



AN ACT CLARIFYING THE RIGHT OF A GRANDPARENT TO HAVE CONTACT WITH A GRANDCHILD IN LIGHT OF DECISIONS BY THE U.S. SUPREME COURT AND THE MONTANA SUPREME COURT; AMENDING SECTION 40-9-102, MCA; AND PROVIDING AN APPLICABILITY DATE.

WHEREAS, the Legislature enacted the principal grandparent-grandchild contact statute, section 40-9-102, MCA, in 1979 and has not amended that statute since 1997; and

WHEREAS, since 1997, the statute has provided that a grandparent wanting to have contact with a grandchild could petition a District Court to grant that contact and that the court must grant the petition if it found that the contact was "in the best interest of the child"; and

WHEREAS, since 1997, the United States Supreme Court and the Montana Supreme Court have both held that a parent's right to the custody, care, and control of a child is founded upon a parent's constitutional right to liberty and have also held that it is the constitutionally protected right of a fit parent to determine who the parent's child may or may not associate with; and

WHEREAS, the Montana Supreme Court held on May 9, 2006, in the case of *Polasek v. Omura*, that a District Court for Cascade County committed reversible error when the District Court granted a petition for grandparent-grandchild contact under section 40-9-102, MCA, against the wishes of the custodial parent who had not been found to be an unfit parent, based upon the single statutory criteria that the contact was "in the best interest of the child"; and

WHEREAS, the Montana Supreme Court held in *Polasek v. Omura* that before a District Court could use the "best interest of the child" standard, the District Court must first determine whether the child's parent was a fit parent and, if the District Court determines the parent to be a fit parent and an objecting fit parent, that the presumption in favor of the parent's wishes has been rebutted; and

WHEREAS, because of the rulings of the U.S. Supreme Court and the Montana Supreme Court, section 40-9-102, MCA, is now misleading to grandparents in that the statute implies that a grandparent may petition a District Court to award, and the District Court may grant, grandparent-grandchild contact without consideration of the wishes of a custodial parent, or even over the objection of a custodial parent, and without consideration of the fitness of that parent; and

WHEREAS, the Legislature believes in the constitutional right of parents to control the actions and

conduct of their children and believes that third parties should not be allowed, through the courts, to control the actions of those children if the parents are fit and proper parents; and

WHEREAS, the Legislature believes that both parents and grandparents must have a clear understanding or "road map" of parental rights and a grandparent's right to contact with a grandchild and that those rights should be clear in state law and easily located in state statutes by both parents and grandparents alike.

THEREFORE, it is the purpose of the Legislature to make Montana statutes reflect the holding of the U.S. Supreme Court in *Troxel v. Granville* and of the Montana Supreme Court in *Polasek v. Omura* regarding the constitutional rights of custodial parents to determine who a child may or may not have contact with by providing that before a District Court may grant grandparent-grandchild contact over the objection of a custodial parent, the District Court must inquire into the fitness of the parent and approve the petition for contact only if the parent is found to be unfit and the contact is in the best interest of the child or, if the court determines the parent to be a fit parent, the contact petitioned for is in the best interest of the child and the presumption in favor of the parent's wishes has been rebutted.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 40-9-102, MCA, is amended to read:

"40-9-102. Grandparent-grandchild contact. (1) Except as provided in subsection (5), the district court may grant to a grandparent of a child reasonable rights to contact with the child, including but not limited to rights regarding a child who is the subject of, or as to whom a disposition has been made during, an administrative or court proceeding under Title 41 or this title. The department of public health and human services must be given notice of a petition for grandparent-grandchild contact regarding a child who is the subject of, or as to whom a disposition has been made during, an administrative or court proceeding under Title 41 or this title.

(2) Before a court may grant a petition brought pursuant to this section for grandparent-grandchild contact over the objection of a parent whose parental rights have not been terminated, the court shall make a determination whether the objecting parent is a fit parent. A determination of fitness and granting of the petition may be made only after a hearing, upon notice as determined by the court.

(3) A determination of unfitness may be made only if the court, based upon clear and convincing evidence, makes one or more of the determinations provided in 42-2-608(1) or finds that one or more of the

events provided for in that subsection have occurred.

(4) Grandparent-grandchild contact may be granted over the objection of a parent determined by the court pursuant to subsection (2) to be unfit only if the court also determines by clear and convincing evidence that the contact is in the best interest of the child.

~~(2)~~(5) Grandparent-grandchild contact granted under this section over the objections of a fit parent may be granted only upon a finding by the court, after a hearing based upon clear and convincing evidence, that the contact with the grandparent would be in the best interest of the child and that the presumption in favor of the parent's wishes has been rebutted.

~~(3)~~(6) A person may not petition the court under this section more often than once every 2 years unless there has been a significant change in the circumstances of:

- (a) the child;
- (b) the child's parent, guardian, or custodian; or
- (c) the child's grandparent.

~~(4)~~(7) The court may appoint an attorney to represent the interests of a child with respect to grandparent-grandchild contact when the interests are not adequately represented by the parties to the proceeding.

~~(5)~~(8) This section does not apply if the child has been adopted by a person other than a stepparent or a grandparent. Grandparent-grandchild contact granted under this section terminates upon the adoption of the child by a person other than a stepparent or a grandparent.

(9) A determination pursuant to subsection (2) that a parent is unfit has no effect upon the rights of a parent, other than with regard to grandparent-grandchild contact if a petition pursuant to this section is granted, unless otherwise ordered by the court."

Section 2. Applicability. [This act] applies to a petition for grandparent-grandchild contact filed in accordance with Title 40, chapter 9, part 1, after October 1, 2007.

- END -

I hereby certify that the within bill,
SB 0027, originated in the Senate.

Secretary of the Senate

President of the Senate

Signed this _____ day
of _____, 2019.

Speaker of the House

Signed this _____ day
of _____, 2019.

SENATE BILL NO. 27

INTRODUCED BY J. ESP

BY REQUEST OF THE CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES INTERIM COMMITTEE

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