Third-Party "Standing" and Child Custody Disputes in Washington: Non-Parent Rights— Past, Present, and . . . Future?

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I. INTRODUCTION

In recent years, much national legislative and judicial attention has been given to the increasing number of claims of stepparents and grandparents seeking custody of children as against a parent under what are often "extra-ordinary circumstances."[1] This trend is not surprising. With almost half of all marriages in America ending in divorce,[2] children are increasingly being raised in nontraditional families.[3] One out of every two children will spend some time living in a step-family.[4] Often a non-

1. *See, e.g.*, Fact Sheet for H.B. 2470 (nonbiological parents), 43d Leg. 1st Reg. Sess. (Ariz. 1997) (explaining why legislative action regarding stepparents is a national necessity and trend). "Due to [the] current statute's premising of the word 'parent' almost exclusively on biology, the courts have been prevented from applying the traditional 'best interest' test in cases where a child is essentially raised by a non-biological parent. Currently, at least eleven states have expanded the definition of parent to include equitable parents, or persons *in loco parentis*." *Id.*; *see also* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 42 n.155 ("[U]nder equitable parent doctrine, [a] husband [was] allowed to bring claim for custody of two-year-old child whom he had treated as his own during the marriage and with whom he had developed a parent-child relationship, when the wife told the husband that another man was the child's father only after a home placement study following dissolution proceedings favored husband's custody." (citing *In re* Gallagher, 539 N.W.2d 479 (Iowa 1995))); *id.* at 42 n.156 (noting that "Pennsylvania recognizes the doctrine of 'in loco parentis' to afford standing to maintain a custody action (with the same substantive rights and obligations of a legal parent) to an individual who assumed obligations for a child incident to a parental relationship with the consent of the legal parent").

2. The 2004 divorce rate was 3.7 per 1,000 total population compared to the marriage rate of 7.8 per 1,000 total population. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2007, at 92 tbl.119 (2006) [hereinafter STATISTICAL ABSTRACT]. Just over half of all divorces take place in families with children, and, as a result, over one million children in the United States go through a parental divorce each year. If the current trends continue, "about 40% of all children will experience parental divorce before reaching adulthood." Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1269 (2000). In 2000, the United States had the third highest divorce rate among advanced Western nations. U.S. CENSUS BUREAU, *supra*, at 838 tbl.1312. Six out of ten divorces took place in families with children. Beth Bailey, *Broken Bonds: The Effects of Divorce on Society, Family, and Children*, CHI. TRIB., Feb. 9, 1997, at C6.

3. Robert W. Lueck, *The Collaborative Law (R)evolution: An Idea Whose Time Has Come in Nevada*, NEV. LAW., Apr. 2004, at 18, 19. The nuclear family is no longer the dominant family model; it is now estimated that only twenty-four percent of American households are traditional nuclear families. *Id.* (citing 2000 Census Report); *see also* 2007 STATISTICAL ABSTRACT, *supra* note 2, at 55 tbl.64 (reporting 32.6% of children living in nontraditional familial arrangements for 2005 compared to 27.5% in 1990); MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 1 (1994); Bryce Levine, *Divorce and the Modern Family: Providing* In Loco Parentis *Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315, 316 (1996) (stating that one in three American children may grow up as part of a stepfamily); Jennifer Klein Mangnall, Comment, *Stepparent Custody Rights After Divorce*, 26 SW. U. L. REV. 399, 400 (1997).

4. *See, e.g.*, 2007 STATISTICAL ABSTRACT, *supra* note 2, at 55 tbl.64 (reporting 32.6% of children living in nontraditional familial arrangements for 2005 compared to 27.5% in 1990). Even

parent is the "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent."[5] That person is essential to a child's development and well-being; the emotional bonds children form with these non-parents can be as strong and meaningful as bonds between biological or adoptive parents and their children[6] and often even stronger.[7]

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by 1995, approximately one-third of all children under eighteen were living in stepfamilies. Larry L. Bumpass et al., *The Changing Character of Stepfamilies: Implications of Cohabitation and Nonmarital Childbearing*, 32 DEMOGRAPHY 425, 426 (1995). Scholars predict that by the year 2010, stepfamilies will be the dominant family type. Emily B. Visher & John S. Visher, *Stepparents: The Forgotten Family Member*, 36 FAM. & CONCILIATION CTS. REV. 444, 444 (1998).

5. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (1973); *see also* Mellisa Holtzman, *Definitions of the Family as an Impetus for Legal Change in Custody Decision Making: Suggestions from an Empirical Case Study*, 31 LAW & SOC. INQUIRY 1, 9 (2006) (discussing how "[t]he daily interactions" between children and non-parents create "psychological attachments" that "effectively elevate their relationship to that of a parent and a child, rather than simply that of a child and a caregiver"); Jennifer Gould, Comment, *California's Move-Away Law: Are Children Being Hurt By Judicial Presumptions that Sweep too Broadly?*, 28 GOLDEN GATE U. L. REV. 527, 548 n.145 (1998); Mangnall, *supra* note 3, at 418-19 (discussing the need for courts to recognize the importance of psychological parenting). A child's perception of a parent is shaped by his or her day-to-day needs. *See, e.g.*, James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. TOL. L. REV. 805, 808-09 (1995).

6. Arlene Browand Huber, *Children at Risk in the Politics of Child Custody Suits: Acknowledging Their Needs for Nurture*, 32 U. LOUISVILLE J. FAM. L. 33, 52-53 (1994). "Terminating custodial relationships between stepparents and stepchildren simply because the marriage ends is unfair to stepparents who assumed a parental role during marriage and can be detrimental to children, especially if they view their stepparents as 'psychological parents.'" Mangnall, *supra* note 3, at 403; *see also* Susan H. v. Jack S., 37 Cal. Rptr. 2d 120, 124 (Cal. Ct. App. 1994) (holding that the relationship between a child and the man he knows as his father does not disappear upon a divorce between the father and the child's mother).

7. "In recent years . . . the consensus that long supported enforcement of bright-line boundaries [between parents and non-parents] has weakened in the face of non-traditional child rearing arrangements that seem to defy basic assumptions underlying the old rules." David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 47, 48 (Robin Fretwell Wilson ed., 2006); *see also* GOLDSTEIN ET AL., *supra* note 5, at 98 (recognizing the importance of this sort of psychological parent, rather than focusing on the biological aspects of parenting). Goldstein, Freud, and Soleit's books, which attempted to integrate legal standards with current psychological theories, articulate a legal standard known as "the least detrimental alternative," which suggested replacing the "best interests" rule currently utilized by courts. *See* 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN, § 2:8 (rev. 2d ed. 2005). These notions have arguably found their way into contemporary Washington custody law. However, much disagreement with that view currently exists. *See id.*

Unfortunately, third-party "psychological parents,"[8] those who have stood *in loco parentis,* have long faced unique obstacles not faced by biological or adoptive parents seeking to gain legal custody.[9] Under common law, often notwithstanding significant long-term attachments, non-parents still had to prove that parents were "unfit" or show "extraordinary circumstances" such as abandonment and "de facto" parenting by those non-parents to obtain custody.[10] In the modern era, non-parents have additionally been precluded from even petitioning for custody if they cannot meet fairly rigid "standing" requirements.[11] These jurisdictional requirements, such as those found in the 1973 Uniform Marriage and Divorce Act ("UMDA"),[12] were intended to reinforce the "superior rights" doctrine,[13] which creates a fairly reasonable legal presumption of long standing in most states, including Washington,[14] that an otherwise fit biological parent is the best person to raise and nurture a child.[15]

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8. *See* James G. O'Keefe, Note, *The Need to Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077, 1081, 1890 (1991) (defining "psychological parent" as that "individual the child perceives, on a psychological and emotional level, to be his or her parent," and pointing out that under the "parental rights" doctrine, such individuals are not even considered for custody until after the natural parent has been shown to be unfit); *supra* note 5.

9. *See, e.g.*, Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 82 (2006) ("Both stepfamilies and the broad question of legal recognition for them have a long history"). Stepparents are not afforded the same rights in child custody suits as parents because, in the eyes of the law, stepparents are seen as legal strangers to their former stepchildren. *See* Bartlett, *supra* note 6, at 918; David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 809 (1999) (arguing there is no historical recognition by courts of unrelated households as families); Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 340-41 (1994) (arguing that courts should pay more attention to children's perspectives in child custody and visitation cases).

10. *See, e.g., In re* Brenner's Guardianship, 282 P. 486 (Wash. 1929) (holding that a guardian of a minor cannot be appointed without showing that parents are not the proper persons to have custody and that the child's welfare requires appointment); State *ex rel.* Le Brook v. Wheeler, 86 P. 394, 396 (Wash. 1906) (granting standing to non-parents only to rule against them on the basis that the father did not abandon the child).

11. *See, e.g.*, Jones v. Minc, 462 P.2d 927, 932 (Wash. 1969) (Hunter, C.J., dissenting) ("[T]he court has no jurisdiction to grant relief unless authority to do so can be found in Washington statutes.").

12. UNIF. MARRIAGE & DIVORCE ACT § 401 (amended 1973), 9A U.L.A. pt. II, at 263-64 (1998).

13. *See infra* notes 33-54.

14. *See, e.g., In re* Welfare of May, 545 P.2d 25, 27 (Wash. Ct. App. 1976) ("A natural parent cannot be deprived of parental rights, including custody and control, unless his or her conduct has been such, or the duty to care for and protect the child has been so violated, that such rights have been abdicated or forfeited.").

15. Not all states refer to a "presumption" or a "superior right." In some states, the doctrine is said to imply a "natural right." *See, e.g.*, State *ex rel.* Paul v. Peniston, 105 So. 2d 228, 232 (La.

The UMDA went further, however, in its efforts to reinforce superior parent rights. It disallowed third-party standing in custody disputes except under the narrowest circumstances: someone other than a biological or adoptive parent can petition for custody only when the child is not in actual physical custody of one of the child's parents.[16] The standing section of the UMDA was designed as a protection for custodial parents in order to limit interference with the parents' rights while the child was in custody of the parents. Only if the parents' care were to fall below "the minimum standard imposed by the community at large," would a custodial parent's rights be intruded upon.[17]

The "not in the physical custody of a parent" standing requirement is incorporated into the laws of Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington.[18] Washington adopted the requirement with

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1958) (Tate, J., concurring). In others, it is a "prima facie right." *See, e.g.*, Rowles v. Rowles, 668 A.2d 126, 128 (Pa. 1995). California law, by contrast, requires a *preference*, rather than a presumption that biological or adoptive parents should prevail over nonparents, and sets forth the order of preference in child custody matters. *See* CAL. FAM. CODE § 3040(a) (West 2007). This is known as the "doctrine of parental preference." *In re* Marriage of Gayden, 280 Cal. Rptr. 862, 865 (Cal. Ct. App. 1991). The majority of courts give such "preferences" to biological and adoptive parents. *See, e.g.*, J.E.C., Jr. v. J.E.C., Sr., 575 So. 2d 592, 594-95 (Ala. Civ. App. 1991); Ethredge v. Yawn, 605 So. 2d 761, 764 (Miss. 1992); *In re* Feemster, 751 S.W.2d 772, 773 (Mo. Ct. App. 1988); Uhing v. Uhing, 488 N.W.2d 366, 374-75 (Neb. 1992); Abaire v. Himmelberger, 558 N.Y.S.2d 678, 679 (N.Y. App. Div. 1990); Michael T.L. v. Marilyn J.L., 525 A.2d 414, 419 (Pa. Super. Ct. 1987); *In re* Guardianship of Sedelmeier, 491 N.W.2d 86, 87-88 (S.D. 1992); Pribbenow v. Van Sambeek, 418 N.W.2d 626, 628 (S.D. 1988); Brown v. Dixon, 776 S.W.2d 599, 603 (Tex. App. 1989).

16. UNIF. MARRIAGE & DIVORCE ACT § 401(d)(2) (amended 1973), 9A U.L.A. pt. II, at 263-64 (1998).

17. *Id.* § 401 cmt. One of the drafters suggested:

> [Given the] intense emotionalism [of custody adjudication], how "unfit" litigating parents often appear or are made to appear to judges, and the invitation the "best interests" standard's indeterminate qualities offers to judges to award custody to those litigants whose attributes and values most resemble their own. Under such circumstances, an expansion of judicial discretion may well produce a much larger increase in the number of stepparent custody awards than is warranted by the number of [stepparents who truly deserve custody]. Denying "standing" to stepparents can be justified, then, because many of the "truly" meritorious stepparent claims will in any event be honored by decisions "outside doctrinal parameters," while the "formal," "no standing," rule will serve to protect many biological parents from those trial judges tempted to use indeterminate custody standards to prefer stepparents inappropriately.

Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 197-98 (1993) (footnote omitted) (speculating why participants at a conference on "Family Law for the Next Century" seemed to be committed to "protecting the interests of the biological parents" and favoring the "traditional doctrine"); *see also id.* at 200-01 (discussing the difficulties with attempting to liberalize third party standing requirements in order to use them as "aspirational legal doctrines").

