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Court of Appeals Division III No. 22930-1-III  
Supreme Court No. \_\_\_\_\_

SUPREME COURT  
OF THE STATE OF WASHINGTON

In re the Custody of A.C.

DAVID NAGEL and ANITA BANGERT

Respondents

v.

HOLLY MARIE CORK

Appellant

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PETITION FOR REVIEW

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### **A. IDENTITY OF PETITIONER**

Ms. Holly M. Cork, by and through her attorneys, asks this Court to accept review of the Division III Court of Appeals decision terminating review of the trial court's decision to transfer custody of her son to his former foster parents in Montana.

### **B. COURT OF APPEALS DECISION**

On February 13, 2007, the Court of Appeals affirmed the trial court's decision granting non-parental custody of Holly Cork's son, A.C. to his former foster parents, Respondents David Nagel and Anita Bangert. A copy of the decision is attached at Appendix 1. In re: A. C., Court of Appeals Div. III, Dkt. No. 22930-1, WL 446978 (Feb. 13, 2007). Ms. Cork specifically requests that the decisions granting jurisdiction to Washington Courts and the transfer of custody based on the alleged detriment of a psychological parent relationship with the former foster parents be reversed.

### **C. ISSUE PRESENTED FOR REVIEW**

1. Did the Court of Appeals err by exercising jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act to make a custody determination for a child who had not lived away from his

home state of Montana for at least six months, when at least one person acting as his parent remained in Montana?

2. Did the Court of Appeals err in creating an exception to In re L.B., 155 Wash.2d 679, 122 P.3d 161 (2005) so that foster parents can use the emotional distress of a child transitioning back to his natural mother as a basis for reclaiming custody?

#### **D. SUMMARY OF ARGUMENT**

The Division Three A.C. decision contradicted established Supreme Court precedent under In re L.B., by creating a foster parent exception for the prohibition against considering the establishment of a psychological parent relationship in non-parental custody actions. The decision violated Ms. Cork's constitutional rights under In re Troxel v. Granville, 530 U. S. 57, 120 S. CT. 2054, 147 L.Ed.2d 49 (2000), in In re L.B., and In re A.F.-C., 307 Mont. 358, 370, 37 P.3d 724 (2001) as a fit parent to be free from state interference in her relationship with her natural child. The decision also violates the plain language of Washington's UCCJEA, denying jurisdiction under a state statute that has not yet been construed by this court and thus presents a matter of substantial public interest that this court should decide.

The trial court found that Holly Cork was a fit parent, *CP465, ln. 4*, but failed to provide her with the requisite constitutional rights to be

from further court interference initiated by the disgruntled foster parents. This contradicted the holding by the Washington Supreme in In re: L.B., 155 Wash.2d 679, 122 P.3d 161 (2005), that limited arguments of psychological parent relationships to instances when the parent like relationship was formed with the consent and encouragement of the biological parent. Here, any development of a psychological parent relationship between A.C. and the foster parents was involuntary, and in fact, repudiated by the Montana Supreme Court. The trial court's order also failed to incorporate the constitutional protections described in Troxel, because Ms. Cork was deprived of her natural child even though she remained a fit parent.

Washington Courts did not have jurisdiction to make any custody determination regarding A.C. because his home state at the time of filing the nonparental custody petition was still Montana. The plain language of the UCCJEA and its intent was to prohibit exactly the type of forum shopping reversal of one state's determination that was brought by the unhappy foster parents in this case. UCCJEA §201 (1997); *see also* Stoneman v. Drollinger, 314 Mont. 139, 144, 64 P.3d 997 (2003); MCA 40-7-203.

## E. STATEMENT OF CASE

The Montana courts made determinations affecting A.C.'s custody from 1998 until May of 2002, including a Montana Supreme Court decision restoring custody to his biological mother. *CP 231-242; CP 244-245*. On October 29, 2002, A.C.'s Montana foster parents filed a non-parental custody petition seeking custody of A.C. in Washington despite the fact that he had not yet met the six month residency requirement. *CP 483; RCW 26.27.201(1)(a)*.

The Montana Supreme Court reversed a trial court order terminating Ms. Cork's parental rights in December of 2001. *CP 231-242*. The State of Montana, through the Department of Public Health and Human Services (DPHHS), continued their supervision and investigation of A.C.'s mother, Holly Cork, via dependency proceedings through May of 2002. *CP 244-245*. The Montana District Court, eventually restored sole custody of A.C. to Holly Cork and the Montana DPHHS's temporary custody of A.C. was terminated effective May 15, 2002. *CP 256-60; CP 244-245*.

A.C. and Holly Cork moved to Spokane, Washington on May 15, 2002. On October 29, 2002, less than 6 months after Holly and A.C. traveled to Washington, the former foster parents, David Nagel and Anita

Bangert, filed the petition for non-parental custody of A.C., alleging that “neither parent is a suitable custodian.” *CP 484, line 30-32.*

The foster parents were successful in reversing the Montana court and DHHPS decisions in Spokane County Superior Court and affirmed that reversal at Division Three of the Washington Court of Appeals. *CP 481-485 ; In re: A.C., Court of Appeals Div. III, Dkt. No. 22930-1, WL 446978 (Feb. 13, 2007).* A.C. was residing in Montana for six consecutive months under the supervision of the Montana courts within six months of filing the Washington petition. *CP 245 ¶1.* A.C.’s home state was Montana; he had been a resident of Montana since 1998. *CP 482, ln. 38-48; CP 483, ln.1-4; CP 232-237.* At no time since 1998 had A.C. lived anywhere else other than Montana for six consecutive months and he was still under Montana’s child custody jurisdiction within the six months preceding the filing of the Washington petition. *CP 482, ln. 38-48; CP 483, ln. 1-4; CP 232-237; MCA 40-7-201(a).* Holly Cork now seeks review in this Court to affirm that Washington’s Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) at RCW 26.27 does not allow a change of jurisdiction under these facts until the child has been absent from his domicile state for at least six months. The Washington Superior Court and Court of Appeals rulings overturning the Montana court decisions should be reversed since there was no original jurisdiction in

Washington, the Montana Courts retained exclusive continuing jurisdiction over A.C. and there has been no finding that the natural mother is unfit or that she ever consented to the establishment of a psychological parental relationship between her son and the foster parents.

## F. ARGUMENT

### I. THE COURT OF APPEALS' STRAINED INTERPRETATION OF THE UCCJEA ALLOWING A WASHINGTON COURT TO REVERSE A MONTANA COURT'S CHILD PLACEMENT ORDER WITHIN LESS THAN SIX MONTHS RAISES A SIGNIFICANT QUESTION OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

The Court of Appeals erroneously ruled that A.C.'s birth state of Montana did not retain jurisdiction even though he had lived there under the parental control of the Montana Department of Health and Human Services (DPHHS) within the last six months before the petition was filed in Washington. The Court of Appeals held that if a child had not lived in any state for the full preceding six months, no state had jurisdiction and Washington could exercise jurisdiction under the second prong of RCW 26.27.201. A.C. at 8-9. This contravenes the express statutory language of both Washington and Montana law and should be resolved by the Washington Supreme Court as a matter of substantial public interest.

**a. The Washington court did not have jurisdiction to hear this matter because at the time of filing, the State of Montana, Eleventh Judicial District Court had continuing jurisdiction over the custody of A.C.**

The Montana courts and DPHHS placed and supervised A.C. from 1998 until May 15, 2002, when the placement with Ms. Cork was made final. Under Montana law, those orders were binding on both the State of Montana's DPHHS and the foster parents, who served as agents for the state while parenting A.C. See MCA 40-7-137. Less than six months later, the foster parents attempted to reverse that order by filing a non-parental custody petition in Washington on October 29, 2002. This type of forum shopping for a reversal of the Montana placement order is prohibited under Washington's UCCJEA as long as it has been less than six months since the child left the state where the previous order was entered and at least one "person" who had previously provided parenting still remains in that state. See RCW 26.27.211; RCW 26.27.021. The Court of Appeals failed to discuss the fact that both the Montana DPHHS and the former foster parents remained in Montana, thus preserving Montana jurisdiction under RCW 26.27.201.

The Court of Appeals premised its decision on the fact that neither of A.C.'s natural parents remained in Montana, but the UCCJEA's definition of parent is broader and includes both government agencies and

unrelated persons who act as parents. RCW 26.27.021 defines “person” as “an individual, corporation... government, governmental subdivision, agency, or instrumentality.” *Id.* at (12). Montana also defines government as a person under the UCCJEA. MCA 40-7-103(12). The UCCJEA is similarly broad in defining what child custody orders are entitled to exclusive jurisdiction. A “child custody determination” is defined as “a judgment, decree, parenting plan, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child.” *Id.* at (3). Under this same statute, a “child custody proceeding” means a proceeding in which legal custody, physical custody, a parenting plan, or visitation with respect to a child is an issue. RCW 26.27.021(4).

The Montana Courts made an initial custody determination for A.C. consistent with RCW 26.27.201 since Montana was the home state of the child in 1999 when the child was found dependent. *CP 234*. In September 2000, the Montana Courts exercised its exclusive continuing jurisdiction over A.C. when Ms. Cork’s parental rights were terminated, and then again in December 2001 when the Supreme Court reversed the termination. Post-Supreme Court decision, Montana continued to exercise jurisdiction over A.C.’s care and custody until May 15, 2002 when A.C. was placed permanently with his mother after a trial court order and the

consent of DHHPS. The Court's April 18, 2002, order canceled a hearing set for that same date regarding protective services for A.C., and dismissed the case without prejudice, contingent upon the State of Montana's TIA and Parental Agreement for Substitute Care for A.C. being in effect from April 18, 2002 until May 15, 2002. *CP 244-245; CP 256-260*. The Parental Agreement for Substitute care granted temporary placement of A.C. into foster care. *CP 244-245*.

Both the DPHHS and the foster parents served as parents within the year leading up to the Washington petition and both remained in Montana at the time the petition was filed, less than six months after A.C. left the state. Montana retained jurisdiction and Washington could not exercise jurisdiction without a decline of jurisdiction by the Montana courts. Unlike In re Hamilton, 120 Wash.App. 147, 152, 84 P.3d 259 (2004) cited by Division III in A.C., the A.C. Washington Superior Court never sought or obtained a declination of jurisdiction from the home state.

The drafters of the UCCJEA explained, "the continuing jurisdiction of the original decree state is exclusive." UCCJEA §201 (1997). Even if the child has acquired a new home state, the original decree state retains exclusive, continuing jurisdiction, so long as the requirements of the "substantial connection" provisions of UCCJEA §201

(1997) are met. Only if the relationship between the child and the person remaining in the state with exclusive, continuing jurisdiction becomes “so attenuated” that the court could no longer find significant connections and substantial evidence, can jurisdiction be lost. Id. (emphasis added). Here, there is no evidence that David and Anita’s relationship with A. C. is attenuated since they continued to seek a relationship with him after he left their custody and currently have primary custody of him in Montana. Any argument that Washington should supplant Montana’s jurisdiction should be rejected under both the plain language and the intent of the UCCJEA.

b. **The Washington court’s order granting custody to the former foster parents in Montana must be reversed because the court had no jurisdiction to act.**

Lack of subject matter jurisdiction renders a court powerless to pass on the merits of this case. Skagit Surveyors & Eng’rs, LLC v. Friends, 135 Wash.2d 542, 556, 958 P.2d 962 (1998). The only jurisdiction alleged in this case was the UCCJEA, and failing that test, must be denied. The Court of Appeals decision erroneously found jurisdiction and will encourage forum shopping in child custody cases unless it is corrected.

**II. THE COURT OF APPEALS DECISION INTERFERES WITH HOLLY CORK’S CONSTITUTIONAL RIGHT TO CARE FOR HER CHILD AND DIRECTLY CONTRADICTS THIS COURT’S DECISION IN L.B. THAT LIMITS**

**CONSIDERATION OF DISTRESS CAUSED BY  
SEPARATION FROM A PSYCHOLOGICAL PARENT  
UNLESS THAT RELATIONSHIP WAS FORMED WITH  
THE CONSENT OF THE NATURAL PARENT.**

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The Court should grant review of this case because the decision of the Court of Appeals Division III essentially created a new foster parent exception to the threshold set by this Court in In re L.B., 155 Wash.2d 679, 122 P.3d 161 (2005). Division III affirmed the trial court's finding that the distress caused by being separated from A.C.'s foster parents was sufficient to outweigh the constitutional rights of his natural, fit mother even though she didn't consent to the foster parent relationship.

