



Children, Families, Health, and Human Services Interim Committee

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59th Montana Legislature

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TO: Children, Families, Health, and Human Services Interim Committee

FROM: David S. Niss, Staff Attorney

RE: Legal Basis for Parental Right of Custody and State Right of Regulating Parent-Child Relationship

DATE: December 27, 2005

I INTRODUCTION

This memorandum outlines the legal basis for the parental right of custody and the basis for the equally important rights in rearing a child that are part of or in addition to the right to custody. This memorandum addresses only the rights of natural or adoptive parents as against the state, and not parental rights against or between each other.

II DISCUSSION

A. Right to Custody and Control Under Constitutional Law.

The relationship of a parent to a child is a legal relationship, mostly as defined by state law.¹ However, the right to custody of one's own child has a federal constitutional foundation based upon a parent's fundamental right to liberty, guaranteed by the Fourteenth Amendment to the U.S. Constitution, in raising a child.² Because a right to liberty is secured against the states by the Fourteenth Amendment, any infringement by the state of that parental right to custody and to raise a child as a parent sees fit must be based upon a strong if not compelling state interest.³ State courts have held similarly, based upon state jurisprudence.⁴ Likewise, the Montana Supreme Court held, in In re Doney, 174 M 282, 570 P2d 575 (1977), and most recently in In re A.C., 2001 MT 126, 305 M 404, 27 P3d 960 (2001), that a parent's right to the care and custody of a child is a fundamental constitutional right. The U.S. Supreme Court, in Prince v. Massachusetts, 321 U.S. 158 (1944), opined that the right of a parent to the control and raising of a child is not absolute and is subject to the power of the state, as

parens patriae, to act in the best interests of the child.⁵ The Montana Supreme Court has also held that it is a fundamental principle of law that parental rights do not exist without concomitant obligations.⁶

B. Requirement of Fitness of a Parent.

Generally, before 1996, it was the law in Montana that the "best interests of the child" standard should be used to determine whether it is appropriate to transfer custody from one or both parents to a third (nonparent) party. But in that year, the Montana Supreme Court issued its opinion in the case of In re A.R.A., 277 M 66, 919 P2d 388 (1996). In that case, the Montana Supreme Court recognized that the right of a parent to custody of the parent's child was, because of the constitutional basis for the right, superior to that of a third party nonparent. The Court therefore ruled that the only situation in which a child could be taken involuntarily from its parent and given to a third party was if the parent had first been found to be an unfit parent. The test of "best interests of the child" was therefore a standard that could be used to determine custody only if the parent had been found to be unfit. This holding overruled the court's previous line of case, represented by Brost v. Glasgow, 200 M 194, 651 P2d 32 (1982), to the contrary and held unconstitutional 40-4-221, MCA, to the extent that it allowed a court to transfer custody to a nonparent before a finding of unfitness of a natural parent (the statute was subsequently amended by Ch. 343, L. 1997, and by Ch. 414, L. 1999, and 40-4-227, MCA, was enacted, recognizing the constitutional rights of natural parents). The law in Montana now is that an adjudication of unfitness is a jurisdictional prerequisite to the power of the state to award custody to a third (nonparent) party.⁷

C. Rights and Obligations of Child Rearing.

Because custody imparts control, a natural or adoptive parent also has a right to direct many aspects of a child's life, including schooling, religious training, and control of the child's property and earnings.⁸ As part of the right to custody (although not necessarily dependent upon having actual custody), a parent also assumes certain obligations, including the duty to supply food, clothing, medical care, an adequate home, and social and religious guidance.⁹ The right of the state to control a parent's decisions on any of these subjects, which are part of or in addition to the right of custody, may be viewed as exceptions to the right of total parental control, to be analyzed under the framework addressed in IID below, or as a right of the state to burden separate fundamental rights themselves.¹⁰

D. Analysis of Burdens on Right of Custody and Control.

It is a settled principle of both state and federal constitutional law that a state's ability to burden, restrict, or infringe upon a "fundamental" constitutional right of any kind is

subject to "strict scrutiny" by the courts, and any infringement of such a right by a state may be upheld only upon a showing that there is a compelling state interest in applying the burden or infringement.¹¹ This analysis has been applied by federal and state courts to a parent's right to the custody and control of children. Thus, in Brooks v. Parkerson, 454 S.E.2d 769, 772 (Ga. 1995), *cert. denied*, 516 U.S. 942 (1995), the Georgia Supreme Court stated that a parent's right to the custody and control of his or her child should be infringed upon only under the most compelling circumstances, and "state interference with a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child."