18. *See* Carolyn Wilkes Kaas, *Breaking up a Family or Putting it Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1069 nn.101-02 (1996).

some fortunate and prescient modifications.[19] In some UMDA states other than Washington, third-party "de facto" parents who fail to meet this original uniform jurisdictional requirement may never be heard as to the "best interests" of children,[20] the basis for custody determinations at trial between biological or adoptive parents.[21] The UMDA standing requirement has been problematic for a number of reasons in those states.[22]

For example, one encountered problem is that "physical custody" has been interpreted in those states to mean "legal custody."[23] Thus, arguably unfairly and unnecessarily, third parties acting *in loco parentis* have the burden of first showing something akin to parental "unfitness" in order to even have standing to proceed to a hearing[24] even though the "parental rights" presumption (of fitness and preference) would already apply during ultimate custody hearings.[25] Standing requirements,

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19. *See, e.g.*, WASH. REV. CODE ANN. § 26.09.180 (West 1986), *repealed by* 1987 Wash. Sess. Laws 2041. *But see* WASH. REV. CODE ANN. § 26.10.030 (West 2005) (augmenting the third-party standing language found in the UMDA by allowing a person other than a parent to file a petition for custody "only if the child is not in the physical custody of one of its parents *or if the petitioner alleges that neither parent is a suitable custodian*") (emphasis added).

20. *See, e.g., In re* Kirchner, 649 N.E.2d 324, 335 (Ill. 1995) (holding, inter alia, that mere physical possession by the former adoptive parents did not entitle them to standing to seek custody).

21. *See, e.g.*, State v. Bean, 851 P.2d 843, 845 (Ariz. Ct. App. 1992) (holding that parental rights are not absolute and must yield to the best interests of the child); Mahon v. People *ex rel.* Robertson, 75 N.E. 768, 770 (Ill. 1905); *In re* Adoption of R.L.M., 156 P.3d 940, 945 n.26 (Wash. Ct. App. 2007).

22. The enactment of rigid standing requirements also raises several additional questions. First, if the "superior rights" presumption is already in play in third-party custody determinations, why have an additional preliminary standing barrier reinforcing that presumption? Second, if third parties rarely receive custody without proof of parental "unfitness" or "unsuitability," why require an earlier showing of "unfitness" or "unsuitability" to *ask* for custody in the first place? It is reasonable to argue that as a matter of public policy, all those with nurturing and meaningful relationships with a child for a significant period of time—those who are or have been "*in loco parentis*"—should be able to at least participate in custody hearings. Indeed, the real best interests of a child may be in retaining relationships, if they exist, with more than one psychological parent. *See generally* Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557 (1983-84); Nanette Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304 (1974) (reviewing GOLDSTEIN ET AL., *supra* note 5); Peter L. Strauss & Joanna B. Strauss, *Joseph Goldstein, Anna Freud & Albert J. Solnit's Beyond the Best Interest of the Child*, 74 COLUM. L. REV. 996 (1974) (book review).

23. *See, e.g., In re* Marriage of Siegel, 648 N.E.2d 607, 610 (Ill. App. Ct. 1995).

24. *See, e.g.*, Moore v. Asente, 110 S.W.3d 336, 360 (Ky. 2003) ("[T]he nonparent must first show by clear and convincing evidence that the parent has engaged in conduct similar to activity that could result in the termination of parental rights by the state."). It should be said, however, that this is not always that difficult, as most states have rather expansive definitions of "unfitness." Modern statutory definitions of unfitness by reason of neglect, such as in Illinois for example, include such notions as "failure to demonstrate a reasonable degree of interest." *In re* A.S.B., 688 N.E.2d 1215, 1221 (Ill. App. Ct. 1997).

25. *See supra* notes 22, 24; *infra* note 325. This is true because "[w]hether as a result of

therefore, would seem unnecessary to protect the biological parents' rights.[26] Moreover, rigid standing requirements for custody petitioners unnecessarily duplicate the efforts of the state Adoption Act and Juvenile Court Act,[27] which already protect the legitimate custody interests of parents. A second problem is that standing requirements tend to force courts to focus on parental "property rights" prior to custody hearings,[28] unduly delaying and quite possibly biasing the court's eventual evaluation and implementation of the "best interests" of children at those hearings. Finally, the UMDA's non-parent standing provisions would have reversed the

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[feeling inadequate to determine the best interests of children] or because of a sympathy for parental emotions, most courts applying the best interest test to third party situations [at trial] utilize a variety of procedural devices [such as the parental rights presumption], which increase the probability of the natural parent winning the suit." Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 154 (1963) (footnote omitted); *see also* Sandra R. Blair, *Jurisdiction, Standing, and Decisional Standards in Parent-Nonparent Custody Disputes–In re* Marriage of Allen, *28 Wn. App. 637, 626 P.2d 16 (1981)*, 58 WASH. L. REV. 111, 117 (1982) ("[P]rocedural devices, such as a presumption in favor of the natural parent, increase the probability that the parent will be awarded custody." (citing *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties, supra,* at 154 n.18; JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 185-86 (1947). Indeed, if in a "best interests" adjudication between a natural parent and a third party, the superior rights presumption, a shift in the persuasion burden, and a raised level of proof were all used, "the resulting law would be virtually indistinguishable from the parental right doctrine." *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties, supra*, at 154 n.18. *But see generally* Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227, 238 (2002) (discussing the virtues of the commonly held presumption that upon the death of a custodial parent, a reversion of custody to the non-custodial parent is in the best interests of the child).

26. "A standing requirement is unnecessary to protect the natural rights of the parent. Even where the court decides the case under the bestinterests-of-the-child [sic] standard, it still will give considerable weight to the right of the natural parent." *In re* Marriage of Houghton, 704 N.E.2d 409, 416 (Ill. App. Ct. 1998) (Cook, J., dissenting); *see also* Rose v. Potts, 577 N.E.2d 811, 813-14 (Ill. App. Ct. 1991) (noting that meeting standing requirements does not place the nonparent on an equal footing with the parents in the proceeding; in order to succeed in a custody petition, the nonparent still must overcome the presumption in favor of the parent). "[T]he parties do not start out even; the parents have a 'prima facie right to custody,' which will be forfeited only if 'convincing reasons' appear that the child's best interests will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents' side." Ellerbe v. Hooks, 416 A.2d 512, 514 (Pa. 1980) (quoting *In re* Hernandez, 376 A.2d 648, 654 (Pa. 1977)).

27. For example, "abandonment" is any conduct which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child and will ordinarily invoke the neglect or dependency jurisdiction of the Juvenile Court Act. *E.g., In re* Adoption of Webb, 544 P.2d 130, 132-34 (Wash. Ct. App. 1975) (finding that the father had "shown willful substantial lack of regard for his parental obligations" and thus had abandoned his child). In many states, the petitions of parents who fail to support their children, relinquish custody or otherwise forfeit a claim to parenthood and then, at some later date, change their minds and want the child back, are usually denied. *See, e.g., In re* Smith, 222 N.Y.S.2d 705, 706 (N.Y. Sup. Ct. 1961).

28. *See infra* note 115.

common law in Washington, which has shifted toward a focus on "best interests" of children rather than the relative "property interests" of potential custodians.[29]

Fortunately, in addition to adopting § 401(d) of the UMDA, Washington has added language under which a non-parent can petition for custody when "neither parent is a *suitable* custodian."[30] While in several other UMDA states the requirement that the child "not be in the physical custody of a parent" led to a focus on parental property rights, rather than children's best interests,[31] this has been avoided in Washington to some extent because the "suitability" language allows for third party standing, regardless of fitness, if parental custody can be shown to be "detrimental" or "harmful" to a child's interests.[32]

The 1973 Washington non-parent custody provision was interpreted eight years after its enactment in the seminal case of *In re Marriage of Allen*.[33] The court articulated criteria for findings of "unsuitability" and the burdens on those who would seek non-parent standing under the 1973 provision, but it raised almost as many questions of interpretation and application as it resolved.[34] Quite recently in decisions such as *In re Custody of S.H.B.*,[35] *In re Parentage of L.B.*,[36] and *In re Custody of Shields*,[37] many of these concerns have been addressed. In doing so, however, the Washington Supreme Court has strengthened state parental presumptions even beyond the dictates of the pivotal decision of the United States Supreme Court in *Troxel v. Granville*,[38] which set out the modern constitutional balancing approach appropriate to non-parent visitation and, by implication, custody claims.[39] These Washington decisions have arguably arrested the historic Washington trend toward viewing meaningful third-party relationships as integral to the "best interests" of children.

Part II of this article describes the evolution of the fundamental liberty interest parents have in raising their children and the constitutional notion of family, both of which are interdependent with and provide insight into the common law presumption

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29. *See* Blair, *supra* note 25, at 127.

30. WASH. REV. CODE ANN. § 26.10.030 (West 2005) (emphasis added).

31. Parental rights are often based on notions of children as property. *See* Lawrence Schlam, *Children "Not in the Custody of One of [Their] Parents:" The Superior Rights Doctrine and Third-Party Standing Under the Uniform Marriage and Dissolution of Marriage Act*, 24 S. ILL. U. L.J. 405, 425 (2000) ("[i]n addition to simply showing a lack of 'physical custody' in a parent, nonparents seeking standing to petition for custody must prove some legally recognizable 'right' in themselves to the care, physical possession, and control of the child.").

32. *In re* Marriage of Allen, 626 P.2d 16, 22 (Wash. Ct. App. 1981).

33. *Id.* at 20.

34. *Id.* at 22.

35. 74 P.3d 674 (Wash. Ct. App. 2003).

36. 122 P.3d 161 (Wash. 2005).

37. 136 P.3d 117 (Wash. 2006).

38. 530 U.S. 57 (2000).

39. *Id.* at 68-69, 71.

of parental fitness. Part III examines directly the common law "superior rights doctrine" and traces how that presumption of parental fitness was strictly reinforced as a *property* right in third-party custody disputes early in Washington history but ultimately became diminished in importance in favor of "child-centered" concerns. The cases provide an overview of the "extraordinary circumstances" that, at least prior to the 1970s, allowed for non-parent custody. This material suggests useful practical and legal precedent for the modern resolution of non-parent custody disputes, and provides historical background for understanding the ultimate criticism of post-1973 rulings on standing made in Part IV.

Part IV discusses the statutory standing requirements adopted in Washington for third parties seeking custody as part of the state's revision of its dissolution laws in 1973 and their subsequent application. First, several decisions where third-party standing has been obtained under the original UMDA "not in the physical custody of a parent" language are discussed. These cases make evident the relationship between this ground and the historical basis for nonparent standing: "unfitness" in the sense of abandonment and abdication of parental property rights. Second, and more extensively, the application of the innovative 1973 "unsuitability" standing language and the effect of the actual "detriment" standard set in 1981 in *Allen*[40] for both standing and custody determinations are explored. Finally, this part notes the interpretational questions raised by pre- and post-*Allen* "unsuitability" decisions and distinguishes, analyzes, and critiques recent important cases seeking to resolve such questions.

Part V, in looking to the future, compares and evaluates Washington's approach to standing and third-party custody with that of UMDA states that originally adopted the "not in the physical custody of the parents" language. Additionally, Washington's approach is compared with those states that have not adopted that uniform law but have instead developed alternative, perhaps more child-centric, approaches to third-party standing and custody disputes. Finally, some general conclusions are offered with regard to the comparative effectiveness or advantages of current Washington custody law in protecting the best interests of children while preserving parental rights, along with recommendations for modifications of third-party custody law that might ultimately be considered.

This article sets forth the argument that while the Washington state legislature took positive steps in child custody law when it added the "suitability" language to the original UMDA provision, Washington courts have construed "unsuitability" far too narrowly. Requiring that non-parents, for standing purposes, prove that "actual harm" will result should the third-party relationship not continue (as compared to proof that *benefit* will accrue if it *does* continue), unnecessarily limits participation by third parties with significant parent-child relationships and, as a basis for custody determinations, conceivably leaves many deserving third-party relationships unprotected while minimizing the views of children as to their own best interests.

40. *See supra* note 32 and accompanying text.

Moreover, this standard of proof has resulted in contemporary decisions that negate or diminish the effect of the rich and well-reasoned historical common law of third-party custody adjudication in Washington which better factored the important "best interests" considerations in such cases. The approach of contemporary decisions in this area represents a trend that moves Washington law toward greater *inhibition* of "best interests" outcomes instead of the "child-centered" determinations increasingly found in other states, both those that have adopted the original 1973 UMDA third-party custody provision and many of those that did not.

II. THE "SUPERIOR RIGHTS" PRESUMPTION: THE CONSTITUTIONAL BASIS FOR THE PROTECTED PARENTAL RIGHT TO CHILD CUSTODY

The "superior rights" presumption in favor of parents is the judicially enforced notion that parents are generally believed to be the best custodians of their children and this presumption plays a significant role in custody decision-making in practically all states.[41] Even though this doctrine may occasionally dictate standing or custody decisions contrary to important interests or desires of children, the parental interest in relationships with their children is a protected fundamental right under the United States Constitution,[42] and has been an explicit liberty interest since early in the twentieth century.[43] Many state constitutions, including Washington's, have long protected the right of a parent to raise his or her own child.[44] Over many years, the United States Supreme Court has developed a constitutional definition of parental rights and family integrity[45] that must be shielded against intrusive state or private action when either protecting a child or modifying custody in favor of non-parents.