In L.B., this Court established a framework for dealing with the potential emotional distress caused when parental figures are removed from a child's life. Id. at 708. In order to comply with the natural parent's rights set out in Troxel, this Court narrowed instances where a non-biological parent can interfere with the custody of a fit natural parent to situations where the natural parent consented to the de facto parent relationship and the non-parent did not care for the child with an expectation of compensation. Id. This important decision holds natural parents accountable for any distress caused when they establish de facto parental relationships between their children and third parties, but protects them from litigating against involuntary de facto non-biological parents or

paid caregivers. The Division III decision in A.C. takes exception to the Troxel protection from litigation on these issues implicit in L.B. and would potentially open the courthouse doors to other foster parents who believe that their relationship with a non-biological child is superior to an otherwise fit natural parent.

The arguments supporting a change in placement away from a fit mother adopted by the Trial Court and the Court of Appeals revolved around the psychological distress experienced by A.C. as he transitioned from his long-term foster care placement to his natural mother. A.C. at 16. “When talking with counselors, A.C. frequently stated that he missed Anita and David, expressed anger toward his mother, and denied that Holly was his real mother.” Id. “He appeared bonded with Anita and David and grieved when separated from them. Ms. Thomas concluded Anita and David were A.C.’s ‘psychological parents.’ CP at 463.” Id. The wisdom of L.B. was that as agonizing as the transition away from non-biological parents might be, that distress may not be used in a placement decision against the fit, biological parent unless the parent consented to the forming of the non-parental bond. L.B., 155 Wash.2d. 679, 708. Similarly, adults that are paid to care for a child, like David and Anita, cannot then sue for placement on the basis of the attachment they developed while being paid to care for the child. Id.

L.B.'s limitations on arguing detriment in the transition process as a basis for depriving a fit biological parent of custody in favor of a non-parent is consistent with Ms. Cork's fundamental constitutional rights to parent her natural child. In re Troxel v. Granville, 530 U. S. 57, 75, 120 S. CT. 2054, 147 L.Ed.2d 49 (2000). Troxel relied on a long line of cases that established fundamental rights of natural parents to establish and maintain their family relationships with their children at the expense of the opinions and needs of third parties. Id. at 65-66. In fact, the mere process of litigating such cases may be a deprivation of their rights. Id. at 75.

There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As Justice KENNEDY recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Post*, at 2079. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right.

Id. Even if Washington's child custody statutes allowed the former foster parents to intervene in court, the Constitution precludes them from depriving Holly Cork of custody on this record, just like it precluded the concerned grandparents in Troxel.

The trial court made a specific finding that Holly is a fit parent for A.C. Accordingly, there is no basis for the former foster parents or the state courts to inject themselves into the private realm of the relationship between a mother and her son. This is particularly true when the petition itself seems to have precipitated A.C.'s behavioral issues. The trial court described potential detriment related to his psychological bond with David and Anita. These concerns were raised in April 2003, almost 6 months after the petition was filed and coincidentally, shortly after David and Anita were forcibly immersed back into A.C.'s life (after Christmas 2002), thus validating that it is the intrusion by the foster parents that places the child's growth and development in detriment not the placement in Holly's home or the decision she made for him. *CP 461, ¶ 18, ¶ 19, RP 163, In. 14-20, RP 164-166, RP 194-195, RP 196, RP 206, RP 212.* Here, the State of Montana's actions in initially terminating Holly's parental rights were unconstitutional and thus, illegal. David and Anita's only bond with A.C. was formed through unlawful conduct of the state of Montana in denying Holly the care and custody of A.C. Allowing the involuntary foster parents to use the former illegal denial of custody for this new denial of custody cannot now be used to expand Washington's non-parental custody statute beyond what was intended in L.B.

The court was required to find actual, not speculative detriment to A.C. if he remained with his mother, unrelated to any distress caused by losing his relationship with the foster parents. The contrary Court of Appeals opinion must be reversed. Otherwise, this new foster parent exception to L.B. will swallow the rule and natural parents will be forced to spend precious resources defending their constitutional rights to be free from third party interference in their families.

#### **G. CONCLUSION**

This Court should accept review of the Court of Appeals' decision and find that the trial court did not have subject matter jurisdiction to heard custody matters relating to A.C. Montana remained the home state of A.C. and had exclusive continuing jurisdiction over matters relating to the child. Thus, any rulings made on the merits of this case should be ruled null and void with custody of A.C. being restored to Holly Cork.

Dated this 15th day of March 2007.

Respectfully submitted,

Attorneys for Appellant:

A handwritten signature in black ink, appearing to read 'B. Beggs', written over a horizontal line.

BREEAN BEGGS, WSBA #20333

ANDREA POPLAWSKI, WSBA #32246

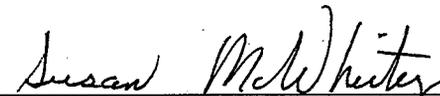
**Certificate of Service**

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I ~~caused to be served in the manner noted below a copy of this document~~ entitled **Petition for Review** on the following individuals:

David J. Crouse  
West 422 Riverside, Suite 518  
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Via Messenger  
 Via Mail  
 Via Facsimile

DATED this 15th day of March 2007



\_\_\_\_\_  
Susan McWhirter, Paralegal

# APPENDIX 1

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foster care, with a relative, on their own, and in a group home. During this period, DPHHS received reports that Holly occasionally became frustrated with A.C. and treated him roughly (including a report that she bit him in the face). She also failed to seek medical care for a lump on A.C.'s chest. Based on these reports, DPHHS obtained an

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order for temporary investigative authority (TIA) over Holly and A.C. and petitioned for temporary legal custody of Holly as well as of A.C.

Holly and A.C.'s placement in a Helena group home treatment facility in February 1999 was not successful. On several occasions, Holly refused to participate in ordered counseling sessions and was reported to have neglected or mistreated A.C. In June 1999, DPHHS removed A.C. from Holly's care and placed him with Anita and David as foster parents. Eventually, DPHHS petitioned for permanent legal custody of A.C. and termination of Holly's parental rights. At this point, the court appointed counsel to represent Holly during the termination proceedings. Holly's parental rights were terminated by court order in September 2000 and Anita and David initiated adoption proceedings. Holly appealed the termination.

In December 2001, the Montana Supreme Court reversed, concluding that due process required appointment of counsel during the formulation of Holly's treatment plan. In re A.F.-C., 2001 MT 283, 307 Mont. 358, 370, 37 P.3d 724. A.C. continued to live with Anita and David until May 2002 while Holly voluntarily participated in a TIA transition program for reunification with her son. She also obtained her GED and completed a 75-hour nurse aide certification. The Montana DPHHS terminated the TIA in April 2002 when Holly fulfilled all the requirements of her treatment plan. In the letter informing Holly of the dismissal of the TIA, a representative of DPHHS stated, "You

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cooperated fully with the Department and the transition was as successful as could be expected considering the obstacles presented. I hope you and [A.C.] continue to do well." Clerk's Papers (CP) at 255.

Soon after A.C. was returned to Holly's care in May 2002, she moved with him to Spokane. She allowed Anita and David visitation with A.C. roughly monthly until

September 2002, when she decided to prevent contact because A.C. was defiant when he returned from visits with them. A.C. entered kindergarten in September and reportedly did well at school.

In early October 2002, the Spokane County Child Protective Services (CPS) received an anonymous call from someone who claimed that A.C. was being punched and thrown around by his violent mother. The caller claimed that Holly had extensive involvement with Montana's child protective services and "wasn't ever interested in parenting but was interested in winning in court." CP at 263. The caller also claimed that immediately after A.C. was returned to Holly "on a technicality," she fled from Montana. CP at 284. A letter from Anita and David to the Spokane office of the Washington Department of Social and Health Services (DSHS) that same month stated that A.C. had been returned to Holly "due to a legal technicality." CP at 266. They offered to continue providing "foster/adoptive care" to A.C. "should the need arise." Id.

DSHS began an investigative assessment of Holly in October 2002. A case worker

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called Holly's Montana social worker, who explained Holly's DPHHS history and opined that Anita and David were the ones who called with the anonymous allegations of abuse. According to the social worker and a supervisor at DPHHS, the foster parents were vindictive because A.C. had been returned to his mother, and they became even more upset when Holly stopped the monthly visits. After a few weeks of investigation, the DSHS case worker concluded that although A.C. was still defiant with Holly and did not believe she was his mother, he was in no danger of abuse and should be fine with continued counseling. DSHS ended its service in late October, finding little or no risk. However, Holly did not provide A.C. with the recommended counseling.

On October 29, 2002, Anita and David filed a petition in Spokane County for nonparental custody of A.C. The petition alleged that Washington had jurisdiction as the home state. It also alleged that Holly was not a suitable custodian and requested limited parental visitation because Holly had engaged in the following conduct: "Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions. Physical, sexual or a pattern of emotional abuse of the child." CP at 5. Holly failed to obtain counsel or to respond to the petition and a default judgment was entered against her in December 2002. She then hired an attorney, who

entered a notice of appearance and successfully moved to vacate the default judgment. Her response to the petition for nonparental custody admitted the assertion of Washington

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jurisdiction.

In March 2003, Mary Ronnestad was appointed A.C.'s GAL. Also that month, Anita and David moved for a temporary order of visitation and for a bonding and attachment assessment. The trial court granted their motion and ordered counseling for A.C. with therapist Carol Thomas, who was recommended by Ms. Ronnestad.

Holly's attorney withdrew in early August 2003. Later that month, Anita and David moved for a temporary order placing A.C. with them pending trial. On August 29, the trial court ordered temporary custody of A.C. with Anita and David in Montana and set out a schedule of visitation for Holly.

Holly obtained new counsel through the Spokane Center for Justice in October 2003 and successfully moved to continue trial beyond its original date of October 20. She moved to dismiss the nonparental custody petition in January 2004, arguing for the first time that Washington did not have subject matter jurisdiction because Montana was the home state and had continuing jurisdiction over A.C.'s custody. The motion was denied.

After trial in February 2004, the court granted residential custody of A.C. to Anita and David with scheduled visitation for Holly. Although the trial court did not find that Holly was an unfit parent, it stated that the evidence was "very clear that continued placement with the mother would detrimentally affect [A.C.'s] growth and development."

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CP at 465. This appeal timely followed.

#### Subject Matter Jurisdiction

Holly first challenges the Washington superior court's subject matter jurisdiction over the nonparental custody petition. She contends Montana, not Washington, was A.C.'s home state at the commencement of the action, and further argues that Montana had continuing jurisdiction over A.C.'s custody. Anita and David respond that Holly consented to Washington's jurisdiction and waived this issue in her response to the petition.

Washington superior courts have general jurisdiction and lack subject matter jurisdiction only when expressly denied. In re Marriage of Thurston, 92 Wn. App. 494, 498, 963 P.2d 947 (1998). Subject matter jurisdiction is the court's authority to hear and determine cases within a particular class of actions. Id. at 497-98. Lack of subject matter jurisdiction renders the superior court powerless to pass on the merits of a case. Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). Contrary to the argument of Anita and David, however, subject matter jurisdiction cannot be conferred by the consent of the parties. Wampler v. Wampler, 25 Wn.2d 258, 267, 170 P.2d 316 (1946); In re Custody of R., 88 Wn. App. 746, 762, 947 P.2d 745 (1997). Although parties may waive their right to assert lack of personal jurisdiction, they may not waive subject matter jurisdiction. Skagit, 135 Wn.2d at 556.

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"Any party to an appeal . . . may raise the issue of lack of subject matter jurisdiction at any time." Id.

This court reviews questions of subject matter jurisdiction de novo. Thurston, 92 Wn. App. at 497. Under Washington's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), chapter 26.27 RCW, a Washington court has subject matter jurisdiction to make an initial child custody determination only if (1) Washington is the child's home state on the date of the proceeding's commencement, or was the home state within six months before commencement and the child is absent from the state but a parent or "person acting as a parent" continues to live in the state; or (2) no other state has jurisdiction or has declined jurisdiction because Washington is the more appropriate forum, and (a) the child and at least one parent or person acting as a parent have a significant connection with Washington other than mere physical presence, and (b) substantial evidence is available in Washington regarding the child's care, protection, training, and relationships. RCW 26.27.201(1); In re Marriage of Hamilton, 120 Wn. App. 147, 151, 84 P.3d 259 (2004). We address first whether Washington or Montana was A.C.'s home state.

The child's "home state" is the state in which the child lived with a parent or person acting as a parent for at least six months immediately before the custody proceedings commenced. RCW 26.27.021(7). A.C. had not lived in Washington or

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Montana for a full six months immediately before Anita and David filed the petition for nonparent custody. (Holly and A.C. moved to Washington some time in June 2002 and the petition was filed on October 29, 2002.) Consequently, neither Washington nor Montana was his home state. *Id.*; see *Hamilton*, 120 Wn. App. at 154. We then ask

whether this case meets the alternate basis for jurisdiction: whether A.C. and Holly had significant connections, other than mere presence, with Washington, and whether there is substantial evidence in the state regarding A.C.'s care, protection, training, and relationships. RCW 26.27.201(1)(b).

