Appellant mischaracterizes Dr. Hansen's testimony as expert testimony on ethics, when in fact Dr. Hansen conceded that "every bit of" her testimony was proffered to criticize the parenting plan of the court-appointed expert, Dr. Miller. Tr. 696.

experience in the specific subject matter at issue in the case—the standard of care in rural hospitals in Montana); Seal v. Woodrows Pharmacy, 1999 MT 247, ¶¶ 27-37, 296 Mont. 197, 203-05, 988 P.2d 1230, 1234-35.

C. Ms. Kulstad Timely Disclosed Her Rebuttal Witness, Dr. Suzanne Dixon.

Ms. Maniaci also argues that Ms. Kulstad engaged in trial by "ambush" by untimely calling expert witness Dr. Suzanne Dixon to rebut certain aspects of Dr. Hansen's testimony. App. Brf. at 48-49. Ms. Maniaci is incorrect. And, even if she had been untimely disclosed, there is no error, because Ms. Maniaci had ample opportunity to prepare for Dr. Dixon's testimony and therefore suffered no prejudice.

Ms. Kulstad timely disclosed the identity of Dr. Dixon. Ms. Maniaci failed to provide any information about the possible content of Dr. Hansen's testimony until late February 2008. D.C. Doc. 214, 217, 224. Twenty days later, on March 17, 2008, Ms. Kulstad disclosed that she would call Dr. Dixon as an expert to rebut Dr. Hansen's testimony. D.C. Docs. 233, 234. This disclosure was made as soon as practicable upon learning of the content of Dr. Hansen's proposed testimony and two months in advance of trial. Most importantly, it was made within the discovery deadline set by the District Court. D.C. Doc. 209 at 11 (ordering, on February 14, 2008, that the

parties had twenty days to produce documents and another twenty days to finish any further discovery).

Ms. Maniaci attempts to circumvent the fact that Dr. Dixon was timely disclosed by arguing that she was "masked" as a rebuttal expert who in truth was called "to shift the purview of the district court from the fundamental rights of a fit natural parent into a forum on same-sex parenting." App. Brf. at 49. Ms. Maniaci claims that before Dr. Dixon was introduced, "same-sex parenting was not an issue in the case, and Dr. Maniaci never raised a question regarding the plaintiff's 'sexual orientation.'" Id. This argument is disingenuous. Dr. Hansen testified at length regarding her beliefs about psychological research that allegedly shows that children may be adversely affected if raised by two same-sex parents. Tr. 677-81; 687-93; 699-705. Dr. Dixon was offered to respond to this testimony, and in fact testified that Dr. Hansen's views were against the overwhelming weight of the research of child development experts. Tr. 402-27. Accordingly, the District Court properly exercised its discretion in allowing Dr. Dixon to testify as a rebuttal witness and accepting her views on same-sex parenting. See Gustafson v. Northern Pac. Ry. Co. (1960), 137 Mont. 154, 164, 351 P.2d 212, 217 (rebuttal evidence is "that which tends to counteract *new matter* offered by the adverse party").

Finally, even if Dr. Dixon was not timely disclosed—which Ms. Kulstad does not concede—there was no error because there was no resulting prejudice. See Weimar v. Lyons, 2007 MT 182, ¶ 36, 338 Mont. 242, 252-53, 164 P.3d 922, 930 (allowing undisclosed witness to testify "*may* constitute reversible error" when there has been prejudice to the opposing party) (emphasis added). Here, Dr. Dixon was disclosed two months before trial. Ms. Maniaci had the opportunity to depose Dr. Dixon before trial, prepare for her testimony, and to plan for cross-examination. See id. (concluding that there was no prejudice when the opposing party knew that the witness would testify, had ample time to prepare its examination of the witness, and was prepared to respond to the witness's testimony). The District Court's decision to allow Dr. Dixon's testimony was, therefore, well within its discretion. See id.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A CONSTRUCTIVE TRUST IN FAVOR OF MS. KULSTAD ON THE REAL PROPERTY AND ON ONE OF THE CARS USED BY THE COUPLE.

The District Court awarded Ms. Kulstad $101,824.43 in real property titled in Ms. Maniaci's name and the Kia Sportage vehicle on the principle that Ms. Maniaci would be unjustly enriched if she retained the full value of the assets that Ms. Kulstad contributed to their domestic partnership. First,

the District Court recognized its broad powers in equity, noting that courts of equity are governed by flexible principles and can adapt themselves to the exigencies of a particular case. COL at ¶ 30 (citing State ex rel Farm Credit Bureau v. District Ct. (1994), 267 Mont. 1, 24, 881 P.2d 594 607). The District Court noted that the intent of the parties and their conduct between themselves is often controlling in determining how property should be divided equitably. Id. at ¶ 31 (citing Flood v. Kalinyaprak, 2004 MT 15, ¶ 26, 319 Mont. 280, 287, 84 P.2d 27, 32-33). The Court further recognized the breadth of case law supporting the equity of distributing property between unmarried cohabitating relationships. See COL at ¶ 40 (citing, e.g., Salzman v. Bachrach, 996 P.2d 1263, 1267-68 (Colo. 2000)); see also Gormley v. Robertson, 120 Wash. App. 31, 83 P.3d 1042 (2004).[23]

> A constructive trust arises:
>
> when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if he were permitted to retain it.