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41. "Natural parents are said to have a *superior right* to the custody, care, and control of the their children." KRAMER, *supra* note 7, § 2:18. "This 'natural parent' preference rule has been enacted into law in a number of states." *Id.*

42. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753 (1982).

43. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

44. *See In re* Ross, 277 P.2d 335, 336 (Wash. 1954) (holding that a parent's right to have custody and control of his or her minor children is guaranteed under the Washington Constitution and may only be disturbed upon the appropriate procedural fairness demanded by due process).

45. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 504-06 (1977) (plurality opinion) (holding that the state could not apply a single family zoning statute to a family consisting of a grandparent and two of her grandchildren who were cousins; the protection accorded the traditional parent-child relationship was based upon a flexible definition of family). In holding that the definition of family is to be interpreted flexibly, the *Moore* Court stated that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Id.* at 504. *But see* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843, 846-47 (1977) (reaffirming a flexible definition of family based not necessarily on blood, marriage, or adoption, yet refusing to extend constitutional protection to a foster family).

The Court established constitutional protection for the parent-child relationship as early as 1923 in *Meyer v. Nebraska*.[46] The *Meyer* case involved a Nebraska statute that prohibited the teaching of any foreign language to a child prior to eighth grade.[47] The statute was deemed unconstitutional because it infringed on the liberties guaranteed by the Due Process Clause of the Fourteenth Amendment.[48] The Court stated: "Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children . . . . [I]t is the natural duty of the parent to give his children education suitable to their station in life . . . ."[49]

Subsequently, in *Pierce v. Society of Sisters*,[50] the Court was confronted with a state statute that prohibited children from attending non-public schools.[51] The Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[52] *Meyer* and *Pierce*, therefore, established that parents' authority to rear their children as they see fit is a constitutionally protected right.[53] In *West Virginia State Board of Education v. Barnette*,[54] the Court reaffirmed this principle by holding that a statute requiring

46. *Meyer*, 262 U.S. at 399; *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). *But see generally* Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1988).

47. *Meyer*, 262 U.S. at 396-97. The statute at issue stated in part: "No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language. . . . Languages other than the English language may be taught . . . only after . . . eight grade . . . . Any person who violates any of the provisions of this act . . . shall be subject to a fine of not less than twenty-five dollars ($25)." *Id.* at 397.

48. *Id.* at 400, 403.

49. *Id.* at 399-400.

50. 268 U.S. 510 (1925).

51. *Id.* at 530. The Compulsory Education Act required every parent or guardian with custody of a child between the ages of eight and sixteen to send the child "to a public school for the period of time a public school shall be held during the current year." *Id.*

52. *Id.* at 534-35. The Court went on to say: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

53. *See* SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 19 (2d ed. 1997) ("[I]n these opinions the Supreme Court was simply articulating principles that had been implicit in the state's relationship to the family in an earlier era."); *see also* Linda L. Lane, *The Parental Rights Movement*, 69 U. COLO. L. REV. 825, 838 (1998) (mentioning that although *Meyer* and *Pierce* recognize a parent's right to control his or her child's upbringing as a fundamental substantive right protected by the Fourteenth Amendment, critics caution that the cases can promote the view of the child as the parent's private property to the detriment of the child and legitimate state authority).

54. 319 U.S. 624 (1943).

children to recite the Pledge of Allegiance over parental objection violated the First and Fourteenth Amendments.[55]

However, this fundamental right as articulated in *Meyer, Pierce,* and *Barnette* is limited. In *Prince v. Massachusetts,*[56] the Court declared that although a parent had a constitutionally protected right to direct the upbringing of his or her child, this right could be outweighed by a state's compelling interest in the child's health and well being.[57] The Court upheld a Massachusetts statute restricting the time and circumstances that children could be on public streets—even though the law indirectly prohibited religious proselytizing by children—because as part of its *parens patriae* power the state had a compelling interest in enacting child labor laws, an interest that outweighed the parents' interests in controlling the religious upbringing of their children.[58]

States have a similarly compelling interest in restricting the rights of unfit parents. In *Stanley v. Illinois,*[59] the Court addressed the question of what rights biological parents have in a case where an Illinois statute *presumed* unwed fathers unfit.[60] The Court declared that putative fathers also have a fundamental right to a parent-child relationship, and that under the Due Process Clause of the Fourteenth Amendment biological fathers cannot be deprived of that right without a hearing to determine their parental fitness.[61] However, a merely biological relationship is

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55. *See id.* at 642. The Court further stated that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* More recently, in *Wisconsin v. Yoder*, Amish parents argued that a law mandating school until the age of sixteen was contrary to the Amish religion and way of life. 406 U.S. 205, 208-09 (1972). The Supreme Court held this statute unconstitutional because it would contravene the parents' child-rearing authority and free exercise of religion, both of which are protected under the Due Process Clause of the Fourteenth Amendment. *Id.* at 233-34.

56. 321 U.S. 158 (1944).

57. *Id.* at 165-66 ("[N]either rights of religion nor rights of parenthood are beyond limitation."). "[A] state as *parens patriae* may restrict the parent's control by requiring school attendance, [or] regulating, or prohibiting the child's labor." *Id.* at 166. Parental authority may be balanced against a state's police power when necessary to protect children and promote their welfare. *See generally* Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971).

58. *Prince*, 321 U.S. at 168-69. Massachusetts's child labor law prohibited a boy under twelve and girl under eighteen from "sell[ing], expos[ing] or offer[ing] for sale any newspapers, magazines, periodicals or any other articles of merchandise . . . in any street or public place." *Id.* at 160-61.

59. 405 U.S. 645 (1972).

60. *Id.* at 650. The statute in *Stanley* failed to include unwed fathers as "parents." *Id.* The statute only included "the father and mother of a legitimate child . . . or the natural mother of an illegitimate child, . . . includ[ing] any adoptive parent." *Id.* Accordingly, in the *Stanley* case, when the natural mother died, the natural father had no parental rights because he was presumed unfit, and his children became wards of the state and were placed with a public guardian. *Id.* at 646-47.

61. *Id.* at 657-58; *see also* Santosky v. Kramer, 455 U.S. 745, 768 (1982) (holding that a

insufficient.[62] The father must step forward and assume some responsibility or make some effort to establish an actual parent-child relationship to be entitled to the due process right.[63]

Nevertheless, in some circumstances a biological father may not have a fundamental right to a relationship with his child even if he makes such an effort. In *Michael H. v. Gerald D.*,[64] the Supreme Court rejected a biological father's asserted parental rights to a child born to a married woman but conceived with him in an adulterous relationship.[65] Prior to the mother's marriage, the biological father lived with the child, provided financial support, and held himself out as the child's father.[66] However, California law created a presumption that a child born to a married woman living with her husband was the husband's child.[67] The plurality opinion, authored by Justice Scalia, rejected the unmarried father's claims on both procedural and substantive due process grounds because the presumption of paternity by the married father furthered legitimate public policies,[68] and because an adulterous father lacked a fundamental right to a relationship with his child.[69] Such a relationship, wrote Justice Scalia, is not "deeply rooted in this Nation's history and tradition."[70]

"preponderance of the evidence" standard failed to comport with due process).

62. Lehr v. Robertson, 463 U.S. 248, 261 (1983).

63. In *Lehr*, an unwed father challenged New York's putative father registry as unconstitutional for failing to give him notice and an opportunity to be heard before the adoption of his child. *Lehr*, 463 U.S. at 255. The Court upheld the statute and found that Lehr failed to develop a parent-child relationship because he failed to "demonstrat[e] a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the raring of his child.'" *Id.* at 261 (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979)). The Court held that Lehr had not stepped forward because he never supported, rarely saw, and never lived with his child. *Id.* at 262-63, 267. In contrast, in *Stanley* the unwed father had made positive manifestations such as living with his child. *Stanley*, 405 U.S. at 650 n.4. As the Court explained in *Lehr*, "[t]he difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* [*v. Walcott*, 434 U.S. 246 (1978)] and [*Lehr*]" is that in the former cases the unwed fathers came forward to participate in the rearing of their children. *Lehr*, 463 U.S. at 261; *see also* Holmes, *supra* note 46, at 367 (stating that the Supreme Court's unwed father jurisprudence demonstrates that "the liberty interest in family relationships is personal and is dependent not only upon a biological tie, but also upon the manifestation of an actual parent-child relationship").

64. 491 U.S. 110 (1989) (plurality opinion).

65. *Id.* at 113-14, 121, 129-30.

66. *Id.* at 163 (White, J., dissenting) (noting Michael had said to others that Victoria was his child, that he lived with her and supported her, and that he sought to be her custodial parent).

67. *Id.* at 115 (plurality opinion) (The statute provided that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage" (quoting CAL. EVID. CODE § 621(a) (West Supp. 1989))).

68. *Id.* at 129-30. Such public policies include an aversion to declare children illegitimate and the promotion of peace and tranquility in the family. *Id.* at 130 n.7.

69. *Id.* at 130 n.7.

70. *Id.* at 124. In concurrence, Justice Stevens stated that he would "not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might

Over the years, several state supreme courts have also addressed the need to protect the parent-child relationship.[71] In *In re B.G.C.*, for example, an unwed father sought to vacate a mother's adoption consent form and assert his parental rights to halt an adoption proceeding.[72] Upon a showing that the unwed father had not abandoned the child, the Iowa Supreme Court denied the unwed mother's request to vacate her consent, granted the unwed father's motion to intervene, denied the adoption, and ordered the surrender of the child to the unwed father.[73] The unwed father was allowed to assert parental rights because he was the biological father, had not relinquished his parental rights, and had not abandoned the child.[74] When the adoptive parents sought to stay the order directing them to return the child to her biological parents,[75] the United States Supreme Court ultimately denied the stay, stating that "unrelated persons [cannot] retain custody of a child whose natural parents have not been found to be unfit."[76]

The most recent discussion of parental rights—and potential limits on those rights—by the United States Supreme Court came in *Troxel v. Granville*.[77] In that case, a nonmarital relationship produced two daughters.[78] After the relationship ended, the biological father resided at his parents' home and maintained regular weekend visitation with his daughters.[79] He committed suicide two years later, but his parents continued to see their grandchildren regularly for approximately six months, at which point the mother informed the grandparents that she sought to restrict visitation to once a month.[80]

The deceased father's parents objected and sought relief under a Washington statute that provided: "*Any person* may petition the court for visitation rights *at any*

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exist in a case [where the mother was married to and cohabiting with another man at the time of the child's conception and birth]." *Id.* at 133 (Stevens, J., concurring in judgment).

71. *See, e.g., In re* Petition of Doe, 638 N.E.2d 181, 182 (Ill. 1994); *In re* B.G.C., 496 N.W.2d 239, 245 (Iowa 1992); Robert O. v. Russell K., 604 N.E.2d 99, 102 (N.Y. 1992).

72. *B.G.C.*, 496 N.W. 2d at 241.

73. *Id.*

74. *Id.* (reasoning that he was the biological father and his parental rights were never terminated prior to the filing of the adoption petition).

75. DeBoer v. DeBoer, 509 U.S. 1301, 1301-02 (1993) (Stevens, Circuit Justice). In that case, the adoptive parents engaged in a vigorous legal battle including petitioning Michigan courts to modify the Iowa Supreme Court's order. *In re* Clausen, 502 N.W.2d 649, 652 n.2 (Mich. 1993). The adoptive parents were successful in the Michigan trial court and were awarded custody but on appeal the custody decision of the Iowa Supreme Court was reinstated. *Id.* at 692. The adoptive parents then unsuccessfully petitioned the United States Supreme Court to stay the enforcement of the custody decision. *See generally DeBoer*, 509 U.S. 1301.

76. *DeBoer*, 509 U.S. at 1302-03.

77. 530 U.S. 57 (2000) (plurality opinion).

78. *Id.* at 60.

79. *Id.*

80. *Id.* at 60-61.

time including, but not limited to, custody proceedings."[81] The statute further authorized courts to "order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."[82] The trial court awarded the paternal grandparents one weekend of visitation per month, one week during the summer, and four hours on each grandparent's birthday, finding that continued contact with their grandparents was in the best interest of the children.[83] The mother appealed and the decision was reversed by the Court of Appeals which held that nonparents did not have standing in the absence of a custody proceeding to seek visitation.[84] The Washington Supreme Court affirmed the appellate court's ruling but based its holding on federal constitutional grounds.[85]

In 2000, the United States Supreme Court affirmed the judgment of the Washington Supreme Court. A four-justice plurality found the Washington statute unconstitutional as applied.[86] In a decision that was narrow and fact-specific, Justice O'Connor, writing for the plurality, focused on the long line of United States Supreme Court cases outlining the fundamental rights of parents to guide the "care, custody, and control of their children."[87] Based upon these fundamental rights, the plurality found the Washington statute was "breathtakingly broad" because it did not take into account the presumption that parents act in their child's best interest and the statute allowed any person to petition at *any* time.[88] The plurality reasoned:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[89]

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81. *Id.* at 61 (quoting WASH. REV. CODE § 26.10.160(3) (1994)) (emphasis added).

82. *Id.* (quoting § 26.10.160(3)).

83. *Id.* The trial court based its decision on "all factors regarding the best interest of the children and considered all the testimony before it." *Id.* at 62 (quoting Petition for Writ of Certiorari at 749, *Troxel*, 530 U.S. 57 (No. 99-138)).