Holly contends all information regarding A.C.'s history is in Montana, including all evidence pertinent to the Montana dependency and termination proceedings. She notes that A.C. lived in Montana and attended school and counseling sessions in Montana at the time of trial. She also argues that she is registered with the Blackfeet Tribe in Montana and has many family members on that reservation. Jurisdiction is determined at the time the custody petition is filed, so A.C.'s contacts with Montana after the proceedings commenced are not relevant. RCW 26.27.201. Holly's membership in the Blackfeet Tribe also is not particularly relevant, especially considering that she was not registered when the petition was filed, A.C. is not registered, and she recounted no visits with relatives on the reservation. Although information regarding the prior termination proceedings was in Montana, those proceedings had ended in December 2001.

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On the other hand, much information relating to A.C.'s care, training, and personal relationships was available in Washington. After reversal of the Montana termination proceedings, Holly's parenting of A.C. took place entirely in Washington (although only for less than six months). She had lived with an uncle in Spokane for several months when A.C. was a baby. *A.F.-C.*, 307 Mont. at 360-61. On her return to Spokane, she lived with her boyfriend, got a job, and placed A.C. in school. Those contacts constitute significant connections with Washington. Substantial information regarding A.C.'s care, protection, training, and relationships was available through his school teacher and counselor, his stepfather, and Holly -- all of whom resided in Washington. The Washington superior court properly assumed subject matter jurisdiction over the petition

to determine the custody of A.C.

Holly next contends Washington cannot assert jurisdiction over A.C.'s custody because Montana has continuing jurisdiction over this issue. Under the federal Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. § 1738A(d), a state that has made a child custody or visitation determination has continuing jurisdiction as long as the state remains the residence of the child or of any contestant. Holly contends Montana made a custody determination when it terminated her parental rights, reversed that termination, and imposed a TIA. However, the PKPA does not apply unless a custody decree already exists or there is a custody action pending in another state. In re Marriage of Murphy, 90

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Wn. App. 488, 496, 952 P.2d 624 (1998). No Montana custody decree appears in the record. And Montana had dismissed all investigations and proceedings regarding Holly and A.C. after her parental rights were reestablished. In short, the record does not show that Montana had continuing jurisdiction over the issue of A.C.'s custody.

Holly also argues that Washington should have declined jurisdiction because this is an inconvenient forum. RCW 26.27.261 provides that a Washington court may decline jurisdiction if it determines that it is an inconvenient forum and a court in another state is a more appropriate forum. The court is urged to consider such factors as the length of time the child has resided in another state, the distance to the other state's court, the relative financial circumstances of the parties, the nature and location of the evidence needed to resolve custody (including the testimony of the child), and the familiarity of each state's courts with the facts and issues in the pending litigation. Id. A decision to decline jurisdiction is discretionary with the court. RCW 26.27.261(1); Myers v. Boeing Co., 115 Wn.2d 123, 128, 794 P.2d 1272 (1990); In re Marriage of Owen, 126 Wn. App. 487, 503-04, 108 P.3d 824 (2005).

The trial court here concluded that the request to decline jurisdiction was inappropriate because it was made a week before trial, after the GAL had completed her report and the bonding analysis had been completed in Spokane. The trial court's decision to retain jurisdiction was not unreasonable or based on untenable grounds,

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especially in light of the fact that Holly lived in Spokane. Myers, 115 Wn.2d at 128.

## Admission of Evidence

Holly next contends the trial court erred in basing its decision in part on the evidence provided by Ms. Thomas. She contends Ms. Thomas's evaluation was based on inadmissible child hearsay statements, was incomplete, and was based on an incorrect standard for determining custody issues. This court generally reviews the trial court's admission of evidence for abuse of discretion. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *Id.*

Under RCW 26.10.130(1), the trial court in a contested custody proceeding may order an investigation and report concerning custody arrangements and may appoint a guardian ad litem for the child under RCW 26.12.175. In preparing the report, the investigator (the guardian ad litem or someone from a professional social service organization) may consult with "medical, psychiatric, or other expert persons" who have served the child. RCW 26.10.130(1), (2). The investigator's report may be received in evidence at the hearing, as long as it meets the notice requirements of the statute. RCW 26.10.130(2), (3). In his or her role to protect the child's best interests, the guardian ad litem and any other investigators may make recommendations based on the independent investigation, "which the court may consider and weigh in conjunction with the

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recommendations of all of the parties." RCW 26.12.175(1)(b). Additionally, the guardian ad litem must report any custody preference expressed by the child, along with information regarding the child's ability to understand the proceedings. *Id.*

By order of the court here, a guardian ad litem was appointed and counseling was ordered for A.C. to address behavioral issues and to aid in the guardian ad litem's assessment of A.C.'s degree of attachment. The guardian ad litem chose Ms. Thomas as counselor, and Ms. Thomas's report was accepted into evidence as plaintiff's exhibit 3. At the hearing, Ms. Thomas explained that she scheduled family sessions with A.C. and either Anita and David or Holly so that she could give the guardian ad litem information on A.C.'s relationships with his foster parents and his mother. She also met with A.C. individually. During the course of her testimony, she occasionally repeated statements A.C. made during these sessions. Defense counsel's objections to these statements as child hearsay were overruled. Holly contends on appeal that the trial court erred in

admitting these hearsay statements because they did not qualify under the medical treatment exception, ER 803(a)(4).

Hearsay, described generally as an out-of-court statement offered into evidence to prove the truth of the matter asserted, is not admissible at trial unless it qualifies as an exception. ER 801(c), ER 802. One of the recognized hearsay exceptions is the statement made for the purposes of medical diagnosis or treatment. ER 803(a)(4). This

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statement may describe the declarant's past or present symptoms, pain, or sensations. Id.

Holly contends Ms. Thomas's interviews with A.C. were not conducted for diagnosis or treatment, but to prepare an assessment report. The trial court concluded, however, that Ms. Thomas acted as A.C.'s therapist and also as the preparer of the forensic evaluation. The record supports this conclusion. As foundation for her testimony, Ms. Thomas explained that she told A.C. her office was where children could come and talk about what they love to do and what causes them problems. Although she was not sure that a child his age could understand what a therapist was, she thought she communicated the concept that her office was a therapeutic environment. In her opinion, A.C. understood that her role was to help him. Her observations of A.C.'s conduct and statements were made during counseling sessions and therefore were properly admitted under ER 803(a)(4).

Holly's additional challenges to Ms. Thomas's testimony are without merit. She first contends Ms. Thomas's report was incomplete because Ms. Thomas did not consult with A.C.'s previous counselors. The limited nature of Ms. Thomas's evaluation -- based entirely upon her personal interaction with A.C., Holly, and Anita and David -- was freely admitted at the hearing, and the trial court accepted her testimony on this basis. Second, Holly contends Ms. Thomas applied the standard for determining custody between two parents -- the best interests of the child -- rather than the standard used in a custody

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dispute between a parent and a nonparent, which favors the parent. See *In re Custody of Shields*, 157 Wn.2d 126, 142, 145, 136 P.3d 117 (2006) (when determining custody between a parent and a nonparent, the best interests of the child standard is

inappropriate). Although it is correct that Ms. Thomas addressed the best interests of A.C., her expert opinion was merely evidence for the trial court's ultimate determination of custody. The trial court's findings of fact indicate that it did not apply the best interests of the child standard. Accordingly, Ms. Thomas's misinterpretation of the appropriate standard had no effect.

#### Custodial Decision

Finally, Holly contends the trial court applied the incorrect standard in awarding custody to Anita and David. She argues that the trial court found her to be a fit parent, yet awarded custody to the nonparents because they had developed a psychological bond with A.C and because custody with Anita and David was in the best interests of the child. She contends a child's bond with so-called "psychological parents" is insufficient to overbalance the natural parent's constitutional rights to privacy and protection of the family. This court reviews the trial court's child custody decision for abuse of discretion. *Shields*, 157 Wn.2d at 150.

Recently, in *Shields*, the Washington Supreme Court held that the best interests of the child standard was unconstitutional in a custody proceeding between a parent and a

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nonparent because that standard does not give the required deference to parental rights. 157 Wn.2d at 142 (citing with approval *In re Marriage of Allen*, 28 Wn. App. 637, 646, 626 P.2d 16 (1981)). Although *Shields* noted that the best interests of the child standard, adopted in RCW 26.10.100 for nonparental custody actions, is proper when determining custody between parents or between nonparents, a custody dispute between a parent and a nonparent requires a more stringent balancing test. *Id.* at 142, 145 n.8. The parent's rights may be outweighed only in two instances: (1) when the parent is unfit, or (2) "when actual detriment to the child's growth and development would result from placement with an otherwise fit parent." *Id.* at 143. When, as in this case, the trial court concludes that the parent is fit, the nonparent is required to make a substantial showing that placement of the child with the parent will result in actual detriment to the child's growth and development. *Id.* at 145. This heightened standard will be met by the nonparent only in extraordinary circumstances. *Id.*

The record shows that the trial court understood the proper standard to be applied. In its oral ruling, the court stated, "It's only if the detriment to [A.C.] outweighs [Holly']

rights that I can find that the allegations of the petition [have] been satisfied." Report c Proceedings at 812. Evidence showing actual detriment to A.C.'s development is listed in the findings of fact and the trial court's oral ruling. The court noted that although Holly has made great strides in getting her life together, after fewer than five months with

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his mother, A.C. began to show anger, agitation, aggression, and out-of-control behavior at school. When talking to counselors, A.C. frequently stated that he missed Anita and David, expressed anger toward his mother, and denied that Holly was his real mother. He had to be sent home on two occasions because he was so disruptive. By June 2003, he was considered to have severe behavioral issues.

Ms. Thomas observed that A.C. was distant and detached with his mother. He told Ms. Thomas he hated Holly and he felt like he was being killed when he lived with her. He had a negative self-image while he was in his mother's custody and felt he was bad. In contrast, he appeared bonded with Anita and David and grieved when separated from them. Ms. Thomas concluded Anita and David were A.C.'s "psychological parents." CP at 463. She was greatly concerned that continued placement with Holly "would result in increased depression, withdrawal, rebellion, self-destructive behaviors, [and] violent behaviors toward others." CP at 463. The trial court found Ms. Thomas's testimony very important to its determination of the issues, and noted that even Holly's expert witness confirmed that A.C. profoundly grieved for Anita and David and would be traumatized by reunification with his mother.

Additionally, the trial court found that Holly's attitude toward A.C. appeared "at best, casual." CP at 464. Although she was advised by numerous people in Montana and Washington to seek counseling for A.C. during the reunification process, she refused to

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admit that he had any behavioral or emotional issues, and did not take him to a counselor until she was required to take him to Ms. Thomas. In a finding better labeled as a conclusion of law, the trial court stated that although Holly was not an unfit parent, "[i]t' very clear that continued placement with the mother would detrimentally affect [A.C.'s] growth and development." CP at 465.

Holly points out that the trial court also found that Anita and David were A.C.'s

psychological parents. In *Shields*, 157 Wn.2d at 145, the court expressed disapproval with "incautious use of terms such as psychological parent, in loco parentis, and de facto parent." To give "legal effect" to the status of de facto parent, *Shields* continued, the court must first find that "the natural or legal parent consented to and fostered the parent-like relationship." *Id.* at 145. Holly never consented to Anita and David's custody of A.C. Consequently, Anita and David cannot use the status of psychological parents to interfere with Holly's constitutionally protected rights. *Id.* at 146. Even with removal of the trial court's finding that Anita and David were A.C.'s psychological parents, however, the court's remaining findings support its conclusion that continued placement with Holly would result in actual detriment to A.C.'s growth and development.

Holly also contends that the trial court actually applied the best interests of the child standard rather than the detriment to the child standard. She notes that the findings of fact and conclusions of law contain a section entitled "BEST INTEREST OF THE

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CHILD/FINDINGS OF THE COURT," followed by "The court's conclusions concerning the best interests of the children are based on the following facts." CP at 460. Later, under the section in the conclusions of law entitled "DISPOSITION," the document states that "[i]t is in the best interest of the child to reside with [Anita and David] for the reasons set forth in the findings." CP at 466. Despite this language, which is apparently contained in the standard custody form used by the court to draft its findings and conclusions, the trial court's findings and its oral ruling clearly establish that it applied the heightened actual-detriment-to-the-child standard required for determining custody between a fit parent and a nonparent. Because the evidence supports the trial court's findings of fact, and the findings were correctly applied to the proper standard to

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reach the conclusions of law, the trial court did not abuse its discretion in placing A.C. with Anita and David.

Affirmed.

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Schultheis, J.