The Montana Supreme Court has yet to issue an opinion stating the application of the "strict scrutiny" test to infringement of the rights of parents other than or in addition to custody in terms as clear as the Georgia Supreme Court did in Brooks. However, the establishment of custody as a fundamental right in Montana, the inclusion of other parental rights as part of custody, and the application of the "strict scrutiny" test to fundamental rights of Montanans is so well established in Montana law that the possibility that the Montana Supreme Court would not apply the strict scrutiny test to a statute imposing a burden on or interfering with a parent's right to raise a child as the parent sees fit is relatively small.

E. Procedure and Burden of Proof.

The requirements of the Fourteenth Amendment to the U.S. Constitution also impose a procedural requirement that any infringement upon a parent's right to custody and control of a child only be applied through a fair procedure.¹² In Montana, the courts have applied this requirement by stating that a natural parent's right to care and custody of a child is a fundamental right that "must be protected by fundamentally fair procedures."¹³ The Montana Supreme Court has held that the fundamentally fair procedure must include the following components:

1. Notice of the proceedings. State ex rel. Taylor v. District Court, 131 M 397, 310 P2d 779 (1957).
2. A hearing. *Id.*
3. Legal counsel. In re Custody of M.W., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).
4. Effective assistance of counsel. In re Matter of A.S., 2004 MT 62, 320 M 268, 87 P3d 408 (2004).
5. Burden of proof upon the person seeking termination of parental rights. In re Custody and Parental Rights of P.M., 1998 MT 264, 291 M 297, 967 P2d 792 (1998).
6. Clear and convincing evidence on all facts required to be proven. *Id.*

SUMMARY

The right of a parent to the custody and control of a minor child is guaranteed by the Fourteenth Amendment to the U.S. Constitution. That Amendment secures both the parent's substantive rights (for example, to raise a child in the religious practices of the parent's religion) and guarantees that a parent's rights not be infringed without a procedure offering due process of law. Along with these rights, under both federal and state law, to custody and control of a child come certain parental obligations. The Montana Supreme Court also recognizes that most of these rights and obligations exist under the Montana Constitution as well.

Endnotes

1. See, e.g., Art. II, sec. 15, Mont. Const.; Title 40, chapter 6, MCA; and Title 41, chapter 1, MCA.
2. Myer v. Nebraska, 262 U.S. 390 (1923); Stanley v. Illinois, 405 U.S. 645 (1972); Troxel v. Granville, 530 U.S. 57 (2000).
3. Lassiter v. Department of Social Services, 452 U.S. 18 (1981).
4. See, e.g., Hoff v. Berg, 1999 ND 115, 595 N.W. 2d 285 (N.D. 1999), and cases cited therein.
5. The purpose of the allowable degree of regulation of the parent's right of control, as addressed in Prince v. Massachusetts (see text accompanying this note), is the sustainment of society. In Prince, the Court explained: "The state's authority over children's activities is broader than over like actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."
6. Matter of Adoption of D.J.V., 244 M 209, 796 P2d 1076 (1990).
7. Babcock v. Wonnacott, 268 M 149, 885 P2d 522 (1994).
8. See, e.g., Stanley v. Illinois, *supra*, note 2; Wisconsin v. Yoder, 406 U. S. 205, 232 (1972); Quilloin v. Walcott, 434 U. S. 246 (1978); Parham v. J. R., 442 U. S. 584 (1979); Santosky v. Kramer, 455 U. S. 745 (1982); Washington, et al. v. Glucksberg, et al., 521 U.S. 702 (1997).
9. Conley v. Walden, 166 M 369, 533 P2d 955 (1975).
10. For this reason, other parental rights implicit in the custody of a child are frequently mentioned in judicial opinions addressing custody as if those other rights were part of the right to custody. For example, in Stanley v. Illinois, *supra*, note 2, at 651, the U.S.

Supreme Court referred to the right to the "companionship, care, custody, and management" of children.

11. 16A Am. Jur. 2d sec. 387.

12. See Stanley v. Illinois, *supra*, note 2.

13. In re Custody and Parental Rights of P.M., 1998 MT 264, 291 M 297, 967 P2d 792 (1998).

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