84. *Id.* at 61-62.

85. *Id.* at 62-63.

86. *Id.* at 72-73. Six of the justices agreed that Washington's statute was overbroad. *Id.* at 67; *id.* at 77 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the judgment); *see also* Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-*Troxel*?*, 43 ARIZ. L. REV. 751, 793 (2001). "Justice O'Connor explicitly refrained from passing on the broader question of whether due process requires a showing of harm before non-parental visitation is ordered [and] . . . [s]he also agreed with Justice Kennedy that much will depend on the facts and circumstances of each suit." *Id.* at 789.

87. *Troxel*, 530 U.S. at 65-66 (plurality opinion).

88. *Id.* at 67.

89. *Id.* at 68-69.

The plurality emphasized that the court must examine and give "at least some special weight" to an otherwise fit parent's preference should the parent's decision be subject to judicial scrutiny.[90] However, the plurality continued:

> Because we rest our decision on the sweeping breadth of [the Washington statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.[91]

Thus, while the Court declined to rule that *all* state statutes allowing for third-party visitation would violate the fundamental right to parental autonomy, it remains unclear what factors may be *constitutionally* required in order to overcome the presumption favoring parents.[92]

The dissenting justices spoke more directly to the issue of whether harm to the child by the denial of visitation needed be shown.[93] The dissenters seemed to favor increasing the weight of the child's "best interests" in the resolution of third-party visitation disputes while placing less emphasis on the "superior rights" of parents.[94] In dissent, Justice Stevens noted:

> While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.[95]

Justice Stevens stressed not only the non-absolute nature of parental rights, but also the liberty interests that children have in their own relationships, and, perhaps most importantly, the notion that parental rights are protected because they are exercised in the context of a *family*.[96] Indeed, it seems that even in the context of a

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90. *Id.* at 70.

91. *Id.* at 73.

92. *See* Marrus, *supra* note 86, at 793 ("[T]he *Troxel* plurality's fact specific approach resulted in a strangling particularity that made the opinion largely irrelevant. At the same time, the vague parental rights are not absolute assertion was a 'glittering generali[ty]' that also diminished the precedential value of the opinion." (quoting Green v. United States, 365 U.S. 301, 311 (1961))).

93. *Troxel*, 530 U.S. at 85-86 (Stevens, J., dissenting); *id.* at 94-96 (Kennedy, J., dissenting).

94. *Id.* at 83 & n.5, 84-91 (Stevens, J., dissenting); *id.* at 98-101 (Kennedy, J., dissenting).

95. *Id.* at 86 (Stevens, J., dissenting) (citation omitted).

96. *Id.* at 88 ("A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not

third-party custody dispute, whoever has created a family for a child should have a preference in becoming the parent of that child.[97]

In dissent, Justice Kennedy argued that the Court erroneously assumed that, should a parent fight against visitation, he or she must have always been the child's primary caregiver and that a third-party seeking visitation lacks an established relationship with the child.[98] He reasoned that in a time when third parties are regularly asked to care for children, the prevailing law is inadequate.[99] Justice Kennedy implied that the Court would look more favorably upon a third-party visitation statute that considered the views or decisions of the parent, yet also granted standing to those who stood *in loco parentis* or who had taken on substantial responsibility in a child's upbringing.[100] Justice Kennedy's opinion may also be read as support for increased *in loco parentis* standing in third-party custody disputes.[101]

On the whole, the opinions in *Troxel* make certain little more than that a valid third-party custody or visitation statute must not be unnecessarily broad in terms of those permitted standing, and must balance the fundamental rights of the parents with those of the child and state. The Washington Court of Appeals subsequently ratified the basic formulation of parental rights affirmed in *Troxel*,[102] but went further by defining and requiring the "threshold finding of harm" the United States Supreme Court declined to demand:[103]

> The liberty and privacy protections of the due process clause of the Fourteenth Amendment establish a parent's constitutional right to the care, custody, and companionship of her child. But a parent's constitutional rights are not absolute. Where a parent's conduct *endangers the physical or mental health of the child,* the parent's constitutional rights must yield to the child's fundamental rights or the State's right and responsibility to protect the child.[104]

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simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae* . . . . [T]o the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.").

97. *See, e.g., In re* Marriage of Allen, 626 P.2d 16, 23 (Wash. Ct. App. 1981).

98. *Troxel,* 530 U.S. at 98 (Kennedy, J., dissenting).

99. *Id.* at 98-99.

100. *Id.* at 98-101.

101. *See generally id.* at 93-102.

102. *See generally In re* Custody of B.D., No. 24797-6-II, 2000 WL 1665266 (Wash. Ct. App. Nov. 3, 2000).

103. *See Troxel,* 530 U.S. at 73 (plurality opinion).

104. *In re Custody of B.D.*, 2000 WL 1665266, at *3 (citations omitted) (emphasis added); *see also In re* RRB, 31 P.3d 1212 (Wash. Ct. App. 2001), where, in considering the applicability of *Troxel* to non-parent custody disputes, the court said:

Therefore, the Washington non-parent custody statute[105] requires a more stringent standard for interference with parental rights than required by the United States Supreme Court plurality in *Troxel*.[106] Indeed, in *In re Custody of Shields*,[107] a Washington appellate court made it clear that the standard of review in challenges to interferences with fundamental parental rights in Washington was strict scrutiny.[108] The Court explained:

> In *Smith*, the court decided Washington's nonparent visitation statutes were unconstitutional because the statutes impermissibly interfered with a parent's fundamental rights by authorizing the court to grant third party visitation after a determination that such visitation was in the best interests of the child. The

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> The safety, welfare, growth, or development of children were not at issue [in *Troxel*]. But in a nonparental custody proceeding, the child's safety, welfare, growth or development is always at issue; otherwise, there is no basis for awarding custody to a nonparent. The court considers the presumption that fit parents act in their children's best interests when *initially deciding* whether to award custody to someone other than the parents. This presumption requires the court to deny nonparental custody unless the court finds that the parents *are unfit or that placing the child with the parents will harm her.* Once a nonparent petitioner establishes either of these factors, the court need not defer to the parents' decision-making at every turn.

Id. at 1219-20 (second emphasis added).

105. WASH. REV. CODE ANN. § 26.10.030 (West 2005).

106. *See In re Custody of B.D.*, 2000 WL 1665266, at *3-4. In *In re* Parentage of C.A.M.A., 109 P.3d 405 (Wash. 2005), the Washington Supreme Court noted that its opinion in *Troxel* actually decided two consolidated cases, only one of which was appealed to the United States Supreme Court. *Id.* at 408. The state opinion deciding *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998) (companion case to *Troxel* in the Washington Supreme Court but which did not join the *Troxel* appeal to the United States Supreme Court) which was not appealed, still stood as the opinion by the highest state court under the Washington Constitution and remained as binding precedent. *C.A.M.A.*, 109 P.3d. at 408-09. *C.A.M.A.* held that parents have a fundamental right to autonomy in child-rearing decisions and that state interference with such right is subject to a *strict scrutiny* standard of review:

> [W]hile "in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child, [s]hort of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a *compelling state interest* overruling a parent's fundamental [due process] rights." . . . [A] grandparent (or other third party seeking visitation) must show that denial of visitation *would result in harm* to the child before a court could order visitation *over the objections of a fit parent.*

Id. at 410 (quoting *Smith*, 969 P.2d at 30) (emphasis added). Thus, notwithstanding Justice O'Connor's refusal in *Troxel* to find that harm to the child must be shown to counteract superior parental rights to custody, a third-party seeking visitation of a child in Washington must meet the high threshold of strict scrutiny by demonstrating "that denial of visitation *would result in harm to the child before a court could order visitation over the objections of a fit parent.*" *Id.* (emphasis added); *see also Custody of B.D.*, 2000 WL 1665266, at *4.

107. 84 P.3d 905 (Wash. Ct. App. 2004).

108. *Id.* at 911.

> nonparent visitation statutes were unconstitutional, the court reasoned, because the statutes lacked a threshold requirement of a finding of harm to the child if the third party visitation was not permitted.[109]

It is just this requisite "threshold of harm"—the showing of detriment already required under current Washington State custody law—that allows the state's third party standing and custody provisions to pass *state* constitutional muster under strict scrutiny.

> [W]e reaffirm our agreement with [earlier case law] which concluded that "where placing the child with an otherwise fit parent would be detrimental to the child, the parent's right to custody is outweighed by the State's interest in the child's welfare." [The case law] considered the detriment standard to be a "middle ground" requiring a showing more than best interests, but less than parental unfitness. Nevertheless, [such a] requisite showing . . . is substantial. While the detriment standard does not require a showing of parental unfitness, it does require a showing of *actual detriment to the child's growth and development*. . . .
>
> . . . We agree . . . that in custody proceedings between a parent and a nonparent RCW 26.10.100 and [earlier case law] recognize the presumption of parental fitness, while providing a remedy *narrowly tailored* to further *the state's interest in protecting children's welfare.*"[110]

Thus, as a matter of both Washington and federal constitutional law, parents have a fundamental right to the parent-child relationship. In Washington, however, interferences with that right must be narrowly tailored to satisfy the state's compelling interest in child protection and safety. The more demanding standard of "detriment to the child's mental or physical health" must be shown, a standard which narrowly tailors interferences with parental rights to situations involving either traditional unfitness (including voluntary and intentional relinquishment of parental rights through abandonment or lack of interest) or clear evidence of the "unsuitability" of continued parental custody (flowing from proof of "detriment" in the sense of actual harm to the child).

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109. *Id.* at 911-12.

110. *Id.* at 912 (quoting *In re* Marriage of Allen, 626 P.2d 16, 23 (Wash. Ct. App. 1981)) (emphasis added).

III. THE "SUPERIOR RIGHTS" DOCTRINE IN THIRD-PARTY CUSTODY DISPUTES AT COMMON LAW IN WASHINGTON

A. *The Origins, Development and Effect of the Doctrine Prior to the Adoption of the UMDA Non-Parent Standing Requirements in 1973*

The "superior rights" doctrine evolved from early custody decisions that, under the common law, looked only to parents' proprietary interests.[111] However, as the concept of children as property became obsolete, judicial attitudes and approaches changed, moving toward "best interests" concerns.[112] Nevertheless, courts in the early twentieth century still held consistently that a father had the right to "custody of his children as a matter of property law or title."[113] Indeed, "the common law tradition of viewing fathers as entitled to do what they wished with their children has made a contemporary reappearance in doctrines recognizing the rights of biological parents over a child's relationships with significant others."[114] At present, most state courts require "extraordinary circumstances," those evincing parental abandonment or the apparent forfeiture of parental rights, combined with third-party bonding, in order to give custody to nonparents.[115] A small minority of states still refuse to grant third-party custody unless all surviving parents have been declared legally unfit.[116]

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111. *See, e.g.*, Eyre v. Shaftsbury, (1722) 24 Eng. Rep. 659 (Ch.).

112. *See, e.g.*, United States v. Green, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256); Chapsky v. Wood, 26 Kan. 650 (1881).

113. Kaas, *supra* note 18, at 1063 & n.63 (citing generally Paul Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 675 (1942) ("explaining the historic interpretation of custody as a property interest")); *see also* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988) (asserting that current custody laws encourage possessiveness); Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U REV. L. & SOC. CHANGE 371, 371 (1996) (recognizing that deference to parental rights results in children being treated like property).

114. Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 48 (1997) (citing Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1113-14 (1992)).

115. *See supra* note 1. The court will often consider factors including the duration of the separation between the parent and child along with any negative effects a change of custody may have on the child. Blair, *supra* note 25, at 117 & n.42 (citing, for example, Ross v. Hoffman, 372 A.2d 582, 593 (Md. 1977) (In determining exceptional circumstances, the court looked at factors including: the length of separation of parent and child, the child's age when the nonparents began caring for the child, the possible emotional effect on the child if change in custody occurred, the strength of ties between child and nonparent, the genuineness of parent's wishes to have their child, and the certainty of child's future with the parent)).

116. Among the UMDA states, see, for example, *In re* A.R.A., 919 P.2d 388, 392 (Mont. 1996) (clarifying that under UMDA, a third-party may have standing, but can be awarded custody only after there has been a finding of abuse, neglect, or dependency). Prior to 1964, even those states that employed the "best interests" test in custody disputes between parents replaced it with the "fitness test" if the contest was between a parent and nonparent. *See* Henry H. Foster, Jr. & Doris

Although the controlling and overarching question in Washington custody law had long been the "best interests" of the child,[117] state law had also maintained a parental "superior rights" presumption in a variety of ways. Before the enactment of the dissolution laws of 1973,[118] a nonparent could only obtain custody under the Probate Act,[119] the Juvenile Court Act,[120] or the adoption provisions.[121] To become a guardian under the Probate Act, both parents had to be deceased or found to be unfit or improper guardians.[122] Under the Juvenile Court Act and the adoption laws, even given a showing of unfitness, parents were provided opportunities to regain or retain custody of minor children at several points in the proceedings.[123] Biological parents were presumed by the courts to be the best custodians for their children under the

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Jonas Freed, *Child Custody (Part I)*, 39 N.Y.U. L. REV. 423, 425 (1964).