WE CONCUR:

# APPENDIX 2

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MONTANA CODE ANNOTATED  
TITLE 40. FAMILY LAW  
CHAPTER 7. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT  
PART 1. GENERAL PROVISIONS  
40-7-137. Binding force of child custody determination

A child custody determination made by a court of this state that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this state or notified in accordance with 40-7-106 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent that the determination is modified.

History: En. Sec. 17, Ch. 91, L. 1999.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

*Commissioners' Note*

No substantive changes have been made to this section which was Section 12 of the UCCJA [former 40-7-113].

**Compiler's Comments**

*Severability:* Section 47, Ch. 91, L. 1999, was a severability clause.

*Effective Date:* This section is effective October 1, 1999.

*Source:* Section 106, UCCJEA.

MCA 40-7-137, MT ST 40-7-137

Current through 2005 Regular Session of the 59th Legislature  
and the December 2005 Special Session.

END OF DOCUMENT

**C**MONTANA CODE ANNOTATEDTITLE 40. FAMILY LAWCHAPTER 7. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACTPART 2. JURISDICTION40-7-201. Initial child custody jurisdiction

(1) Except as otherwise provided in 40-7-204, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) this state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) a court of another state does not have jurisdiction under subsection (1)(a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under 40-7-108 or 40-7-109, and:

(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) all courts having jurisdiction under subsection (1)(a) or (1)(b) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under 40-7-108 or 40-7-109; or

(d) no state would have jurisdiction under subsection (1)(a), (1)(b), or (1)(c).

(2) Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

History: En. Sec. 21, Ch. 91, L. 1999.

<General Materials (GM) - References, Annotations, or Tables>

**NOTES, REFERENCES, AND ANNOTATIONS***Commissioners' Note*

This section provides mandatory jurisdictional rules for the original child custody proceeding. It generally continues the provisions of the UCCJA § 3 [former 40-7-104]. However, there have been a number of changes to the jurisdictional bases.

1. Home State Jurisdiction. The jurisdiction of the home State has been prioritized over other jurisdictional

bases. Section 3 of the UCCJA [former 40-7-104] provided four independent and concurrent bases of jurisdiction. The PKPA provides that full faith and credit can only be given to an initial custody determination of a "significant connection" State when there is no home State. This Act [chapter] prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any potential conflict between the two acts.

The six-month extended home state provision of subsection (a)(1) [(1)(a)] has been modified slightly from the UCCJA. The UCCJA provided that home state jurisdiction continued for six months when the child had been removed by a person seeking the child's custody or for other reasons and a parent or a person acting as a parent continues to reside in the home State. Under this Act [chapter], it is no longer necessary to determine why the child has been removed. The only inquiry relates to the status of the person left behind. This change provides a slightly more refined home state standard than the UCCJA or the PKPA, which also requires a determination that the child has been removed "by a contestant or for other reasons." The scope of the PKPA's provision is theoretically narrower than this Act [chapter]. However, the phrase "or for other reasons" covers most fact situations where the child is not in the home State and, therefore, the difference has no substantive effect.

In another sense, the six-month extended home state jurisdiction provision in this Act [chapter] is narrower than the comparable provision in the PKPA. The PKPA's definition of extended home State is more expansive because it applies whenever a "contestant" remains in the home State. That class of individuals has been eliminated in this Act [chapter]. This Act [chapter] retains the original UCCJA classification of "parent or person acting as parent" to define who must remain for a State to exercise the six-month extended home state jurisdiction. This eliminates the undesirable jurisdictional determinations which would occur as a result of differing state substantive laws on visitation involving grandparents and others. For example, if State A's law provided that grandparents could obtain visitation with a child after the death of one of the parents, then the grandparents, who would be considered "contestants" under the PKPA, could file a proceeding within six months after the remaining parent moved and have the case heard in State A. However, if State A did not provide that grandparents could seek visitation under such circumstances, the grandparents would not be considered "contestants" and State B where the child acquired a new home State would provide the only forum. This Act [chapter] bases jurisdiction on the parent and child or person acting as a parent and child relationship without regard to grandparents or other potential seekers of custody or visitation. There is no conflict with the broader provision of the PKPA. The PKPA in . (c)(1) authorizes States to narrow the scope of their jurisdiction.

2. Significant connection jurisdiction. This jurisdictional basis has been amended in four particulars from the UCCJA. First, the "best interest" language of the UCCJA has been eliminated. This phrase tended to create confusion between the jurisdictional issue and the substantive custody determination. Since the language was not necessary for the jurisdictional issue, it has been removed.

Second, the UCCJA based jurisdiction on the presence of a significant connection between the child and the child's parents or the child and at least one contestant. This Act [chapter] requires that the significant connections be between the child, the child's parents or the child and a person acting as a parent.

Third, a significant connection State may assume jurisdiction only when there is no home State or when the home State decides that the significant connection State would be a more appropriate forum under Section 207 or 208 [40-7-108 or 40-7-109]. Fourth, the determination of significant connections has been changed to eliminate the language of "present or future care." The jurisdictional determination should be made by determining whether there is sufficient evidence in the State for the court to make an informed custody determination. That evidence might relate to the past as well as to the "present or future."

Emergency jurisdiction has been moved to a separate section. This is to make it clear that the power to protect a child in crisis does not include the power to enter a permanent order for that child except as provided by that section.

Paragraph (a)(3) [subsection (1)(c)] provides for jurisdiction when all States with jurisdiction under paragraphs (a)(1) and (2) [subsections (1)(a) and (1)(b)] determine that this State is a more appropriate forum. The determination would have to be made by all States with jurisdiction under subsection (a)(1) and (2) [subsections (1)(a) and (2)]. Jurisdiction would not exist under this paragraph because the home State determined it is a more appropriate place to hear the case if there is another State that could exercise significant connection jurisdiction under subsection (a)(2) [subsection (1)(b)].

Paragraph (a)(4) [subsection (1)(d)] retains the concept of jurisdiction by necessity as found in the UCCJA and in the PKPA. This default jurisdiction only occurs if no other State would have jurisdiction under subsections (a)(1) through (a)(3) [(1)(a) through (1)(c)].

Subsections (b) and (c) [(2) and (3)] clearly State the relationship between jurisdiction under this Act [chapter] and other forms of jurisdiction. Personal jurisdiction over, or the physical presence of, a parent or the child is neither necessary nor required under this Act [chapter]. In other words neither minimum contacts nor service within the State is required for the court to have jurisdiction to make a custody determination. Further, the presence of minimum contacts or service within the State does not confer jurisdiction to make a custody determination. Subject to Section 204 [40-7-204], satisfaction of the requirements of subsection (a) [(1)] is mandatory.

The requirements of this section, plus the notice and hearing provisions of the Act [chapter], are all that is necessary to satisfy due process. This Act [chapter], like the UCCJA and the PKPA is based on Justice Frankfurter's concurrence in *May v. Anderson*, 345 U.S. 528 (1953). As pointed out by Professor Bodenheimer, the reporter for the UCCJA, no "workable interstate custody law could be built around [Justice] Burton's plurality opinion... . Bridgette Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand.L.Rev. 1207,1233 (1969). It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act [chapter] is ineffective.

#### Compiler's Comments

*Source:* Section 201, UCCJEA.

#### Case Notes

#### CASES DECIDED UNDER UCCJEA

*Analysis of Child's Home State for Purposes of Determining Jurisdiction:* A child's home state, for purposes of determining jurisdiction under this section, is not limited to the time period of 6 months immediately before the commencement of a child custody proceeding. The applicable time period should be within 6 months before commencement of a child custody proceeding. In the present case, the mother moved the children back to Arkansas 4 months after moving to Montana, thereby stopping the clock for the time needed to establish Montana as the home state for jurisdictional purposes. The children had not lived in Montana for at least 6 months before the father began child custody proceedings, so Montana could not acquire home state status. *Stephens v. District Court*, 2006 MT 21, 331 M 40, 128 P3d 1026 (2006).

*Removal of Child Across State Lines While Custody Proceedings Pending in Montana -- Continuing Jurisdiction Versus Pending Jurisdiction Under Federal Parental Kidnapping Prevention Act:* When the parties were divorced, an Oregon court granted a parenting plan. The mother later moved to Montana, and the Montana District Court properly assumed jurisdiction. The mother then fled with her son to American Samoa. A Samoan court assumed jurisdiction and awarded custody to the mother. The father petitioned the Montana District Court to enforce the earlier parenting plan, and the petition was granted. The mother appealed the Montana court's failure to recognize the jurisdiction of the Samoan court. The Supreme Court applied the provisions of the federal Parental Kidnaping Prevention Act of 1980 (PKPA), holding that a sister state may modify a child custody determination when the sister state has jurisdiction to make a child custody determination under its own laws, which the Samoan court had, and when the first state no longer has jurisdiction by having lost or given up its continuing or pending jurisdiction. A state has continuing jurisdiction if it has jurisdiction under its own law and it remains the residence of the child or any of the contestants. A state has pending jurisdiction if that state is engaged in proceedings that will ultimately impact the custody and visitation of a child. In this case, Montana did not have continuing jurisdiction because none of the parties were residing in Montana once the mother moved with the child to American Samoa. However, Montana did have pending jurisdiction at the time that the mother initiated the action in American Samoa. The PKPA was designed to prevent precisely what occurred here, namely the removal of a child from one jurisdiction to another in order to obtain a different result regarding custody or other matters affecting a minor child. The mother could not divest Montana of jurisdiction simply by removing the child to American Samoa in an effort

to restart the entire issue. Because the Montana court did not decline jurisdiction, the Samoan court was without authority to assume jurisdiction and instead was required to enforce the Montana custody determination. *Paslov v. Cox*, 2004 MT 325, 324 M 94, 104 P3d 1025 (2004).

*Determination of Inconvenient Forum -- Consideration of Statutory Factors Required:* The District Court determined, based on the best interests of the child standard in the 1977 Uniform Child Custody Jurisdiction Act (UCCJA), that Montana was not a convenient forum for a child custody proceeding. The Supreme Court noted that the proper standard under the 1999 Uniform Child Custody Jurisdiction and Enforcement Act, which replaced the UCCJA, is whether Montana is the child's home state, in which case Montana has continuing jurisdiction unless a Montana court determines that this state is an inconvenient forum and another state is a more appropriate forum. To determine whether Montana is an inconvenient forum, the Montana court must apply the factors in 40-7-108(2). Thus, the District Court erred by applying the old UCCJA standard, and the Supreme Court reversed for a hearing under present law to address the factors in 40-7-108(2) regarding jurisdiction. In *re Custody of N.G.H.*, 2004 MT 162, 322 M 20, 92 P3d 1215 (2004), following *In re Marriage of Fontenot*, 2003 MT 242, 317 M 298, 77 P3d 206 (2003).

*Error in Montana Court's Declination of Jurisdiction to Washington Court -- Inconvenient Forum:* Following several incidents of partner abuse over the years, the mother moved to Washington state and then requested that the Montana court decline jurisdiction as an inconvenient forum in order to allow the Washington court to assume jurisdiction. The request was denied, and the mother appealed. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a Montana court has jurisdiction to make child custody determinations if Montana is the child's home state, as defined in 40-7-103, and Montana will continue to have exclusive continuing jurisdiction unless the Montana court declines to exercise its jurisdiction. In this case, the parties conceded that Montana was the home state. Jurisdiction may be declined at any time if the Montana court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum to make custody determinations. The factors in 40-7-108 must be considered when evaluating a motion to decline jurisdiction, and the Act places domestic violence at the top of the list of factors to be considered. Although this factor alone is not dispositive, the Supreme Court held that, given the high propensity for recidivism in domestic violence, when a court finds that partner abuse or child abuse has occurred or that a party has fled Montana to avoid further violence or abuse, the court is authorized to consider whether the party and the child might be better protected if further custody proceedings are held in another state. Here, the District Court abused its discretion by failing to consider which forum would best protect the mother and children. The Supreme Court then went on to discuss the other statutory factors and concluded that the protection of the parties, the years that the children have resided in Washington, the significant distance between the courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors all supported the Montana court declining jurisdiction. None of the jurisdictional factors mitigated against declination, and no factor outweighed the concern for safety raised by the history of domestic violence. Thus, the Supreme Court ordered the District Court to decline jurisdiction as an inconvenient forum and arrange to transfer the case to Washington. In *re Marriage of Stoneman v. Drollinger*, 2003 MT 25, 314 M 139, 64 P3d 997 (2003).