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[23] Other jurisdictions have developed specific equitable remedies for unmarried cohabitants when they dissolve their relationship and possession of, or title to, their assets does not match the agreements they made and their contributions. Absent a recognized and predictable body of law that can be used to equitably and fairly apportion property among unmarried cohabitants, including same-sex partners who are prohibited by statute from marrying, unmarried cohabitants will be burdened with legal fees significantly higher than those of married cohabitants.

§ 72-33-219, MCA; see also In re Marriage of Moss, 1999 MT 62, ¶ 29, 293 Mont. 500, 506, 977 P.2d 322, 326.

In determining the amount of unjust enrichment, the District Court examined Plaintiff's Ex. 13 which details Ms. Kulstad's funds acquired prior to the relationship, including the funds that were deposited in the parties' joint checking account. COL at ¶ 38. The District Court found that the parties were supported from 1996 to 2001 "primarily with assets Ms. Kulstad acquired prior to the parties' relationship." FOF at ¶ A(7). The Court determined that the amount of Ms. Maniaci's unjust enrichment, after subtracting one-half attributable to Ms. Kulstad's support for herself, was $101,824.43. COL at ¶ 38.

Ms. Kulstad testified that the house was only a shell when she and Ms. Maniaci first moved in together in 1996. Tr. 34. Ms. Kulstad agreed to support the couple and pay for the improvements to the house, including hiring contractors, paying for the lumber, and purchased "anything that we needed" to make the house habitable. Tr. 35. Ms. Kulstad bought the wood heater, got the electrical wiring done, installed the cabinetry, hung the doors, helped install the drywall, did the flooring, and built outbuildings for storage. Tr. 44-50. In 2000, she helped Ms. Maniaci finish off the basement so that Ms. Maniaci could see her patients there. Tr. 49. In exchange for her

investment of time and her life's savings, Ms. Maniaci "assured Ms. Kulstad that the property would be equally divided should their relationship end." FOF at ¶ C(7); see also Tr. 37. Clearly, Ms. Maniaci would be unjustly enriched by retaining sole title to the property.

Ms. Kulstad presented compelling testimony that she was the main support of the couple for the first five years they were together. Ms. Kulstad testified she came into the relationship with approximately $200,000 in savings. Tr. 443; Pl. Ex. 13. Based upon Ms. Kulstad's extensive contributions to the property and to the support of Ms. Maniaci, the District Court concluded that Ms. Maniaci would be unjustly enriched by 101,824.43[24] which was the "equitable, fair, and just amount" Ms. Kulstad had contributed for the support of joint assets that benefitted Ms. Maniaci. COL at ¶ 38. This finding of unjust enrichment is clearly supported by the record.

Ms. Maniaci wrongly claims that her decision not to transfer title of the property to Ms. Kulstad should defeat a unjust enrichment award, despite

[24] The Court determined that Ms. Kulstad had deposited $176,268.09 into the parties' joint checking account from her previous savings. The Court found that half, or $88,134.05, was for the benefit of Ms. Maniaci. The Court then performed the same calculation with respect to other sources of funds Ms. Kulstad had prior to her relationship with Ms. Maniaci that were spent for the benefit of Ms. Maniaci. The total was $101,824.43.

her promise to do so. As the District Court found: "Ms. Kulstad expected to share in the appreciation of the real property. Had Ms. Maniaci not agreed that the property would be divided if their relationship ended, Ms. Kulstad would not have invested her time and money into improving it." FOF at ¶ C(8).

Ms. Maniaci also claims that even if the District Court was correct in deciding that she was unjustly enriched, the Court should have limited the award to $46,049.88, the amount detailed in Plaintiff's Exhibit 16 as the summary of Ms. Kulstad expenses for improvements to the real property. This argument fails because the unjust enrichment is not based solely upon Ms. Kulstad's direct monetary contribution for improvements to the property, but rather upon the total benefit that Ms. Maniaci received, one-half of Ms. Kulstad's contribution of assets acquired prior to her relationship with Ms. Maniaci. Accordingly, Ms. Maniaci's reliance on Robertus v. Candee (1983), 205 Mont. 403, 670 P.2d 540 (involving a cause of action between a lessor and lessee for improvements to the leased property, where only the value of the improvements was at issue), is misplaced. Here, one half of Ms. Kulstad's contribution to the joint assets for the time she provided full support of the family is a reasonable basis for determining unjust enrichment and imposing a constructive trust on the property.