117. *See, e.g.*, Viereck v. Sullivan, 137 P. 456, 457 (Wash. 1914) (awarding and maintaining custody to the adoptive parents over the biological mother, the court reasoned "In this, as in all other cases of the kind, the dominant question is the moral, intellectual, and material welfare of the children. The wishes of the parent are subordinated to these considerations which, by all the courts, are deemed paramount."); State *ex rel.* Collier v. Bell, 109 P. 51, 51-52 (Wash. 1910) (in giving custody to the father over the maternal grandmother the court stated: "The paramount right of the parent must, however, in all cases be held subordinate to the welfare of the child.").

118. WASH. REV. CODE § 26.09.180 (1981).

119. WASH. REV. CODE § 11.88.030 (2004).

120. WASH. REV. CODE § 13.34.145 (2004). This law required a high burden of proof. *See, e.g.*, *Ex parte* Day, 65 P.2d 1049, 1055 (Wash. 1937) ("[T]he right of the parent . . . should not be . . . abridged, save for the most powerful reasons.").

121. WASH. REV. CODE §§ 26.33.010-.901 (2004); *id.* § 13.34.030(1) ("'Abandoned' means when the child's parent, guardian, or other custodian has expressed, either by statement or conduct, an intent to forego, for an extended period, parental rights or responsibilities despite an ability to exercise such rights and responsibilities. If the court finds that the petitioner has exercised due diligence in attempting to locate the parent, no contact between the child and the child's parent, guardian, or other custodian for a period of three months creates a rebuttable presumption of abandonment, even if there is no expressed intent to abandon.").

122. *See In re* Brenner's Guardianship, 282 P. 486, 486-87 (Wash. 1929) (stating that a guardian of a minor cannot be appointed without showing that his or her parents, if living, are not the proper persons to have custody, and that the child's welfare requires appointment).

123. *See, e.g.*, WASH. REV. CODE ANN. § 13.34.136 (West 2007) (codifying that a permanency plan in neglect proceedings, which should tend toward re-unification if possible, is required after the child is removed from the home); *id.* § 13.34.145 (discussing the permanency plan and providing for review hearings based on necessity for the placement); *id.* § 13.34.180(e) (2004) ("(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future."); *see also In re* Welfare of C.B., 143 P.3d 846, 850 (Wash. Ct. App. 2006) (if a parent can demonstrate improvement before the termination hearing, the state cannot simply rely on past performance of the parent to prove their case); *In re* J.F., 37 P.3d 1227, 1233 (Wash. Ct. App. 2001) (statute in general is designed to help parents regain custody of their children if they correct their behavior).

notion of superior parental rights,[124] regardless of whether children had developed meaningful relationships with adult third parties or disruption and psychological harm could ensue from returning a child to his or her biological parents.[125]

Washington courts first articulated and employed the "superior rights" doctrine in the late nineteenth century, only a few years after statehood.[126] In *Lovell v. House of the Good Shepherd*,[127] an 1894 habeas corpus case, the Washington State Supreme Court held that a mother and stepfather were entitled to custody as against an orphanage.[128] In *Lovell*, the child's biological widowed mother left her child with the institution on an oral agreement.[129] The mother later returned to retrieve her child, but was unsuccessful.[130] She later married and she and her husband adopted the child.[131] Nevertheless, the orphanage continued to refuse to return her child.[132] While the orphanage raised doubts about the conditions under which the child would be raised, the court based its ruling on a parent's superior legal right to custody.[133]

> There is such a diversity of religious and social opinion, and of social standing and of intellectual development and of moral responsibility, in society at large, that courts must exercise great charity and forbearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing, before a parent should be deprived of the comfort or custody of a child.[134]

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124. Blair, *supra* note 25, at 115-17.

125. *Id.* 116-17. Washington courts had long articulated the principle that, in the absence of a finding of unfitness, "the natural parent's right to custody of a child as against third persons has been absolute" and that one of the parents should be awarded custody and control of their children. *In re* Becker, 553 P.2d 1339, 1343 (Wash. 1976); *see also In re* Sego, 513 P.2d 831, 832-33 (Wash. 1973); *Ex parte* Ward, 239 P.2d 560, 561 (Wash. 1952); *Ex parte* Smith, 202 P. 243, 244 (Wash. 1921); *In re* Mead, 194 P. 807, 809 (Wash. 1920); *In re* Neff, 56 P. 383, 384 (Wash. 1899).

126. *See* Washington Secretary of State–Wahington History: Washington State Constitution, http://www.secstate.wa.gov/history/constitution.aspx (last visited Jan. 11, 2008) (President Harrison approved the Constitution of the State of Washington and admitted it to the Union in November of 1889).

127. 37 P. 660 (Wash. 1894).

128. *Id.* at 661-62.

129. *Id.* at 660.

130. *Id.* at 660-61.

131. *Id.* at 661.

132. *Id.*

133. *Id.*

134. *Id.*

The court reviewed the concerns of the orphanage,[135] but found that none of them rose to a level of "unfitness" requiring depriving the parent of care and custody of her child, especially where custody would revert to a corporation with no legal claim to parenthood.[136] The *Lovell* court, at least on the face of these facts, may also have implicitly enforced parental preferences due to the lack of alternative bonding with individual (as compared to institutional) caring adults.

However, even where third parties were "de facto" parents,[137] early courts protected the "superior rights" of parents although arguably contrary to the psychological interests or personal wishes of children.[138] *In re Neff*,[139] an 1899 habeas case from the Washington State Supreme Court provides an example in which the parents had divorced and custody of their three children was awarded to the mother.[140] At her death, the mother left her estate to her second husband while also seeking to leave him guardianship of her two sons and guardianship of her daughter to the maternal grandmother.[141] She had requested that the father, who had not seen the children for four years, have no care or custody of the children.[142] The father

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135. *Id.*

> It is true that . . . Mrs. Lovell has not been the most exemplary mother; that the care of her children has not been of that kind which would commend itself to many mothers. That she is a passionate woman, with an uncontrollable temper,—coarse, vulgar, and pugnacious,—is evident from the record. But if every coarse, vulgar, and passionate woman were deprived of the custody of her children, our orphan asylums would be filled to overflowing; and if every man who is given to brutalizing himself by the excessive use of intoxicants, and by other debasing habits, were to be deprived of the custody of his children, the said institutions would be found altogether inadequate.

Id.

136. *Id.* at 662; *see also In re* Becker, 553 P.2d 1339 (Wash. 1976), where the court cited *Lovell* for the proposition that, "the [potential adoptive parents had] no standing to question the fitness of the natural parent . . . since the respondent . . ., a corporate 'orphan asylum,' had no legal rights to the custody of the child, [therefore] 'it matters not whether the parents were competent custodians or not . . . .'" *Id.* at 1342. However, a court has "a responsibility to the child beyond determining the legal rights of the disputing parties. *Id.* "If the protection of a child's interests is dependent upon the 'legal rights' of the persons opposing the petition," a hearing must still be held even if parent has not yet had chance to parent (as in *Lovell*) and regardless of standing to bring a dependency petition. *Id.*

137. For a modern definition of "de facto" parent, see *In re* Custody of Shields, 136 P.3d 117, 127 (Wash. 2006).

138. *See supra* notes 124-125.

139. 56 P. 383 (Wash. 1899).

140. *Id.* at 383-84. The court found that although the father was capable of supporting his wife and children, he failed to do so. *Id.* at 384. Furthermore, the mother had separate property, "and was in all respects a fit person to have the care and custody of the children named." *Id.*

141. *Id.*

142. *Id.*

sued, claiming his right to custody.[143] Four years likely would seem a sufficient period of absence to suggest parental abandonment, and enough time for a presumption of meaningful nonparent-child bonding, especially as we understand it today.[144] Consequently, separation from their stepfather at that point would seem to have been to the detriment of the children. Nevertheless, the Washington Supreme Court sided with the father because:

> The deceased wife could not, by testamentary disposition, deprive the father of these children of their custody [because h]e has the natural and legal right to the custody and control of the children, *unless so completely unfit for such duties that the welfare of the children themselves imperatively demanded another disposition of their custody.*[145]

Holding that the father should receive custody of his children instead of the maternal grandparents, the court additionally pointed out that:

> [L]ittle weight, in this proceeding, can be attached to the wishes of the children, as it appears they had not seen their father for years, and had been surrounded by influences that perhaps would not make them think favorably of him.[146]

In *Neff*, the ultimate ruling seemed to disregard the children's apparent preference for third-party custody, and the father's arguable abandonment of significant duration, and focused instead on both the legal inadequacy of the efforts to deprive the father of custody and the longstanding principle of automatic reversion of legal custody to a surviving parent.[147] Yet, interestingly, both of these early cases, *Lovell* and *Neff*, establishing the "superior rights" doctrine were also based on concerns over assuring the best interests of children.[148]

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143. *Id.*

144. *See* GOLDSTEIN ET AL., *supra* note 7, at 40-42 (suggesting that lack of bonding for more than approximately one year may have adverse effects on a child's future psychological development).

145. *Neff*, 56 P. at 384 (emphasis added); *see also Ex parte* Smith, 202 P. 243, 244 (Wash. 1921) (In an action by a biological father against maternal grandparents, the court similarly held: "[T]here must be weighed in the balances against this situation the rights which the father has to his own flesh and blood, and, the evidence being satisfactory of his ability and willingness and qualification, there exists no reason why he should not perform those duties and experience those pleasures which are the natural circumstances of parenthood. The petitioner is entitled to his legal and moral right to the care, custody, control, and association of this little one."); Blair, *supra* note 25, at 115-16.

146. *Neff*, 56 P. at 384.

147. *Id.*

148. The court in *Lovell* reasoned that the better interests of the child involved individual rather than "corporate" care. Lovell v. House of the Good Shepherd, 37 P. 660, 662 (Wash. 1984). In *Neff*, the court ruled in favor of the biological father not just because of his legal property rights, but

In those early years of the twentieth century, parents continually prevailed in asserting their superior rights notwithstanding arguments that this would be to the detriment of their children. Still, courts did not completely disregard the "best interests" evaluations in the decisions. In *Carey v. Hertel*,[149] for example, the court considered a habeas action brought by the father of a three-year-old who, at the father's request, had been left at the age of three months with her maternal grandparents after the death of her mother.[150] When the father brought the action, the grandparents resisted the father's petition because it was their understanding that the child was to stay with them until she reached the age of six.[151] Perhaps more importantly, the grandparents had concerns about the child's lack of affection for her father, which they raised in defense of their continued custody.[152] However, the court noted that:

> [I]t was stated that some cases hold that the parent cannot assert his right to the child after he has given it into the care of another; such holdings being founded upon the humane idea that, by reason of the *long and intimate* intercourse between the child and the foster parent, and of mutual affection arising therefrom, it would be heartless to force a separation. [However, i]n the case at bar the child was but three years of age when the father sought her possession by this proceeding. Her age is such that *the deeply grounded affection which arises from long-time association, extending into more mature years, is necessarily wanting.*[153]

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quite possibly because it recognized that the long-term parent-child relationship, often of significant value, needed to be preserved. *Neff*, 56 P. at 384; *see also* Caban v. Mohammed, 441 U.S. 380, 394 (1979). This is often true in other states as well, albeit with occasionally different outcomes. In Arkansas, for example, all citations to the "superior rights" of parents ultimately lead back to *Verser v. Ford*, 37 Ark. 27 (1881). *Verser* held that because of biological ties and the duty and affection they engender, and his greater ability and worldliness, a father had a superior right to custody of his child—even over the rights of the mother and notwithstanding the best interests of the child. *Id.* at 30. However,

> the *Verser* case, used ultimately to support the position that a parent has a right to custody . . . unless the parent be shown to be unfit and only then can the best interest of the child be considered, was in fact decided upon best interest of the child criteria, taking into account the relationship of the child with the third party and despite the natural parent being perceived as a fit parent. [Thus, although it gave] lip service to the accepted view of the time that the father is lord of the home, [even *Verser*] was actually decided for the benefit of the child, using what might be considered today as a children's rights standard.

O'Keefe, *supra* note 8, at 1093.

149. 79 P. 482 (Wash. 1905).

150. *Id.* at 482.

151. *Id.*

152. *Id.*

153. *Id.* (emphasis added).