*Jurisdictional Requirement Over Dissolution Proceeding Satisfied by Party's Residence -- Inconvenient Forum Improperly Applied Absent Opportunity to Respond to Motion:* After several years of a difficult relationship, the husband was charged with partner or family member assault and the wife moved to Oregon with the four children. An Oregon court determined that it had temporary emergency jurisdiction over the children, issued a restraining order against the husband, and granted residential custody to the wife. The husband subsequently filed for dissolution and a parenting plan in Montana. The District Court ordered the wife to show cause why the parenting plan should not be adopted. The wife moved to vacate the hearing, claiming that the Montana court did not have jurisdiction and that it was an inconvenient forum. The District Court vacated the show cause hearing without allowing the husband to respond to the motion and dismissed the dissolution petition without explanation. The husband appealed and the Supreme Court reversed. Oregon's exercise of temporary emergency jurisdiction over the children did not automatically divest Montana of jurisdiction over the same parenting issues. Neither party had initiated dissolution proceedings at the time that the husband's petition was filed, so no concurrent jurisdiction issue existed regarding dissolution. Because the husband resided in Montana for 90 days prior to filing the petition, the jurisdiction requirements of 40-4-104 were satisfied. However, jurisdiction over a dissolution of marriage does not necessarily confer jurisdiction over related child custody issues. Once the Montana court was notified of the child custody proceedings in Oregon, the Montana court was obligated by 40-7-204 to contact the Oregon court regarding potential jurisdictional conflicts, but that was not done, so the Montana court's decision to decline to address the

parenting issues in the husband's petition because the Oregon court had already exercised jurisdiction was reversed. Further, the inconvenient forum argument was also inappropriate because the husband was not given the opportunity to submit arguments on the issue as required under 40-7-108. In re Marriage of Vanlaarhoven, 2002 MT 222, 311 M 368, 55 P3d 942 (2002).

MCA 40-7-201, MT ST 40-7-201

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Current through 2005 Regular Session of the 59th Legislature  
and the December 2005 Special Session.

END OF DOCUMENT

**C**MONTANA CODE ANNOTATEDTITLE 40. FAMILY LAWCHAPTER 7. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACTPART 1. GENERAL PROVISIONS40-7-103. Definitions

As used in this chapter, the following definitions apply:

- (1) "Abandoned" means left without provision for reasonable and necessary care or supervision.
- (2) "Child" means an individual who has not attained 18 years of age.
- (3) (a) "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, a temporary, an initial, and a modification order.  
  
(b) The term does not include an order relating to child support or other monetary obligation of an individual.
- (4) (a) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear.  
  
(b) The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under part 3 of this chapter.
- (5) "Commencement" means the filing of the first pleading in a proceeding.
- (6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.
- (7) "Home state" means the state in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.
- (8) "Initial determination" means the first child custody determination concerning a particular child.
- (9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under this chapter.
- (10) "Issuing state" means the state in which a child custody determination is made.
- (11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.
- (12) "Person" includes a government, a governmental subdivision, an agency, an instrumentality, or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

(a) has physical custody of the child or has had physical custody for a period of 6 consecutive months, including any temporary absence, within 1 year immediately before the commencement of a child custody proceeding; and

(b) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Tribe" means an Indian tribe or band or Alaskan Native village that is recognized by federal law or formally acknowledged by a state.

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

History: En. 61-403 by Sec. 3, Ch. 537, L. 1977; R.C.M. 1947, 61-403; amd. Sec. 4, Ch. 91, L. 1999.

<General Materials (GM) - References, Annotations, or Tables>

## NOTES, REFERENCES, AND ANNOTATIONS

### *Commissioners' Note*

The UCCJA did not contain a definition of "child." The definition here is taken from the PKPA.

The definition of "child-custody determination" now closely tracks the PKPA definition. It encompasses any judgment, decree or other order which provides for the custody of, or visitation with, a child, regardless of local terminology, including such labels as "managing conservatorship" or "parenting plan."

The definition of "child-custody proceeding" has been expanded from the comparable definition in the UCCJA. These listed proceedings have generally been determined to be the type of proceeding to which the UCCJA and PKPA are applicable. The list of examples removes any controversy about the types of proceedings where a custody determination can occur. Proceedings that affect access to the child are subject to this Act [chapter]. The inclusion of proceedings related to protection from domestic violence is necessary because in some States domestic violence proceedings may affect custody of and visitation with a child. Juvenile delinquency or proceedings to confer contractual rights are not "custody proceedings" because they do not relate to civil aspects of access to a child. While a determination of paternity is covered under the Uniform Interstate Family Support Act, the custody and visitation aspects of paternity cases are custody proceedings. Cases involving the Hague Convention on the Civil Aspects of International Child Abduction have not been included at this point because custody of the child is not determined in a proceeding under the International Child Abductions Remedies Act. Those proceedings are specially included in the Article 3 [part 3] enforcement process.

"Commencement" has been included in the definitions as a replacement for the term "pending" found in the UCCJA. Its inclusion simplifies some of the simultaneous proceedings provisions of this Act [chapter].

The definition of "home State" has been reworded slightly. No substantive change is intended from the UCCJA.

The term "issuing State" is borrowed from UIFSA. In UIFSA, it refers to the court that issued the support or parentage order. Here, it refers to the State, or the court, which made the custody determination that is sought to be

enforced. It is used primarily in Article 3 [part 3].

The term "person" has been added to ensure that the provisions of this Act [chapter] apply when the State is the moving party in a custody proceeding or has legal custody of a child. The definition of "person" is the one that is mandated for all Uniform Acts.

The term "person acting as a parent" has been slightly redefined. It has been broadened from the definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as a person who currently has physical custody of the child. In addition, a person acting as a parent must either have legal custody or claim a right to legal custody under the law of this State. The reference to the law of this State means that a court determines the issue of whether someone is a "person acting as a parent" under its own law. This reaffirms the traditional view that a court in a child custody case applies its own substantive law. The court does not have to undertake a choice-of-law analysis to determine whether the individual who is claiming to be a person acting as a parent has standing to seek custody of the child.

The definition of "tribe" is the one mandated for use in Uniform Acts. Should a State choose to apply this Act [chapter] to tribal adjudications, this definition should be enacted as well as the entirety of Section 104 [40-7-135].

The term "contestant" as has been omitted from this revision. It was defined in the UCCJA § 2(1) [former 40-7-103(1)] as "a person, including a parent, who claims a right to custody or visitation rights with respect to a child." It seems to have served little purpose over the years, and whatever function it once had has been subsumed by state laws on who has standing to seek custody of or visitation with a child. In addition UCCJA § 2(5) [former 40-7-103(4)] of the which [sic] defined "decree" and "custody decree" has been eliminated as duplicative of the definition of "custody determination."

### Compiler's Comments

*1999 Amendment:* Chapter 91 inserted definitions of abandoned, child, child custody determination, child custody proceeding, commencement, court, issuing court, issuing state, person, tribe, and warrant; deleted definition of contestant that read: "'Contestant' means a person, including a parent, who claims a right to custody or visitation rights with respect to a child"; deleted definition of custody determination that read: "'Custody determination' means a court decision and court orders and instructions providing for the custody of a child, including visitation rights. It does not include a decision relating to child support or any other monetary obligation of any person"; deleted definition of custody proceeding that read: "'Custody proceeding' includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes issues of custody in adoption proceedings. A 'custody proceeding' is not a proceeding pursuant to Title 41, chapter 3 or 5"; deleted definition of decree or custody decree that read: "'Decree' or 'custody decree' means a custody determination contained in a judicial decree or order made in a custody proceeding and includes an initial decree and a modification decree"; in definition of home state in first sentence after "child" deleted "immediately preceding the time involved" and at end inserted "immediately before the commencement of a child custody proceeding" and in third sentence at beginning substituted "A period" for "Periods" and at end before "period" deleted "6-month or other"; substituted definition of initial determination for definition of initial decree that read: "'Initial decree' means the first custody decree concerning a particular child"; substituted definition of modification for definition of modification decree that read: "'Modification decree' means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court"; substituted definition of person acting as a parent for definition of person acting as parent that read: "'Person acting as parent' means a person other than a parent who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody"; in definition of physical custody substituted "means the physical care and supervision of a child" for "means actual possession and control of a child"; substituted present definition of state for former definition that read: "'State' means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia"; and made minor changes in style. Amendment effective October 1, 1999.

*Severability:* Section 47, Ch. 91, L. 1999, was a severability clause.

*Source:* Section 102, UCCJEA.

*Montana Changes:* Montana changed subsection (3) by including issues of custody in adoption proceedings and excluding the areas covered by Title 41, ch. 3 and 5.

#### Case Notes

#### CASES DECIDED UNDER UCCJEA

*Analysis of Child's Home State for Purposes of Determining Jurisdiction:* A child's home state, for purposes of determining jurisdiction under 40-7-201, is not limited to the time period of 6 months immediately before the commencement of a child custody proceeding. The applicable time period should be within 6 months before commencement of a child custody proceeding. In the present case, the mother moved the children back to Arkansas 4 months after moving to Montana, thereby stopping the clock for the time needed to establish Montana as the home state for jurisdictional purposes. The children had not lived in Montana for at least 6 months before the father began child custody proceedings, so Montana could not acquire home state status. *Stephens v. District Court*, 2006 MT 21, 331 M 40, 128 P3d 1026 (2006).

*Error in Montana Court's Declination of Jurisdiction to Washington Court -- Inconvenient Forum:* Following several incidents of partner abuse over the years, the mother moved to Washington state and then requested that the Montana court decline jurisdiction as an inconvenient forum in order to allow the Washington court to assume jurisdiction. The request was denied, and the mother appealed. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a Montana court has jurisdiction to make child custody determinations if Montana is the child's home state, as defined in this section, and Montana will continue to have exclusive continuing jurisdiction unless the Montana court declines to exercise its jurisdiction. In this case, the parties conceded that Montana was the home state. Jurisdiction may be declined at any time if the Montana court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum to make custody determinations. The factors in 40-7-108 must be considered when evaluating a motion to decline jurisdiction, and the Act places domestic violence at the top of the list of factors to be considered. Although this factor alone is not dispositive, the Supreme Court held that, given the high propensity for recidivism in domestic violence, when a court finds that partner abuse or child abuse has occurred or that a party has fled Montana to avoid further violence or abuse, the court is authorized to consider whether the party and the child might be better protected if further custody proceedings are held in another state. Here, the District Court abused its discretion by failing to consider which forum would best protect the mother and children. The Supreme Court then went on to discuss the other statutory factors and concluded that the protection of the parties, the years that the children have resided in Washington, the significant distance between the courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors all supported the Montana court declining jurisdiction. None of the jurisdictional factors mitigated against declination, and no factor outweighed the concern for safety raised by the history of domestic violence. Thus, the Supreme Court ordered the District Court to decline jurisdiction as an inconvenient forum and arrange to transfer the case to Washington. *In re Marriage of Stoneman v. Drollinger*, 2003 MT 25, 314 M 139, 64 P3d 997 (2003).

#### CASES DECIDED UNDER UCCJA

*Adoption Proceeding in Foreign Jurisdiction -- Applicability of Habeas Corpus:* A child was born to petitioner in Wyoming in 1980. She relinquished custody to a couple and moved to Montana. Petitioner executed handwritten instruments that were notarized relinquishing custody to the couple and stating she did not know the natural father. The couple began adoption proceedings in Wyoming. Petitioner then executed a written revocation of custody and petitioned for a Writ of Habeas Corpus for the child in Yellowstone County. The District Court deferred jurisdiction to the Wyoming court having jurisdiction of the adoption proceeding. The habeas corpus petition was properly filed in Yellowstone County because the child was currently located there. The District Court properly deferred jurisdiction because although petitioner contended she executed the written instruments under fraud and duress, those issues were equally triable in Wyoming. Under 40-7-108, the District Court could not determine whether Wyoming was an inconvenient forum, only whether the court itself was. The Supreme Court in upholding the District Court's action said in cases of simultaneous proceedings, the provisions of 40-7-107(3) should be followed. *In re Application of Peterson*, 203 M 305, 661 P2d 40, 40 St. Rep. 465 (1983).

*Custody Jurisdiction Under UCCJA and Interstate Compact on Juveniles:* Wyoming had jurisdiction over the runaway juvenile as it was her home state. The District Court in Montana therefore did not have jurisdiction to modify the Wyoming court's custody decree. The interaction of the Interstate Compact on Juveniles and the Uniform Child Custody Jurisdiction Act (UCCJA) placed the District Court in the following position: (1) under the Compact, it had the authority to deny Wyoming's requisition ordering the juvenile's return to Wyoming and to place her in the custody of her grandparents; and (2) under the UCCJA it was not required to recognize or enforce the Wyoming custody decree but was precluded from modifying the decree. The District Court concluded that the juvenile's best interest would be served by having her in the custody of her grandparents and denied the Wyoming requisition. The court did not modify the Wyoming custody order. This procedure appears to be allowed under the interaction of the Compact and the UCCJA. Application of Pierce, 184 M 82, 601 P2d 1179 (1979).