Ms. Maniaci also claims that the amount of unjust enrichment should be offset by rent owed to her by Ms. Kulstad. Ms. Maniaci's belated effort to distort the underlying facts of this case by asserting that Ms. Kulstad was a tenant rather than a full member of this family lacks any support. The District Court, based upon substantial evidence, expressly found that the "parties operated as a family unit, in which both parties contributed assets, income, and labor for the joint benefit of the parties and the minor children." FOF at ¶ A(11). Thus, unlike the agreement by Ms. Maniaci to divide the property with Ms. Kulstad because of the significant money she had spent on improvements, there was no similar agreement or expectation that Ms. Kulstad would pay rent.

Ms. Maniaci also asserts that the award of the car is not supported by the record. Ms. Kulstad, however, testified that she and Ms Maniaci shared use of their vehicles. Tr. 133. Ms. Maniaci drove vehicles that were titled in Ms. Kulstad's name. Id. Ms. Kulstad paid the automobile insurance policy for both Ms. Kulstad and Ms. Maniaci, as well as all car maintenance. Tr. 132; 765. The District Court awarded Ms. Kulstad the Kia for her contributions of labor in improving the property, which greatly exceeded those of Ms. Maniaci. FOF at ¶ C(10); COL at ¶ 41. All these findings support the Court's award.

Lastly, Ms. Maniaci claims the District Court erred in allowing the parties to retain personal property in their possession. The District Court was well within its discretion to order that each party keep the personal property in her possession. Ms. Kulstad stated on her property disclosure that "musical instruments" belonged to her, and Ms. Maniaci herself testified that the musical instruments were purchased by "Ms. Kulstad and I." D.C. Doc. 181; Tr. 758. Ms. Maniaci provided no evidence that she or she alone purchased the musical instruments she identified or that Ms. Kulstad has possession of these particular instruments. Moreover, no credible evidence exists that the jewelry described by Ms. Maniaci is, or ever was, in the possession of Ms. Kulstad. Ms. Kulstad's property disclosure does not mention any jewelry in her possession except for the parties' rings. D.C. Doc. 181. Ms. Maniaci testified only that the jewelry was "not there" "when [she] came back to the house." Tr. 757. Ms. Maniaci refused to comply with the court's order to submit a property disclosure, but just days before the trial, moved to add a counterclaim regarding the jewelry, valuing it at $90,000. App. Brf. at 60. In view of all of these facts and circumstances, the District Court did not abuse its discretion.

As Ms. Maniaci acknowledges, the District Court imposed a partial constructive trust on the real property in the amount of $101,824.43,

and imposed a full constructive trust on the Kia automobile. Ms. Maniaci, to date, has furnished neither the $101,824.43 nor the title to the car to Ms. Kulstad. To eliminate any ambiguity in the District Court's order, Ms. Kulstad requests this Court, in affirming the District Court, specifically to hold that a partial constructive trust in the amount of $101,824.43 in favor of Ms. Kulstad is imposed on the real property located at 13795 Turah Road, Tract A of COS No. 3250, and that a full constructive trust in favor of Ms. Kulstad is imposed upon the Kia Sportage vehicle.

CONCLUSION

The District Court properly found that Ms. Kulstad has a parental interest, and the evidence before the Court fully supported the determination that continuing the parental relationship between Ms. Kulstad and the children was constitutional, and necessary to protect their best interests. Similarly, the Court did not abuse its discretion in awarding Ms. Kulstad a constructive trust for her significant expenditures to the benefit of Ms. Maniaci. The decision should be affirmed.

Respectfully submitted this 27th day of March, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is proportionally spaced, and printed in Times New Roman 14 point font. The brief is double spaced, except for quoted material and footnotes. It does not exceed 15,000 words, excluding those portions exempted by Rule 11(4).

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CERTIFICATE OF SERVICE

I certify that on March 27, 2009, true and correct copies of the foregoing Brief of Petitioner-Appellee, were served by first class mail and electronic mail on the following counsel of record for Respondent-Appellant:

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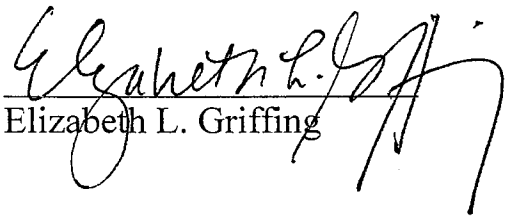

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