The court speculated that over time the daughter would most likely develop the affection for her father that might have existed had she been with him during her infancy.[154] The court seemed to conclude that a continuing father-daughter relationship was in the best interest of the child since the relationship had not been irretrievably breached and the presumption of superior parental rights had not been sufficiently overcome.[155]

A year later, in *State ex rel. Le Brook v. Wheeler,*[156] a habeas corpus proceeding was brought by a father for the custody of his child.[157] The father left the child's mother and took their child with him because his wife had committed adultery.[158] He placed the child in the care of his mother while he left for another city to obtain employment.[159] He remained away for five to six months without contact with his mother.[160] In the meantime, his wife took the child from his mother, who was ill, and the child was eventually placed with, and adopted by, the Wheelers.[161] In granting the writ, the court reasoned that no abandonment had occurred by the father leaving the child in care of the paternal grandmother.[162]

Thus, where it was not reasonable to conclude that permanent and intentional parental abandonment had taken place, the early courts were reluctant to deny parents their custodial rights even where meaningful relationships with good faith third parties had developed. Under these circumstances, similar to *Carey v. Hertel,*[163] the point may well have been that it was in the best interests of the child to allow a parental relationship to develop and flourish. The fundamental and explicit judicial concern, though, continued to be whether the father had in fact intentionally relinquished his "superior" legal right to custody to a third-party. Therefore, these early decisions still established and reinforced the strong presumption that parents maintained a property right in their children regardless of extraordinary

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154. *Id.*

155. *Id. at* 482-83. *But cf.* Caban v. Mohammed, 441 U.S. 380, 385-86 (1979) (where the United States Supreme Court invalidated a New York law granting the mother but not the father of an illegitimate child the right to block the child's adoption by withholding consent). Justice Powell's majority opinion rejected the argument that the gender distinction could be justified "by a fundamental difference between maternal and paternal relations" because there was no "universal difference . . . at *every phase* of a child's development . . . [e]ven if unwed mothers as a class were closer than unwed fathers to their newborn infants." *Id.* at 388-89. This similar notion, that parent-child relationships inevitably change over time, may ultimately flourish, and thus should be preserved, was also arguably the underlying rationale in *Carey.*

156. 86 P. 394 (Wash. 1906).

157. *Id.* at 396.

158. *Id.* at 395.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 396; *see also infra* notes 226-231 and accompanying text.

163. *See* 79 P. 482, 482-83 (Wash. 1905).

circumstances that might indicate that the children's emotional well-being would be better served through third-party custody.

B. *Early Limitations on the "Superior Rights" Doctrine and the Ultimate Shift in Emphasis Toward the "Best Interests" of Children*

Although guided primarily by the "superior rights" doctrine early in state history, Washington courts were, at the same time, not unmindful of the psychological bonds that develop between third parties and children. Actually, children's interests in continuing custodial relationships with caring third parties were occasionally vindicated given extraordinary circumstances, such as where there had been a sufficient duration of custody with nonparents during which meaningful bonds could be assumed to have formed, and where a court could imply voluntary and intentional relinquishment of parental rights to physical custody through explicit or implied abandonment. Under such circumstances, courts were prepared to rebut the presumption of superior parental rights.

For example, as early as 1909 the Washington State Supreme Court resolved conflicting evidence to find that a child's residence and caring relationship with a third-party had to be sanctioned in light of voluntary and intentional parental abandonment.[164] The director of a foundling hospital testified that when the child's mother brought her to the orphanage she signed papers which acknowledged she was abandoning her child and that the child was "neglected, dirty, and sickly" when the mother brought the child in.[165] The child remained in the hospital for approximately one year, and the mother was not heard from again until after the child had been taken and adopted by a third-party some ten years later.[166] Although the trial court previously had found the mother to be a fit parent,[167] the Washington Supreme Court was:

> forced to the conviction that . . . the intention of the [mother] when she took the child to the hospital was to abandon it, in the sense of relinquishing all claims

164. *Ex parte* Fields, 105 P. 466, 468 (Wash. 1909).

165. *Id.* at 467. The director further noted that the mother "showed no feeling whatever. She did not touch the child nor kiss it goodbye; so much so [the director] doubted . . . whether it was her own child." *Id.* at 468.

166. *Id.* at 467-68. The hospital director, "however, [was] unable to produce the relinquishment which she said the mother made; her testimony being to the effect that she had searched in the records for it," but it could not be found because "the hospital was in a torn up and disorderly condition just at that time." *Id.* at 467. The mother, on the other hand, testified that "about three weeks after she left it, she went to see the child, and was informed that [her child] had been placed in a family . . ., that she did not know when she took the child there that it was a foundling hospital, and [that she] did not wish to, and did not, abandon the child or authorize the hospital to do anything but exercise temporary care over the child." *Id.*

167. *Id.* at 468.

> that she had upon it, so that it might be legally disposed of by the authorities of the hospital . . . . [and] that there was an abandonment after [an] attempted recovery of the custody of the child [two years later]. *Ten years is a long time to leave a child in the custody of kind-hearted people who have seen fit to adopt it, when the tendency must be that mutual affection will spring up between the foster parents and the adopted child.* . . . [T]here is a warm attachment and affection existing between the [adoptive parents] and this child . . . [—]as warm and abiding as the affection between a natural parent and child. . . . [T]o transfer his care, custody, and control to the [mother at this point] *would be detrimental to the interests of said child*. . . .[168]

This "child-centric" approach to the evidence which, interestingly, anticipated the modern balancing required in third-party custody disputes and acknowledged that "extraordinary circumstances," such as actual bonding and the need to avoid detriment caused by disruption of the non-parent relationship, should be grounds to negate the presumption of superior parental rights.

This approach was firmly established by the late 1920s in *Ex parte Allen*.[169] In *Allen*, the mother of a minor child died and the child was left with the maternal aunt.[170] The father remarried, and after eight years apart from the child, sued to obtain custody.[171] Apparently, in addition to the reasonable implication of abandonment, the third-party child relationship (as distinguished from the much earlier case of *Carey v. Hertel*[172]) had indeed extended into the child's "mature" years, making it less likely that any renewal of the psychological bond with the father was possible.[173] Consequently, the court placed the child in custody with the aunt by focusing on the "welfare of the child" instead of the "original and primary right of a parent."[174] The court found that it was essential to make its determination on the unique facts of the case.[175]

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168. *Id.* (emphasis added).

169. 245 P. 919 (Wash. 1926); *see also* Viereck v. Sullivan, 137 P. 456, 457 (Wash. 1914) (maintaining custody in the adoptive parents against a petition by the biological father, the court stated, "In this, as in all other cases of the kind, the dominant question is the moral, intellectual, and material welfare of the children. The wishes of the parent are subordinated to these considerations which, by all the courts, are deemed paramount."). *But see* State *ex rel.* Collier v. Bell, 109 P. 51, 51-52 (Wash. 1910) (giving custody to the father over the maternal grandmother, the court stated: "The paramount right of the parent must, however, in all cases be held subordinate to the welfare of the child.").

170. *Allen*, 245 P. at 920.

171. *Id.*

172. 79 P. 482 (Wash. 1905); *see also infra* notes 226-231 and accompanying text (the *Carey* court found that the child was too young to allow for the assumption that the parent-child relationship has been irretrievably severed).

173. *See Allen*, 245 P. at 920.

174. *Id.*

175. *Id.*

By the early twentieth century, two approaches existed to rebut the superior custodial rights of parents. "Unfitness" under the Juvenile Court Act negated the presumption of superior parental rights and supported petitions for removal by nonparents.[176] However, evidence of parental abandonment,[177] even if not unfitness under the Act, along with third-party bonding may also constitute "extraordinary circumstances" requiring that custody not be returned to a parent. In justifying findings of voluntary and intentional relinquishment that would prevent parents from regaining custody from third parties, courts would look to: (a) how the third-party acquired possession of the child; (b) the duration of possession; and (c) the nature of the possession anticipated by the parties.[178] By the 1920s, the focus in third-party custody adjudications began to shift away from the protection of parental "property" rights and toward vindication of the "best interests" of children.[179]

However, especially where there was clear evidence of "bad faith" on the part of custodial nonparents, and reasonable justification for parent absence, the "best interests" focus did justifiably result in returning children to their biological parents. This was the case even where there was long-term parental absence or lack of concern, assuming it was reasonably justified. For example, in *Penney v. Penney*,[180] the custody of a three-year-old was awarded to the mother after a divorce.[181] The child remained with her mother or the mother's relatives for approximately six months, at which time the mother placed her with unrelated third parties unknown to the father.[182] The father remarried and attempted to visit his daughter soon after the mother had placed her with a third party.[183] He had a difficult time finding her and did not receive a cordial welcome from the third-party family when he did.[184]

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176. *See generally* WASH. REV. CODE ANN. §§ 13.34.010-.810 (West 2004).

177. *See, e.g., In re* Custody of Miller, 548 P.2d 542, 545-46 (Wash. 1976) (noting that non-support of children does not "in and of itself . . . constitute abandonment . . . [which] means the *voluntary* failure or neglect *to care for as well as failure to support*. . . . The duty to 'care for' includes the parental obligation to train, supervise and guide a child's growth and development . . . [while n]onsupport . . . connotes a failure to contribute to the maintenance and material well-being of a child.") (emphasis added).

178. Blair, *supra* note 25, at 117 & n.42 ("These circumstances include the duration of the parent-child separation and the adverse effect that a change in custody may have on the child." (citing Ross v. Hoffman, 372 A.2d 582, 593 (Md. 1977) ("factors in determining 'exceptional circumstances' include: length of separation of parent and child; child's age when care assumed by nonparent; possible emotional effect on child of change in custody; lapse of time before parent sought to reclaim child; nature and strength of ties between child and nonparent; intensity and genuineness of parent's desire to have child; and certainty of child's future with the parent"))).

179. *Id.* at 118.

180. 275 P. 710 (Wash. 1929).

181. *Id.* at 710.

182. *Id.*

183. *Id.*

184. *Id.* He "was not permitted to see the child except in the presence of members of the

Subsequently, partly for business reasons and partly due to his health, the father and his new family moved to Canada.[185] After about three years, his farming venture failed and he returned to Washington, recovered financially and again attempted to obtain custody of his daughter,[186] ultimately initiating proceedings for custody.[187] Prior to the hearing, the father had a visit with his daughter in which she interacted well with him and the members of his family considering they were arguably complete strangers.[188] Additionally, the court noted:

> [T]he [unrelated custodial third-party family] consists of the mother, a woman past the prime of life, and her daughter who is and has been, at all times since the child has been with them, gainfully employed . . . but she is away from home throughout business hours and considerable time in the evenings, and also makes semiannual trips as a buyer to New York, being absent apparently several weeks each time.[189]

Weighing the above factors, the court held that the father had not in fact abandoned his child and was a fit and proper person to have custody.[190] In affirming, the Washington State Supreme Court said:

> The father's natural and legal rights were not destroyed by the [divorce] decree. They were limited, only, in favor of the mother. The mother having abandoned the rights which the decree gave her, . . . the father stands in the same position as to strangers as he would if the decree had never been entered.

[third-party family,] and his suggestions that he be permitted to take the child home with him were [denied because] the mother had instructed them not to give up the child. . . . [I]n January, 1920, the father [again] sought to visit the child," and after a great deal of searching found that the third-party family had moved, "where he did visit the child with about the same results as before." *Id.* at 710-11.

185. *Id.* at 711. At about the same time, the mother told him that "she had married a wealthy man, would take [her daughter] into her new home, and no longer needed [any child support. Consequently, t]he father . . . made no further payments." *Id.* However, in actuality, the daughter remained with the third-party family, the mother divorced her second husband, and then "married a third husband with whom she . . . liv[ed] in Seattle." *Id.*

186. *Id.* The father's attempts to see his daughter were discouraged, and the third-party family claimed that they were due the $40 per month for the child support for the entire time that the child had stayed with them, a payment the father could not afford. *Id.* After some time, the father found the mother's Seattle address and went to see her, only to learn that the third-party had moved to Bellingham, Washington, with his daughter. He went there to see them, but with the same unsatisfactory result as years earlier. *Id.*

187. *Id.* The father counter-petitioned after contempt proceedings were started against him by the third-party family to enforce payment of support money. *Id.*

188. *Id.* at 712. Also, at the time of the hearing, "[i]t very clearly appear[ed] that the mother ha[d] entirely abandoned the child, ha[d] not even seen her for 4 or 5 years, and apparently ha[d] lost all interest in her." *Id.* at 711.

189. *Id.* at 712.

190. *Id.* at 712-13.

> Under these conditions the love and affection which have grown up between the child and those in whose care she has been for 10 years is not a *controlling* factor. . . . But it is said that the father by his long absence in Canada, his silence for a considerable time, and his failure to make earlier and more effective efforts to regain the custody of the child, has forfeited his rights. Paternal or maternal rights will not be held to have been abandoned, except upon a plain showing to that effect, and that the acts are without justifiable excuse. Here, we think the father's financial reverses, and his prompt resumption of efforts as soon as financially able so to do, fully excuse the apparent delay.[191]

Thus, so long as the lengthy absence from the child was excusable, and given the third party's lack of cooperation in visitation or justifiable belief that the father voluntarily and intentionally relinquished his parental rights, even a meaningful nonparent-child relationship of *ten years duration* would not defeat a father's superior parental right to custody. The parent-child bond was not irretrievably broken (given the evidence of father-child interaction prior to the hearing) and "extraordinary circumstances" indicated that the "best interests" of the child at least over the long term, are best met by granting parental custody.

Another example of lengthy, though excusable absence by parents, in conjunction with willful ignorance of a third party was *Ex parte Ward,*[192] a 1952 case in which a mother left her four-month-old son with her husband's mother while she visited her spouse before he went to war.[193] The paternal grandmother cared for the child during the first seven years of his life.[194] The parents visited once, when their son was approximately nine months old.[195] When the child was two-years old, his father returned from military service and visited him after receiving a telegram that he was sick.[196] At that time, the father discussed with the grandmother some tentative plans for the parents to take back their son.[197] During the next four years, the father did not inquire about his son[198] and contributed nothing toward the child's support, but he explained this behavior by saying "he knew the child was well."[199]

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191. *Id.* at 712 (emphasis added).