*Notice Requirements for Enforcement of Out-of-State Decree:* Before the recognition and enforcement provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) can be applied, the initial decree must be entered in conformity with strict notice requirements. If there is no compliance with the notice requirements of the UCCJA by the state entering the initial decree, Montana courts are not required to recognize and enforce the out-of-state decree. (Following Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).) Here notice of the Wyoming hearing was not given to the Raws, the persons in physical custody of Katherine, and the District Court therefore was not required to recognize or enforce the Wyoming order. Application of Pierce, 184 M 82, 601 P2d 1179 (1979).

*Child Custody -- Home State -- Jurisdiction:* When a child was present in Montana, having been abandoned by both of her natural parents, having been subjected to mistreatment and abuse, and having been threatened with further mistreatment and abuse, her situation met the test for jurisdiction expressed in 40-4-211. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

#### **Attorney General's Opinions**

##### *Commencement Filing Fee Not Chargeable for Certain Postdissolution Proceedings:*

The Attorney General relied on the holding in In re Marriage of Billings, 189 M 520, 616 P2d 1104 (1980), in finding that a District Court Clerk may not charge a commencement filing fee for postdissolution of marriage action that is brought under the same cause number as the marital dissolution proceeding and that remains under the continuing jurisdiction of the District Court. 43 A.G. Op. 72 (1990).

#### **Collateral References**

Divorce + 290; Habeas Corpus + 48.

27A C.J.S. Divorce § 303; 39 C.J.S. Habeas Corpus § § 237 through 248, 260 through 266.

Pending proceeding in another state as ground for declining jurisdiction under § 6(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(g), 20 ALR 5th 700.

MCA 40-7-103, MT ST 40-7-103

Current through 2005 Regular Session of the 59th Legislature  
and the December 2005 Special Session.

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**C**MONTANA CODE ANNOTATEDTITLE 40. FAMILY LAWCHAPTER 7. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACTPART 2. JURISDICTION40-7-203. Jurisdiction to modify determination

Except as otherwise provided in 40-7-204, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under 40-7-201(1)(a) or (1)(b) and:

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under 40-7-202 or that a court of this state would be a more convenient forum under 40-7-108; or

(2) a court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

History: En. Sec. 23, Ch. 91, L. 1999.

<General Materials (GM) - References, Annotations, or Tables>

## NOTES, REFERENCES, AND ANNOTATIONS

*Commissioners' Note*

This section complements Section 202 [40-7-202] and is addressed to the court that is confronted with a proceeding to modify a custody determination of another State. It prohibits a court from modifying a custody determination made consistently with this Act [chapter] by a court in another State unless a court of that State determines that it no longer has exclusive, continuing jurisdiction under Section 202 [40-7-202] or that this State would be a more convenient forum under Section 207 [40-7-108]. The modification State is not authorized to determine that the original decree State has lost its jurisdiction. The only exception is when the child, the child's parents, and any person acting as a parent do not presently reside in the other State. In other words, a court of the modification State can determine that all parties have moved away from the original State. The court of the modification State must have jurisdiction under the standards of Section 201 [40-7-201].

**Compiler's Comments**

*Source:* Section 203, UCCJEA.

**Case Notes**

## CASES DECIDED UNDER UCCJEA

*Removal of Child Across State Lines While Custody Proceedings Pending in Montana -- Continuing Jurisdiction Versus Pending Jurisdiction Under Federal Parental Kidnapping Prevention Act:* When the parties were divorced, an Oregon court granted a parenting plan. The mother later moved to Montana, and the Montana District Court properly assumed jurisdiction. The mother then fled with her son to American Samoa. A Samoan court assumed jurisdiction and awarded custody to the mother. The father petitioned the Montana District Court to enforce the earlier parenting plan, and the petition was granted. The mother appealed the Montana court's failure to

recognize the jurisdiction of the Samoan court. The Supreme Court applied the provisions of the federal Parental Kidnaping Prevention Act of 1980 (PKPA), holding that a sister state may modify a child custody determination when the sister state has jurisdiction to make a child custody determination under its own laws, which the Samoan court had, and when the first state no longer has jurisdiction by having lost or given up its continuing or pending jurisdiction. A state has continuing jurisdiction if it has jurisdiction under its own law and it remains the residence of the child or any of the contestants. A state has pending jurisdiction if that state is engaged in proceedings that will ultimately impact the custody and visitation of a child. In this case, Montana did not have continuing jurisdiction because none of the parties were residing in Montana once the mother moved with the child to American Samoa. However, Montana did have pending jurisdiction at the time that the mother initiated the action in American Samoa. The PKPA was designed to prevent precisely what occurred here, namely the removal of a child from one jurisdiction to another in order to obtain a different result regarding custody or other matters affecting a minor child. The mother could not divest Montana of jurisdiction simply by removing the child to American Samoa in an effort to restart the entire issue. Because the Montana court did not decline jurisdiction, the Samoan court was without authority to assume jurisdiction and instead was required to enforce the Montana custody determination. *Paslov v. Cox*, 2004 MT 325, 324 M 94, 104 P3d 1025 (2004).

*Continuing Custody Jurisdiction in North Dakota Court -- Modification by Montana Court Improper:* When the parties were divorced in North Dakota, that state properly exercised jurisdiction in entering divorce and custody decrees. A Montana District Court subsequently modified the custody decree. The Supreme Court reversed. Under the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act of 1980 (PKPA), full faith and credit must ordinarily be given to child custody determinations made by another state's court if that court appropriately exercised jurisdiction under PKPA standards. Further, under Thompson v. Thompson, 484 US 174 (1988), once a state exercises appropriate PKPA jurisdiction, no other state may exercise concurrent jurisdiction even if it would have been empowered to exercise original jurisdiction. Absent a determination by the North Dakota court that it no longer had exclusive and continuing jurisdiction or that a Montana court would be a more convenient forum, the Montana court had no jurisdiction to modify the North Dakota decree. *Vannatta v. Boulds*, 2003 MT 343, 318 M 472, 81 P3d 480 (2003), following *In re Marriage of Shupe*, 276 M 409, 916 P2d 744 (1996).

#### CASES DECIDED UNDER UCCJA

*Concurrent State Jurisdiction Under UCCJA Determined by PKPA:* Pamela Shupe obtained a divorce decree from Utah granting her sole custody of the couple's child. The father, Yancy, petitioned for a change of custody in Montana. The Supreme Court determined that each state had adopted the UCCJA and therefore each state had jurisdiction to make a custody determination. The Supreme Court stated that the PKPA had been enacted to remedy problems of concurrent state jurisdiction under the UCCJA. The Supreme Court held that because Utah had jurisdiction and had not declined to exercise its jurisdiction, then under the PKPA, Montana was not authorized to modify the original custody determination of Utah. *In re Marriage of Shupe*, 276 M 409, 916 P2d 744, 53 St. Rep. 447 (1996), followed in *Vannatta v. Boulds*, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

MCA 40-7-203, MT ST 40-7-203

Current through 2005 Regular Session of the 59th Legislature  
and the December 2005 Special Session.

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# APPENDIX 3

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No. 00-804

IN THE SUPREME COURT OF THE STATE OF MONTANA

2001 MT 283

IN THE MATTER OF A.F.-C.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eleventh Judicial District,

In and for the County of Flathead,

Honorable Katherine R. Curtis, Judge Presiding

COUNSEL OF RECORD:

For Appellant:

Julianne Hinchey, Hinchey Law Offices, Kalispell, Montana

For Respondent:

Honorable Mike McGrath, Attorney General; Jim Wheelis,

Assistant Attorney General, Helena, Montana

Thomas J. Esch, County Attorney, Kalispell, Montana

Submitted on Briefs: April 5, 2001

Decided: December 20, 2001

Filed:

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Clerk

Justice Jim Rice delivered the Opinion of the Court.

H.C. appeals from the Findings of Fact, Conclusions of Law and Order entered by the  
th Judicial District Court, Flathead County, terminating her parental rights to A.F-

C.

¶2 We reverse.

¶3 H.C. raises three issues on appeal which we restate as follows:

¶4 1. Whether the District Court erred in concluding that H.C.'s treatment plan was appropriate.

¶5 2. Whether the District Court abused its discretion in determining that there was clear and convincing evidence that the conduct or condition rendering H.C. unfit was unlikely to change within a reasonable time.

¶6 3. Whether the District Court erred in relying on hearsay evidence in its Findings of Fact.

¶7 Because we reverse on the first issue, determining that H.C.'s treatment plan was inappropriate, we decline to address the remaining issues.

#### BACKGROUND

¶8 H.C. is the natural mother of A.F.-C., born on August 28, 1997. A.F.-C.'s father is deceased. The Department of Health and Human Services (DPHHS) first became involved with H.C. in July 1997, when it received a referral that H.C. was pregnant and had been caught shoplifting baby clothes. H.C. was fourteen years old at the time and was living under the care of her grandmother, Mavis, and her aunt, Sherry. DPHHS had been involved with H.C.'s family since the early 1980's as a result of reports that H.C.'s father was deceased and her mother was abusing drugs and neglecting H.C. and her older brother, A.C. At the time H.C. was caught shoplifting, her mother, Sandy, was incarcerated for drug-related charges and awaiting federal sentencing.

¶9 Prior to giving birth to A.F.-C., H.C. was sent to Havre by Mavis and Sherry to live with Shirley, a friend of the family. H.C. gave birth to A.F.-C while living with Shirley. Shortly thereafter, Shirley was no longer able to provide a residence for H.C. and A.F.-C., and both were returned to Lakeside in September 1997 to live with Mavis and Sherry, who subsequently contacted DPHHS a number of times regarding H.C.'s parenting of A.F.-C. DPHHS received reports that H.C. had bitten A.F.-C. on the face and had become very frustrated and rough with A.F.-C. DPHHS also received a report that H.C. had not sought medical care for A.F.-C. at any time since his birth even though there was apparently a lump on A.F.-C's chest that may have required medical attention. Based upon these reports, neglect was substantiated by DPHHS.

¶10 On December 19, 1997, DPHHS removed H.C. and A.F.-C. from Mavis and Sherry's care and placed them in foster care. DPHHS petitioned the District Court for Temporary Investigative Authority and Protective Services of Sandy's children, H.C. and her brother,

A.C., as well as H.C.'s son, A.F.-C., on December 24, 1997. The District Court granted an order for protective services that same day, scheduled a show cause hearing and ordered personal service of the petition to all parties. H.C.'s mother, Sandy, and her grandmother, Mavis, were both served with the petition.

¶11 Present at the show cause hearing on February 17, 1998, was Robert B. Allison, Esq. (Mr. Allison), who had been appointed by the District Court as guardian ad litem for A.F.-C. Also present were H.C.'s grandmother Mavis and her aunt Sherry. H.C.'s mother, Sandy, remained incarcerated. The District Court entered an order on February 23, 1998, granting the State's Petition for Temporary Investigative Authority. Neither H.C. nor A.F.-C. were present at the show cause hearing, nor were their whereabouts known at that time.

¶12 During a visit to the foster home on January 1, 1998, Mavis arranged to have H.C. and A.F.-C. taken from the foster home and driven to Spokane, Washington, to live with Steve, H.C.'s uncle. Mavis did this without the permission of DPHHS and was subsequently convicted of custodial interference and child endangerment. Soon after discovering that H.C. and A.F.-C. were taken to Spokane, DPHHS attempted to perform a home study of Steve's home through a social worker in Washington. The home study was not completed because it was immediately discovered that H.C. and A.F.-C. had left Steve's home and their whereabouts were unknown.

¶13 Although H.C. and A.F.-C.'s whereabouts were unknown at the time, upon the State's motion, the District Court issued an order continuing Temporary Investigative Authority on June 17, 1998. No further contact was made between H.C. and DPHHS until July of 1998, when H.C.'s aunt Shirley contacted DPHHS to inform it that H.C. and A.F.-C. were with her in Kalispell. Foster care training was offered to Shirley and DPHHS eventually licensed her as a kinship placement. H.C. and A.F.-C. remained with Shirley until December 1998.

¶14 On October 2, 1998, DPHHS, in a combined petition, petitioned for temporary legal custody of Sandy's children, H.C. and A.C., as well as H.C.'s son, A.F.-C., and requested that the court adjudicate all three children youths in need of care. It is important to note the complexity of H.C.'s position under this combined petition: H.C. was an alleged youth in need of care by reason of her mother's imprisonment and resultant lack of care; yet she was also a respondent-parent within a simultaneous proceeding to adjudicate her son, A.F.-C., a youth in need of care. Personal service of the combined petition upon H.C.'s mother, Sandy, was unsuccessful. H.C. was personally served on November 12, 1998. Neither Sandy nor H.C. were present at the November 18, 1998, hearing on the petition. Mr. Allison appeared at the hearing as guardian ad litem to represent the interests of A.F.-C. No guardian was appointed to represent the interests of fifteen-year-old H.C. as an abused or neglected child. Further, H.C. had no adult assistance in the simultaneous proceeding to adjudicate A.F.-C. a youth in need of care.

¶15 Because service of the combined petition on Sandy was unsuccessful, the District Court rescheduled the hearing for temporary legal custody as to her two children, H.C. and A.C. The District Court entered H.C.'s default in her role as a respondent-parent of A.F.-C., and entered default Findings of Fact and Conclusions of Law, based on the State's petition and attached affidavit, adjudicating A.F.-C. a youth in need of care and granting the State's petition for temporary legal custody.

¶16 On December 10, 1998, Sandy was served in prison in California with the combined petition. In response, Sandy wrote a letter to the District Court regarding her two children and her grandson A.F.-C. She requested that the court appoint legal counsel for herself, as she did not understand the significance of the proceedings. In the letter, Sandy also relayed to the District Court her understanding that Mr. Allison was the legal counsel for her children, and expressed concern that Mr. Allison had told H.C. that he was not representing H.C. and would not speak to H.C.

¶17 Having served Sandy, another hearing on the combined petition was held on January 7, 1999. Sandy, still incarcerated, did not appear. According to the minute entry, H.C. appeared and gave her consent to the State's request for temporary legal custody of her child, A.F.-C. In the order of January 14, 1999, the District Court simply states that H.C. had appeared and "acknowledged her consent to the Petition for Temporary Legal Custody." The District Court found H.C. was a youth in need of care, and ordered that temporary custody of H.C. and her brother A.C. be awarded to the State. The order did not address A.F.-C. Finally, the District Court denied appointment of counsel for Sandy, citing this Court's previous decision for the rule that, "unless termination of parental rights is sought, or other long term interference with the parent/child legal relationship by the Department is sought, appointed counsel is not appropriate."

¶18 Previously, in December 1998, placement of H.C. and A.F.-C. with Shirley had broken down for various reasons and both were placed in foster care with Delores Montana Choi (Tanna), a family friend who resided in Kalispell. H.C. and A.F.-C. remained with Tanna for approximately one month. Although H.C. and Tanna both strongly objected to H.C. and A.F.-C. being removed from Tanna's home, DPHHS placed H.C. and A.F.-C. in the mother-baby unit at Florence Crittenton Home & Services (FCH) in Helena in early February 1999.

¶19 At FCH, now sixteen-year-old H.C., signed and entered into her second treatment plan dated January 27, 1999, despite her objections to being there. An earlier treatment plan, signed by H.C. on September 18, 1998, had not been approved by the District Court. On February 17, 1999, the District Court approved and ordered that H.C. comply with the second plan. The second plan contained few written responsibilities or requirements, but rather incorporated the first, non-approved treatment plan, and further required that H.C. follow the rules and recommendations made by FCH within its programs, called "programmatically treatment plans."

¶20 The initial programmatic treatment plan at FCH required H.C. to adhere to all rules and regulations without argument, to actively participate in Positive Peer Culture, consistently attend all therapy appointments, classes, groups, and recreational activities, be responsible for the care of A.F.-C., demonstrating a willingness to follow staff instruction and supervision, engage in age-appropriate interaction with A.F.-C., enroll A.F.-C. in FCH daycare and abide by daycare guidelines, complete daycare and parenting assignments, refrain from using manipulation and learn healthier alternatives to meet her needs, enroll in high school and consistently attend classes, and refrain from running away.

¶21 While at FCH, H.C. entered five subsequent, but essentially similar, FCH programmatic treatment plans within a period of approximately five months. H.C. continued to sign and enter into each subsequent placement program without a guardian ad litem or upon advice of an adult representing her interests. Additionally, although H.C.'s programmatic treatment plans required H.C. to attend individual therapy, H.C. and her counselor, Sue Kronenberg, did not work well together. H.C. testified that she felt like she could not trust her or talk with her. Although on several occasions H.C. refused to meet or participate in counseling with Kronenberg, counseling sessions between H.C. and Kronenberg continued into the first week of October 1999. The staff at FCH attempted to accommodate H.C. by providing her with a different counselor, but for various reasons, other counselors were not available and H.C. did not again begin individual counseling until after proceedings began to terminate her parental rights.

¶22 On June 21, 1999, after four months at FCH, it was determined that H.C. was not making enough progress and was failing the mother-baby unit. DPHHS removed A.F.-C. from H.C.'s care at FCH and placed him in foster care. On that same day, H.C. was removed from the mother-baby unit at FCH and placed in the Assisted/Independent Living Program. Whereas the purpose of the mother-baby unit is to teach parenting skills to pregnant, parenting, or a soon to be reunited parent, the assisted living program is for non-pregnant, non-parenting young women who are seriously emotionally disturbed and need a therapeutic, moderate level group home. The assisted living program, although structured similar to the mother-baby program, does not contain any parenting component. However, the programmatic treatment plan in effect from June 6, 1999, to October 21, 1999, continued to require that H.C. participate in individualized parenting classes with a case manager and the class coordinator in the event that A.F.-C. be placed back in H.C.'s care in the future. While living in the assisted living program, H.C. received a weekly one-hour visit with A.F.-C. The visitation was eventually reduced to one hour every other week by February 2000.

¶23 The District Court held a permanency plan hearing on July 6, 1999. Although A.F.-C. had been placed in foster care and visitation with H.C. greatly reduced, and although H.C. had been moved from the mother-baby unit to the assisted living program, the District Court entered its order finding that the best interests of H.C. and A.F.-C. would

be served if both remained at FCH until H.C. reached 18 years of age, and was able to parent A.F.-C. effectively.

¶24 On August 31, 1999, the District Court granted the motion of DPHHS to extend temporary legal custody of A.F.-C. until January 6, 2000. On September 14, 1999, a team meeting was held between DPHHS social worker Hope Hunter, H.C.'s case manager Danielle Gennardo, H.C.'s counselor at FCH, Sue Kronenberg, and H.C. The meeting was held to determine H.C.'s future parenting options of A.F.-C. At the meeting, H.C. was asked whether she would be willing to relinquish parental rights of A.F.-C. and was also informed that, as part of the concurrent planning of DPHHS, steps were being taken to terminate her parental rights and that such termination would be pursued in the following months if she failed to make sufficient progress on the FCH programmatic treatment plan. Sue Kronenberg noted H.C.'s reaction to this meeting in her case note of September 14, 1999, stating that H.C. was "very upset and disagreed with the state (DPHHS) and FCH about [H.C.'s] past parenting."

¶25 On November 2, 1999, a family group conference was held at FCH which included H.C. and two of H.C.'s family members, including her uncle Steve, as well as her case manager Emily Hargis, social worker Hope Hunter, and counselor Sue Kronenberg. According to Emily's testimony, the meeting was held to determine where A.F.-C. would go once H.C.'s parental rights were either relinquished or terminated. According to Kronenberg's testimony, her understanding after the meeting was that DPHHS was taking steps to terminate H.C.'s parental rights and that H.C. was not being given another chance to successfully complete the treatment plan or an extension of the treatment plan. According to Emily's testimony, H.C. continued working on the treatment plan only in the hope that the court would decide not to terminate her parental rights. Emily's January 12, 2000, Quarterly Progress Report notes her impression of H.C.'s reaction to the November 2 meeting:

After the conference, [H.C.] stated she thought it was unfair to have everyone attend the conference to talk about what is going to happen if it had already been decided; [H.C.] was upset that no one in her family was able to change DPHHS's mind. This writer reminded [H.C.] that the purpose of the conference was to provide the opportunity for everyone involved to exchange information and to talk about their concerns, not to reconsider the process that has already been started.

¶26 By January 26, 2000, Hope Hunter made the determination, based upon reports from case managers at FCH, that H.C. was failing to successfully comply with the October FCH programmatic treatment plan. After making a determination that H.C. again failed to successfully comply with the treatment plan, on January 26, 2000, DPHHS petitioned for permanent legal custody and termination of parental rights as to A.F.-C, alleging that H.C. failed to successfully complete her court-approved treatment plan. In its order of March 2, 2000, the District Court appointed counsel as required by § 41-3-607(2), MCA, to represent the interests of H.C. during the proceeding to terminate her parental rights.

Although § 41-3-607(3), MCA, requires the appointment of a guardian ad litem for a minor parent in addition to the minor parent's counsel, one was not appointed.

¶27 The District Court held hearings on the petition for permanent legal custody and termination of parental rights on April 14, May 23, and June 8, 2000. The District Court entered its Findings of Fact, Conclusions of Law, and Order on September 29, 2000, terminating H.C.'s parental rights to A.F.-C. and granting permanent care and custody of A.F.-C. to DPHHS with authority to assent to his adoption. The District Court found that the termination of H.C.'s parental rights was appropriate because H.C. failed to comply with an appropriate, court-approved treatment plan and because the conduct or condition of H.C. rendering termination appropriate was unlikely to change within a reasonable time.

¶28 H.C. appeals the District Court's Order terminating her parental rights.

#### STANDARD OF REVIEW

¶29 This Court has not specifically defined what constitutes an "appropriate" treatment plan because no bright line definition is possible in light of the unique circumstances of each case. *In re A.N.*, 2000 MT 35, ¶ 26, 298 Mont. 237, ¶ 26, 995 P.2d 427, ¶ 26 (citations omitted). Factors routinely considered, however, are whether the parent was represented by counsel and stipulated to the treatment plan, and whether or not the treatment plan takes into consideration the particular problems facing both the parent and the child. *In re A.N.*, ¶ 26 (citing *Custody and Parental Rights of M.M.* (1995), 271 Mont. 52, 57, 894 P.2d 298, 301).

#### DISCUSSION

¶30 Whether the District Court erred in determining that H.C.'s treatment plan was appropriate.

¶31 A natural parent's right to the care and custody of a child is a fundamental liberty interest. This fundamental liberty interest requires that the State provide a fundamentally fair procedure at all stages in proceedings for the termination of parental rights. *In re A.N.*, ¶ 24 (citations omitted). A minor parent is entitled to the same due process protections and procedures as his or her adult counterpart. Article II, Section 15 of the Montana Constitution provides:

**Rights of persons not adults.** 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 protections of such persons.

See *In re C.H.* (1984), 210 Mont. 184, 202-03, 683 P.2d 931, 940-41.

¶32 Here the District Court terminated H.C.'s parental rights pursuant to § 41-3-609(1)(f),

MCA (1997), which provides in part:

**41-3-609. Criteria for termination.** (1) The court may order a termination of the parent-child legal relationship upon a finding that any of the following circumstances exist:

(f) the child is an adjudicated youth in need of care and both of the following exist:

(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful;

¶33 H.C. puts forth four arguments in support of her contention that the treatment plan was inappropriate.

¶34 First, H.C. argues that, as both an indigent and a minor at all times during the proceeding, the District Court erred in not appointing counsel to represent H.C.'s interests as a minor parent until the petition for termination of her parental rights was filed in January 2000, long after an opportunity for formal objection to her placement at FCH and formal objection to the treatment plan would have been appropriate or meaningful. H.C. contends that her lack of counsel, combined with her strong objection to placement at FCH, and thus, to the second treatment plan, militates against the appropriateness of the plan.

¶35 Second, H.C. argues that her placement in the highly structured residential facility at FCH was inappropriate. H.C. contends that she was more appropriately placed at Tanna's, especially given H.C.'s success in the first treatment plan outside of a residential facility, as well as H.C.'s early independence and inherent distrust of authority figures.

¶36 Third, H.C. argues that the treatment plan was inappropriate because it required H.C. to participate in therapy with Sue Kronenberg, an individual she did not trust and could not talk to.

¶37 Finally, H.C. argues that the timeline of events from June 1999, up to the petition for termination of parental rights, demonstrates that the goals of the final parenting plan no longer focused on reuniting H.C. and A.F.-C., nor did the treatment plan take into account the particular problems facing parent and child. Further, H.C. argues that the change in focus of the treatment plan combined with the significant pressures H.C. received shortly thereafter from social workers, therapists, and case managers to either relinquish her parental rights or face termination proceedings further demonstrates that the treatment plan was not appropriate.

¶38 Because we reverse on the first argument, we do not reach the other three.

¶39 DPHHS notes that H.C. signed both treatment plans and had notice of and signed each successive FCH programmatic treatment plan. It contends that the plans were appropriate because the plans addressed specific behaviors and goals for H.C.'s personal treatment and attempted to provide her with reasonable parenting skills. It further argues that the plans were designed by professionals at FCH based on observations of H.C.'s behavior and her unhealthy adaptations to her past circumstances.