192. 239 P.2d 560 (Wash. 1952).

193. *Id.* at 561.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* Nevertheless, it was apparent to the grandmother that there was no intended permanent relinquishment of parental rights. The grandmother told the father that "she wanted to go with the boy, rent a room and stay with him, and leave him with his parents a little longer each day until he became acquainted with his father. The boy's father did not agree to this because there was a very serious disagreement between his wife and his mother" about this proposal. *Id.*

198. *Id.*

199. *Id.*

Once the father told his mother that they planned to take their son back, the grandparents initiated adoption proceedings.[200] The father responded by seeking a writ of habeas corpus, which was granted, and the grandparents appealed.[201] The Washington Supreme Court held that while unfitness would negate parental rights, even under circumstances of lengthy absence, the father's actions were understandable and excusable, he had no intention of abandoning his child, and the grandparents knew it.[202] Even extreme neglect under these "extraordinary circumstances" would not defeat parental rights:

> [A]lthough we have no hesitancy in saying that the parents were *extremely neglectful* of their child, we cannot hold that, when the mother took the baby to its grandmother it was her *intention to abandon it in the sense of relinquishing all claims to it which she and her husband had.* It was a temporary arrangement. The grandmother recognized this status because, when the child's father visited her upon his return from the service, she and he discussed the return of the boy to his parents. We do not condone his subsequent neglect. . . . He apparently had no fear as to the care which was being given to the child. . . . We are convinced . . . that [the parents] had no intention of abandoning the child to its grandmother and her husband, nor do their actions constitute abandonment.[203]

Notwithstanding *Penney* and *Ex Parte Ward*, during the post-World War II period, in *Fitzgerald v. Leuthold*[204] and somewhat later in *Eickerman v. Eickerman,*[205] the Washington State Supreme Court continued its trend begun in the 1920s toward emphasizing children's "best interests" over parental property rights where parents sought to regain custody. These relatively modern cases resulted in custody in the nonparents in factual contexts that may not have had the same result earlier in the century. Such a shift was important in that it more strongly integrated children's actual needs and interests into the balancing between parents and nonparents for purposes of custody. In *Fitzgerald* a father brought a habeas proceeding to obtain custody of his child from the child's maternal aunt and uncle.[206] After the divorce, the mother received custody, but upon her death shortly thereafter, the child resided with her aunt and uncle.[207]

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200. *Id.*
201. *Id.*
202. *Id.* at 562.
203. *Id.*
204. 192 P.2d 371 (Wash. 1948).
205. 253 P.2d 962 (Wash. 1953).
206. *Fitzgerald*, 192 P.2d at 371.
207. *Id.* at 374-75.

Although the court acknowledged that a father should not ordinarily be deprived of the custody of his child, the court carefully considered and concerned itself solely with the welfare of the child, focusing on the fact that the father's primary interest was in the child's inheritance.[208] Upon the mother's death, the father's rights may have revived, but given the totality of the circumstances, which also included an apparent lack of interest by the father in the child for a significant period of time, custody was resolved in favor of the aunt and uncle.[209] The court found that the father was not the proper person to have custody, regardless of whether the father was unfit.[210]

A few years later, the *Eickerman* Court[211] continued the trend away from rigid application of parental "superior rights" presumptions by giving far greater consideration to the entirety of the circumstances as they affected the child's interests. At the trial court level, the father and stepmother were visited by the judge, who examined the respective home environments and spoke with the children, in addition to hearing extensive evidence.[212] In determining that custody should remain with the stepmother, the trial court emphasized that the stepmother was the only mother the children had ever known.[213] The appellate court affirmed the trial court's findings that the father had not given up nor waived his parental rights.[214] The *Eickerman* court held that given the meaningfulness and duration of the stepparent-child relationship, caused in part by the father's historic lack of concern, the most appropriate placement was with their stepmother because she provided the stability that the children were entitled to have.[215]

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208. *Id.* at 378.

209. *Id.* at 371, 382.

210. *Id.* at 377-78, 382 ("We reiterate, can it be said that the trial court was *not* justified in concluding that this man was *unfit* to have the care and custody of his son—this man who professes such love for his son and yet who admits that he agreed that his wife should have the custody of their son, who was willing to sever all relations with him and did not even desire the right of visitation, and who even contemplated that [his wife] might marry again and that her future husband would probably want to adopt [his son]—this man who had seen his son only three times for short periods . . . and who had made no effort to see him after [his wife] obtained her divorce . . .[;] this man who has no home of his own to which he could take [his son]—this man who comes to Spokane and registers at a hotel under an assumed name?" (emphasis added)).

The father, however, testified that "it was understood between him and [the mother] that if she procured a divorce she was to have the absolute custody of [their son]; that he felt that, if [she] was to have their son, it was better that he sever all connection with him, and for that reason he did not ask for even the right of visitation." *Id.* at 374. Further, the father stated that he "registered at the . . . hotel under [another] name . . . on the advice of his counsel." *Id.* at 375.

211. 253 P.2d 962 (Wash. 1953).

212. Blair, *supra* note 25, at 119; *see Eickerman*, 253 P.2d at 963.

213. Blair, *supra* note 25, at 119; *see Eickerman*, 253 P.2d at 963.

214. Blair, *supra* note 25, at 118-19; *see Eickerman*, 253 P.2d at 964.

215. Blair, *supra* note 25, at 119; *see Eickerman*, 253 P.2d at 963.

By the 1970s, the Washington Supreme Court expressly rejected the primacy of the "superior rights" doctrine where parents sought to regain custody from third parties.[216] *In re Guardianship of Palmer*,[217] serves as an example in which "the court of appeals . . . held that a child's natural parents could not be deprived of custody in favor of a grandmother with whom the child had lived for three years unless the parents were unfit" or the child's health and welfare were at issue.[218] The Washington State Supreme Court reversed, however, holding "that the welfare of the child is the only operative standard at this stage of the [custody determination] and all other considerations are secondary."[219] The court listed the factors to be considered in this regard,[220] and remanded this case for a determination of the best interests of the child.[221]

Through its decisions in cases such as *Allen, Fitzgerald, Eickerman*, and *Palmer*, the courts had shifted emphasis toward serving the best interests of children. Although unfitness might often still exist—making third-party custody disputes easier to resolve where nonparents are *seeking* custody from parents—parental unfitness is no longer required where third parties seek to *retain* custody. Parents still have common law superior rights as well as fundamental constitutional rights to retain, maintain, and control their relationships with their children[222]—at least absent a "willful substantial lack of regard for parental obligations"[223]—but "extraordinary circumstances" can prevent them from regaining custody from third parties.[224] Of course, the nature of the "extraordinary circumstances" that might allow children to

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216. Blair, *supra* note 25, at 119.

217. 494 P.2d 233 (Wash. Ct. App. 1972).

218. *Blair*, *supra* note 25, at 119; *see Palmer*, 494 P.2d at 237.

219. *In re* Guardianship of Palmer, 503 P.2d 464, 465 (Wash. 1972) (emphasis added).

220. *Id.* at 466 (According to the court, "[w]hen the guardianship of a child has been given to another and the natural parents seek the return of custody of the child to them, there are several factors to be considered in determining whether the child will be benefited or harmed by the shift of custody back to the parents. These include, but are not limited to, (1) the length of the child's stay with the guardian, (2) the nature of the relationship to the guardian, and (3) the degree of contact maintained with the parent during the period of guardianship. These are in addition to the normal considerations of whether the natural parents are fit and whether the reasons for creating the guardianship initially have ceased to exist") (citation omitted); *see also* Blair, *supra* note 25, at 119.

221. *Palmer*, 503 P.2d at 467. While "courts will normally be less reluctant to transfer a child from its guardian back to its parents than to initially take the child from its parents to be placed with a guardian[,] . . . the function of parenthood is not purely a matter of biology. Persons other than natural parents may occupy the relationship of parent to the child." *Id.* at 466.

222. *See supra* Part II.

223. *In re* the Matter of the Interests of H.J.P., 789 P.2d 96, 100 (Wash. 1990).

224. Blair, *supra* note 25, at 117. Courts in jurisdictions giving greater emphasis to the best interests of children tend to "require [not necessarily unfitness but] a showing of 'extraordinary' or 'exceptional' circumstances before they will award custody to a nonparent. These circumstances include the duration of the parent-child separation and the adverse effect that a change in custody may have on the child." *Id.*; *see also supra* note 178 and accompanying text.

remain with or revert to third parties and, in particular, findings of parental lack of interest of sufficient duration when evaluating those circumstances, were essentially within the subjective discretion of trial courts.

Consequently, during the 1970s, many state legislatures began to perceive decisions in their states which were similar to *Allen, Eickerman,* and *Palmer* as dangerous precedent which gave trial judges the authority to arbitrarily remove children from parents regardless of their constitutionally protected rights.[225] In response, many of states adopted the third-party (nonparent) standing provisions of the UMDA, whose drafters were also inclined toward this view, in order to reinforce the superiority of parental rights by requiring an additional initial barrier to nonparent custody.[226] This barrier would limit third parties' right to petition for custody to only situations where children, as a preliminary matter of jurisdiction and standing,[227] could be shown to "not [be] in the physical custody (defined as legal custody) of either parent."[228]

IV. WASHINGTON'S MODIFIED ADOPTION OF THE UMDA AND ITS THIRD-PARTY STANDING REQUIREMENTS

When the Washington legislature adopted the UMDA third-party custody standing provision in 1973 as part of the state's revised dissolution laws,[229] it modified the language of that provision to allow nonparents to institute custody proceedings not only if the child is "not in a parent's physical custody," but also if neither parent is a suitable custodian.[230] At the time, some viewed this additional language as an effort to continue the trend away from the parental rights doctrine,[231] with its emphasis on abandonment of rights or "unfitness,"[232] and to more accurately

225. *See* Levy, *supra* note 17, at 196-97.

226. In addition, for example, to the presumption already existing in adjudicating the merits. *See* Blair, *supra* note 25, at 128.

227. *Id.* at 124 ("A child custody proceeding is governed by the custody provisions of the Dissolution Act and the court's jurisdiction is strictly limited by those provisions.").

228. *See supra* notes 15-17 and accompanying text.

229. WASH. REV. CODE § 26.09.180(1) (Supp. 1973); WASH. REV. CODE § 26.09.180 (1981), *repealed by* 1987 Wash. Sess. Laws 2041 (effective January 1, 1988). This section was subsequently replaced by Section 26.10.030. *See* WASH. REV. CODE ANN. § 26.10.030 (West 2007).

230. WASH. REV. CODE ANN. § 26.10.030(1).

231. Adoption of the UMDA was seen at the time as a "shift away from a theory that parents have a property interest in their children toward a test which emphasizes the performance of the parental responsibilities." Luvern V. Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375, 407 n.147 (1974).

232. *See* WASH. REV. CODE ANN. § 26.10.030 (West 2007). Allowing petitioner to allege that neither parent is a suitable custodian is an alternative provision outside of that articulated for by the UMDA, which essentially extended and incorporated the old unfitness standard or voluntary relinquishment of parental rights requirements into standing or jurisdictional law. *See In re* Custody

reflect the increasingly "child-centric" third-party custody law in Washington.[233] "[T]he 'unsuitability' requirement [was characterized as] both less stringent than the old 'unfitness' requirement and a means of balancing the parents' legitimate interests with the child's needs[,] . . . a significant movement toward favoring the child's interests over the parents' absolute rights."[234] Thus, for non-parents to gain standing to seek custody they are now required to show that the child was not in the physical custody of one of its parents or that neither parent was a "suitable custodian."[235] Once this jurisdictional hurdle—one focused on the behavior of parents—is overcome, third parties could then, presumably, contest "best interests" as in a dissolution proceeding between natural parents.[236] However, this has not been the course the decisions have taken. As will be shown, the Washington courts have taken a more restrictive approach to third-party custody rights.

A. *Nonparent Standing When Children are "Not in the Physical Custody of a Parent"*

The original UMDA ground for third-party standing adopted in Washington has been typically applied, without apparent controversy, in circumstances where the voluntary indefinite relinquishment of legal custody is fairly clear. That is, while the statutory phrase "not in the physical custody of a parent" may seem straightforward, courts in most UMDA states have regularly required more than mere physical custody by a nonparent. Instead, courts have required nonparents to prove some legally cognizable right to possess the child before being allowed to petition for legal custody.[237] Arizona courts, for example, have held that "physical custody . . . does

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of Nunn, 14 P.3d 175, 181 (Wash. Ct. App. 2000) ("[A] threshold inquiry for any nonparental child custody action under [Wash. Rev. Code § 26.10] is whether the nonparent petitioner has standing to being the action, that is, whether the nonparent petitioner can produce substantial evidence to support the allegation of parental unfitness by which he or she gained entry to the courthouse in order to file the petition. Without substantial evidence of parental unfitness, a nonparent petitioner lacks standing to being the action, and it should be dismissed.").

233. *See supra* Part III.