¶40 This matter presents the unique circumstance that H.C. was adjudicated a youth in need of care and was simultaneously a minor parent in an abuse and neglect proceeding whose own child was adjudicated a youth in need of care. Further, the record reflects that H.C. was confused as to the role played by A.F.-C.'s guardian ad litem, Robert B. Allison, in that H.C. attempted to contact Mr. Allison in order to obtain legal aid to represent her interests as a minor parent, but was told that Mr. Allison was not her attorney, and would not speak with her. This confusion was shared by H.C.'s mother, Sandy, in her December 19, 1998, letter to the District Court requesting that counsel be appointed to advise her during the proceedings and expressing her concern that H.C. appeared to have been turned away by Mr. Allison and had no counsel to represent her interests.

¶41 In its order denying appointment of counsel at the request of H.C.'s mother, the District Court relied on *In re T.C. & R.C.* (1989), 240 Mont. 308, 784 P.2d 392, which held that due process of law does not require that parents have counsel during the initial stages of child protective proceedings, requiring only that parents have counsel prior to the permanent custody hearings. *In re T.C.*, 240 Mont. at 314, 784 P.2d at 396; *Matter of M.F.* (1982), 201 Mont. 277, 653 P.2d 1205 (citing *Lassiter v. Department of Social Services* (1981), 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640). In so relying, the District Court concluded that unless termination of parental rights, or other long term interference with the parent/child legal relationship is sought by the Department, "appointed counsel is not appropriate."

¶42 While we held in *In re T.C.*, and recently reaffirmed in *Matter of M.W. & C.S.*, 2001 MT 78, ¶ 25, 305 Mont. 80, ¶ 25, 23 P.3d 206, ¶ 25, that due process requires appointment of counsel at the proceeding to terminate parental rights, we have not held that appointment of counsel is always "inappropriate" or otherwise precluded during earlier stages of child protective proceedings.

¶43 Our holding in *In re T.C.* is derived from the decision of the United States Supreme Court in *Lassiter*. In *Lassiter*, the Supreme Court affirmed the judgment of a North Carolina state court in denying counsel to an indigent parent through the entire proceeding to terminate the parent's parental rights. The *Lassiter* Court declined to hold that the Constitution requires appointment of counsel in every parental termination proceeding, instead adopting the standard in *Gagnon v. Scarpelli* (1972), 411 U.S. 778,

93 S.Ct. 1756, 36 L.Ed.2d 656, leaving the decision for whether due process requires appointment of counsel for indigent parents in termination proceedings to the trial and reviewing courts. *Lassiter*, 452 U.S. at 31-32, 101 S.Ct. at 2162, 68 L.Ed.2d at 652.

¶44 The *Lassiter* Court stated that it "is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements . . . [since the] facts and circumstances . . . are susceptible of almost infinite variation." *Lassiter*, 452 U.S. at 32, 101 S.Ct. at 2162, 68 L.Ed.2d at 652-53 (citing *Scarpelli*, 411 U.S. at 790, 93 S.Ct. at 1764, 36 L.Ed.2d at 666). Likewise, this Court has not formulated any guidelines precluding or making inappropriate the appointment of counsel in child protective proceedings which precede termination proceedings, if due process so requires. Rather, whether due process requires counsel to be appointed at earlier stages in the proceedings must be determined in view of all of the circumstances. See *Lassiter*, 452 U.S. at 33, 101 S.Ct. at 2163, 68 L.Ed.2d at 653.

¶45 In the instant case, H.C. was fourteen and pregnant when DPHHS again became involved in her life after receiving reports of her shoplifting. At that time, and throughout the termination proceedings, H.C.'s mother Sandy was incarcerated, and H.C.'s grandmother, Mavis, and her aunt, Sherry, participated minimally in the proceedings. H.C.'s father was deceased. A.F.-C.'s father was also deceased.

¶46 In the combined abuse and neglect proceedings, H.C. was both an abused and neglected youth as well as a minor parent, yet did not receive the benefit of representation. H.C. attempted to obtain legal advice by contacting Mr. Allison, but was told that he was not her attorney. H.C.'s mother wrote to the District Court requesting counsel as well as expressing concern about whether H.C.'s interests were being represented by legal counsel. Neither H.C. nor anyone representing her was present at the hearing to determine whether A.F.-C. was a youth in need of care. Default was therefore entered against her. Further, at the January 7, 1999, hearing which adjudicated H.C. a youth in need of care, H.C. appeared and represented herself and, according to the District Court order, "acknowledged her consent" that temporary custody of herself be awarded to DPHHS. Although H.C.'s involvement in child protective proceedings is not an issue before the Court in this appeal, the prospect of a minor appearing in court, without assistance or representation, and consenting to the State's custody of her own self, is a fact indicative of the failure of due process in this case.

¶47 H.C. was fifteen and sixteen respectively when she signed the first and the second treatment plans. H.C. and her foster parent, Tanna, strongly objected to H.C.'s placement at FCH and to the treatment plan, yet H.C. had no adult assistance to help her make an appropriate or meaningful objection in a timely manner to the District Court, and therefore, no such objection was made.

¶48 At the June 8, 2000, termination hearing, at which H.C. was represented by counsel,

the District Court expressed frustration with H.C.'s counsel for raising for the first time the appropriateness of the treatment plan:

Well, certainly you can make the argument - or present the evidence, number one, that the reason she didn't comply with the treatment plan is because she felt like there was no use in it, . . . and, secondly, that it wasn't appropriate to begin with, although that seems to be something that should have been litigated back then, before the court approved it, and not now after the fact.

Unfortunately, H.C., an indigent minor parent, did not have any representation or other adult assistance to make an appropriate and meaningful objection at a time when such objection would have been timely.

¶49 While at FCH, H.C. signed and entered into six different FCH programmatic treatment plans as required by the second court-ordered treatment plan. H.C.'s adult advice while living at FCH consisted of counselors who would also eventually testify in the hearing to terminate her parental rights. The testimony of her case manager, Emily Hargis, aptly demonstrates the tension between the support they attempted to offer H.C. and their role as witnesses for DPHHS:

[T]here was a distinction for [H.C.] . . . [t]hat she needed support as a mother, . . . that she did not receive our support for her individual because we were part of the proceedings, we were testifying in court. Crittenton was testifying in court for the State essentially. And [H.C.] was having trouble distinguishing between our support of her as an individual versus our support of her as a mother to [A.F.-C.].

¶50 Although the phrase "due process" cannot be precisely defined, the phrase expresses the requirements of "fundamental fairness." *Lassiter*, 452 U.S. at 24-25, 101 S.Ct. at 2158, 68 L.Ed.2d at 648. Fundamental fairness requires fair procedures. *In re A.N.*, ¶ 24. It is therefore imperative that the process by which a treatment plan is implemented must be fair.

¶51 The significance of adult advice for a minor in the context of proceedings to terminate parental rights is acknowledged in § 41-3-607(3), MCA, which requires in relevant part, that "If a respondent parent is a minor, a guardian ad litem must be appointed to serve the minor parent *in addition* to any counsel requested by the parent" (emphasis added). In view of the circumstances presented in this matter, we conclude that, in order to preserve the fundamental fairness of the proceedings, due process required that counsel be appointed for H.C. during the formulation of the treatment plan and prior to the District Court's approval of the plan. The District Court erred in not doing so. Therefore, the treatment plan here cannot be deemed appropriate.

¶52 The order terminating H.C.'s parental rights to A.F.-C. is reversed.

/S/ JIM RICE

We concur:

/S/ KARLA M. GRAY

/S/ JAMES C. NELSON

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/S/ W. WILLIAM LEAPHART

/S/ TERRY N. TRIEWELER

# APPENDIX 4

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West's RCWA 26.27.021

C

West's Revised Code of Washington Annotated Currentness

Title 26. Domestic Relations (Refs & Annos)

Chapter 26.27. Uniform Child Custody Jurisdiction Act (Refs & Annos)

Article 1. General Provisions

→ 26.27.021. Definitions

The definitions in this section apply throughout this chapter, unless the context clearly requires otherwise.

- (1) "Abandoned" means left without provision for reasonable and necessary care or supervision.
- (2) "Child" means an individual who has not attained eighteen years of age.
- (3) "Child custody determination" means a judgment, decree, parenting plan, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.
- (4) "Child custody proceeding" means a proceeding in which legal custody, physical custody, a parenting plan, or visitation with respect to a child is an issue. The term includes a proceeding for dissolution, divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, emancipation proceedings under chapter 13.64 RCW, proceedings under chapter 13.32A RCW, or enforcement under Article 3.
- (5) "Commencement" means the filing of the first pleading in a proceeding.
- (6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.
- (7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a child, parent, or person acting as a parent is part of the period.
- (8) "Initial determination" means the first child custody determination concerning a particular child.
- (9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under this chapter.
- (10) "Issuing state" means the state in which a child custody determination is made.
- (11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.
- (12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

West's RCWA 26.27.021

(13) "Person acting as a parent" means a person, other than a parent, who:

(a) Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Tribe" means an Indian tribe or band, or Alaskan Native village, that is recognized by federal law or formally acknowledged by a state.

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

CREDIT(S)

[2001 c 65 § 102.]

#### LIBRARY REFERENCES

2005 Main Volume

Child Custody  702.  
Westlaw Topic No. 76D.

#### NOTES OF DECISIONS

##### **Commencement of action 4**

**Home state 1**

**Preemption 2**

**State 3**

##### 1. Home state

For purposes of child custody action jurisdiction, "home state" is state in which child immediately preceding time involved lived with his parents, a parent, or person acting as parent for at least six consecutive months, and in case of child less than six months old, state in which child lived from birth; periods of temporary absence of any of named persons are counted as part of six-month or other period. In re Marriage of Greenlaw (1994) 123 Wash.2d 593, 869 P.2d 1024, certiorari denied 115 S.Ct. 333, 513 U.S. 935, 130 L.Ed.2d 291, rehearing denied 115 S.Ct. 686, 513 U.S. 1066, 130 L.Ed.2d 617. Child Custody  736

Neither Oregon nor Washington satisfied "home state" test of Uniform Child Custody Jurisdiction Act (§ 26.27.010 et seq.) where children did not reside in Oregon except for brief period while parties looked for house in Washington and, at time proceedings were commenced, children had not resided in Washington for past three months and neither party evidenced any intention to return to Washington. Hudson v. Hudson (1983) 35 Wash.App. 822, 670 P.2d 287. Child Custody  736

##### 2. Preemption

West's RCWA 26.27.201

**C**

West's Revised Code of Washington Annotated Currentness

Title 26. Domestic Relations (Refs & Annos)

Chapter 26.27. Uniform Child Custody Jurisdiction Act (Refs & Annos)

Article 2. Jurisdiction

**→ 26.27.201. Initial child custody jurisdiction**

(1) Except as otherwise provided in RCW 26.27.231, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) A court of another state does not have jurisdiction under (a) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under RCW 26.27.261 or 26.27.271, and:

(i) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) All courts having jurisdiction under (a) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under RCW 26.27.261 or 26.27.271; or

(d) No court of any other state would have jurisdiction under the criteria specified in (a), (b), or (c) of this subsection.

(2) Subsection (1) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

CREDIT(S)

[2001 c 65 § 201.]

LIBRARY REFERENCES

2005 Main Volume

Child Custody  730 to 753.

Westlaw Topic No. 76D.

West's RCWA 26.27.211

**C**

West's Revised Code of Washington Annotated Currentness  
Title 26. Domestic Relations (Refs & Annos)

Chapter 26.27. Uniform Child Custody Jurisdiction Act (Refs & Annos)

Article 2. Jurisdiction

**→ 26.27.211. Exclusive, continuing jurisdiction**

(1) Except as otherwise provided in RCW 26.27.231, a court of this state that has made a child custody determination consistent with RCW 26.27.201 or 26.27.221 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

(2) A court of this state that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under RCW 26.27.201.

CREDIT(S)

[2001 c 65 § 202.]

LIBRARY REFERENCES

2005 Main Volume

Child Custody  745.  
Westlaw Topic No. 76D.

RESEARCH REFERENCES

**Treatises and Practice Aids**

20 Wash. Prac. Series § 33.37, Modification or Adjustment of Parenting Plan--Venue for Modification Proceedings.

22 Wash. Prac. Series 26.27.221, Jurisdiction to Modify Determination.

22 Wash. Prac. Series WPF CU 01.0100, Nonparental Custody Petition (PTCUS).

22 Wash. Prac. Series WPF CU 02.0100, Findings of Fact and Conclusions of Law (Nonparental Custody) (FNFCL).

22 Wash. Prac. Series WPF DR 01.0100, Petition for Dissolution of Marriage (PTDSS).