234. Blair, *supra* note 25, at 119-20 (footnotes omitted); Rieke, *supra* note 231, at 407-08.

235. Blair, *supra* note 25, at 119.

236. *Id.* at 126 ("[T]he most stringent test occurs at the threshold, jurisdictional level. It is at this first stage that the adequacy of the parents is an issue. Thereafter, the court can turn its attention to the child. And it is at this point that the courts have reiterated that the welfare or best interests of the child is the court's paramount concern."); *see also id.* at 128.

237. *See, e.g.*, Webb v. Charles, 611 P.2d 562, 565 (Ariz. Ct. App. 1980) (refusing to grant standing to a maternal grandmother to petition for custody where there was insufficient indication that the child's father had voluntarily relinquished his legal rights to the child); Harper v. Tipple, 184 P. 1005, 1008 (Ariz. 1919); *In re* Custody of Peterson, 491 N.E.2d 1150, 1152-53 (Ill. 1986); Williams v. Phelps, 961 S.W.2d 40, 42 (Ky. 1998); *see also, e.g.*, 2 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 8.06 (1986) ("In most cases in which stepparents have obtained custody, the stepparent has been very active in raising the child and has treated the child as if it was the stepparent's natural child.").

not equate to having actual, immediate control of the physical presence of the child, rather it is the legal right to control the child."[238] This has also been the view in Illinois.[239] Among the problems encountered in custody litigation with this basis for standing, is that if a family court is forced to focus initially on the relative legal property interests held by potential guardians for purposes of standing, its decisions and opinions on custody may give less than adequate attention to the "best interests" of the child.[240]

While the issue of exactly when and why a child is "not in the physical custody of [a] parent" has been heavily litigated in other states that have also adopted the UMDA standing provisions,[241] this has been less the case in Washington. Two possible reasons for this exist. First, the existing common law has been fairly clear in indicating when physical and legal custody has or has not in fact been legally relinquished by parents to third parties.[242] Second, the fact that regardless of whether or not a child is *legally* "not in the physical custody of [a] parent," third party standing can still be achieved, often more easily, if non-parents allege and prove in the alternative that a parent is "unsuitable."[243]

Even if the petition is not initially brought under the nonparent provision, standing may still be upheld given the liberal rules for amending pleadings.[244] An interesting and informative example of how "not in the physical custody of a parent" jurisdiction may be found, and of the liberal pleadings amendment provisions in Washington, was *In re Marriage of Farrell*,[245] where after a decree of dissolution the mother was awarded custody of her two daughters.[246] Three years later, she

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238. *Webb*, 611 P.2d at 565.

239. *See generally* Mahon v. People *ex rel.* Robertson, 75 N.E. 768 (Ill. 1905).

240. *See id.* at 769-70; *see also* Henderson v. Henderson, 568 P.2d 177, 179 (Mont. 1977).

> Courts' opinions might have included revealing discussions about the importance of preserving biologic ties or the importance of preserving continuity in caretaking or frank discussions of the rights of biologic parents to the custody of their children regardless of children's needs. Unfortunately, nearly all the discussion is unilluminating. Courts fuss over statements of the [legal] standard[s] without explaining what considerations are affecting their inquiry.

David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" after Divorce, in* DIVORCE REFORM AT THE CROSSROADS 102, 123 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

241. *See, e.g.*, Schlam, *supra* note 31, at 425.

242. *See generally supra* Part III.

243. Moreover, as a matter of litigation strategy, raising "unsuitability" as a basis for standing may pre-dispose the trier of fact toward a third-party to a greater extent than simply alleging voluntary relinquishment of legal custody. *See, e.g., In re* Custody of Shields, 136 P.3d 117, 122-23 (Wash. 2006).

244. *See* FED. R. CIV. P. 15; WASH. SUP. CT. CIV. R. 15.

245. 835 P.2d 267, 270 (Wash. Ct. App. 1992).

246. *Id.* at 268.

remarried and lived with her daughters and their stepfather.[247] However, nine years after the remarriage, one of the daughters left home claiming her stepfather was mistreating her.[248] She sought refuge with the Brewers, a couple she felt she could trust.[249] A year later, rather than filing an independent nonparent custody action,[250] the Brewers filed a petition for modification of custody in the original dissolution action.[251]

Nevertheless, the court held it still had jurisdiction under the "not in the physical custody" nonparent provision because, under the facts shown, the daughter "had been integrated into the Brewer home with the knowledge of her natural parents, and they agreed to the proposed change in custody," and therefore the child was "not in the physical custody of either parent."[252] Further, while the stepfather may have stood *in loco parentis* to the child for purposes of determining whether the Brewers had standing,[253] this was only while she lived with him, since "an *in loco parentis* relationship may be abrogated by either participant."[254] The court held that because the parents knowingly and voluntarily relinquished physical custody and the stepparent was no longer custodial, the requirement that the child not be in the physical custody of one of her parents (including the step-parent as well) was met.[255] The Brewers had standing and they were properly granted custody under the agreed order.[256]

In another recent interesting Washington decision, *In re Custody of S.H.B.*,[257] a paternal grandmother and the child's cousin both brought actions for custody under the non-parent custody provision.[258] Neither of the child's parents had or petitioned

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247. *Id.* at 268-69.

248. *Id.* at 269.

249. *Id.*

250. *Id.* Although the question of whether the nonparents had standing to sue for custody of Michelle where their custody petition was brought in the parents' original dissolution action (instead of as a separate nonparent custody action) was raised, the court held that the entry of the agreed order changing custody was a procedural error, not a jurisdictional defect. *Id.* at 270. The Brewers' standing to petition the court for Michelle's custody existed because the child was "not . . . in the physical custody" of a parent. *Id.* While Mr. Spencer, the stepfather, stood *in loco parentis* to Michelle, this was true only while she lived with him. *Id.* An *in loco parentis* relationship may be abrogated by either participant. *Id.* Once custody changes to a nonparent, the stepparent is no longer "custodial." *Id.* at 271.

251. *Id.* at 269.

252. *Id.* (the Brewers had a *legal* claim to custody).

253. *See id.* at 270.

254. *Id.*

255. *Id.*

256. *Id.*

257. 74 P.3d 674 (Wash. Ct. App. 2003).

258. *Id.* at 677. It should be noted that the Washington Court of Appeals referred to the child's cousin as the child's godmother. The Washington State Supreme Court, on further appeal,

for custody, so both third parties had standing because the child was "not in the physical custody of either parent."[259] The trial court found that the child's interests would best be served if she resided with her cousin.[260] On appeal the paternal grandmother argued that since the child was living with her at the time the petitions were filed she should have been afforded the preferential rights of a parent under the common law doctrine of *in loco parentis*.[261] According to the court's reasoning;

> If the child is in the custody of a parent, to gain custody [a nonparent] must establish that the parent is unfit, or that continuing to reside with the parent would detrimentally [affect] the child's growth and development.[262]

The court of appeals held that the grandmother was not entitled to the rights of parents and thus, contrary to the grandmother's assertion, actual detriment from the child's current living circumstances did not need to be established.[263] Therefore, applying the "best interests" standard in granting custody to the cousin did not deprive the grandmother of any due process rights.[264]

On appeal, the Washington State Supreme Court agreed, pointing out that a showing of actual detriment from current custody was inapplicable here because the grandmother was not attempting to employ the doctrine of *in loco parentis* to establish standing, where such status would at least raise a question about the unsuitably of parental custody,[265] but to gain a *presumption* of her superior fitness for custody at trial against another nonparent.[266] The grandmother had "not in the physical custody of a parent" standing, as did the cousin, but the grandmother did not succeed to the presumption of fitness as a parent would because she had physical but not legal possession.[267] Consequently, since both parties had nonparent standing, their dispute was properly evaluated under the "best interests" standard used between parents.[268]

Thus, to claim "not in the custody of a parent" nonparent standing there must be knowing and voluntary relinquishment of physical custody by the legal parents or

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referred to the same person as the child's cousin. For simplicity and consistency purposes, the author has elected to refer to the third-party caregiver as the child's cousin.

259. *Id.* at 679.

260. *Id.* at 677.

261. *Id.* at 680-81.

262. *Id.* at 679.

263. *Id.* at 684.

264. *Id.* The court also held that the standard of proof for placement of child with either the cousin or the paternal grandmother was by preponderance of evidence. *Id.* at 681.

265. *In re* Brown, 105 P.3d 991, 993-94 (Wash. 2005).

266. *Id.*

267. *Id.* at 994-95.

268. *Id.*

custodial "de facto" parents. However, to obtain custody the third party must still overcome the presumption of parental fitness. If the child does not have legal parents or "de facto" parents who can avail themselves of the presumption, all competing third parties will be evaluated under the "best interests" standard of proof employed between parents in a dissolution proceeding, rather than the "detriment" standard required where a parent and a nonparent both petition for custody.

B. *Petitions Under the "Unsuitability" Language of the 1973 Nonparent Provision: In re Marriage of Allen*

The 1973 statutory alternative to achieving third-party standing, a showing of parental unsuitability, was construed and extensively discussed in the seminal case of *In re Marriage of Allen*.[269] That case concerned a father's custody of a child, Joshua, who was born deaf during a former marriage.[270] After dissolution of his marriage and considerable difficulty dealing with Joshua's disability, the father met and married Jeannie, who had three children of her own.[271] The father, his new wife, and the four children lived together during the course of this second marriage.[272] Upon petitioning for dissolution, Jeannie requested custody of all four minor children.[273]

In resolving the question of custody of Joshua, the court relied on substantial evidence of Jeannie's dedication and efforts toward him.[274] She worked diligently with Joshua to teach him sign language, found special training for him, and secured one-on-one tutoring in sign language for him, provided by his public school.[275] Jeannie attended special classes on her own to provide additional training and tutoring.[276] Jeannie and her three children always communicated with sign language while in the presence of Joshua.[277] While the father was somewhat familiar with sign language, his skill level paled in comparison to that of Jeannie and her children.[278] Further, the court described his attitude toward Joshua's future development as "apathetic and fatalistic."[279]

While the trial court did not find the father unfit, it "found that Joshua's future development would be *detrimentally* affected by placement with his father."[280] In

269. 626 P.2d 16, 19-20 (Wash. Ct. App. 1981).
270. *Id.* at 18.
271. *Id.* at 18-19.
272. *Id.*
273. *Id.* at 19.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 22 (emphasis added).

affirming the ruling below, the appellate court expounded on the standard that should be applied in what would eventually come to be called *Dombrowski* (stepparent) disputes,[281] stating that:

> [W]e must look to a middle ground; to give custody to a nonparent there must be *more* than the "best interests of the child" involved, but *less* than a showing of unfitness. In extraordinary circumstances, where placing the child with an otherwise fit parent would be detrimental to the child, the parent's right to custody is *outweighed* by the State's [concern with] . . . detriment to the child, *something greater than the comparative and balancing analyses of the "best interests of the child" test.* Precisely what may outweigh parental rights is to be determined on a case-by-case basis.[282]

Thus, where a child was in the "physical custody of a parent," unfitness would ordinarily "outweigh the deference normally given [to] parent's rights."[283] However, "where circumstances are such that the child's *growth and development would be detrimentally affected* by placement with an otherwise fit parent, parental rights may [still] be outweighed" in favor of a nonparent acting *in loco parentis*.[284] Recognizing the importance of the family as well as the parent-child relationship, the *Allen* court noted that:

> Joshua had become integrated into the family unit formed by the marriage of Joe and Jeannie and his adoption of her three children. By the award of custody to Jeannie, the family unit remains essentially the same. *Where the reason for deferring to parental rights—the goal of preserving families —would be ill-served by maintaining parental custody, as where a child is integrated into the nonparent's family, the de facto family relationship does not exist as to the natural parent and need not be supported.* In such a case, custody might lie with a nonparent.[285]

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281. Stepparents standing *in loco parentis* may file for child custody as a parent under WASH. REV. CODE § 26.09.180(1)(a) in a dissolution proceeding. *In re* Custody of Dombrowski, 705 P.2d 1218, 1220-21 (Wash. Ct. App. 1985).

282. *Allen*, 626 P.2d at 23 (emphasis added); *see also In re* Custody of Stell, 783 P.2d 615, 619-20 (1989) ("The test adopted by the *Allen* court acknowledges the constitutional right to privacy implicated in custody disputes and establishes a test which is sensitive to both a biological parent's rights and the needs of a child. This standard requires that the non-parent establish either that the parent is unfit or that 'circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent.'" (quoting *Allen*, 626 P.2d at 23)).

283. *Allen*, 626 P.2d at 22.

284. *Id.* (emphasis added). "The court held that a stepparent may commence a proceeding for custody of a stepchild in a dissolution action in the same manner as a parent if the stepparent stands in loco parentis to the child." Blair, *supra* note 25, at 120 (citing *Allen*, 626 P.2d at 22).

285. *Id.* at 23 (footnote omitted) (emphasis added); *see also* Troxel v. Granville, 530 U.S. 57,

In Washington, after *Allen*, nonparent standing could be based on a showing that custody in a parent might be unsuitable.[286] To petition for third-party custody, even absent parental unfitness, a party must allege that parental custody would be detrimental to the child's physical or mental health or well-being.[287] The showing required was *greater* than that a child's best interests will be served, but *less* than the unfitness required to terminate parental rights.[288] Further, the *Allen* formulation took into account the common law parental "superior rights" presumption.[289] At the time of the *Allen* decision, it was thought that, while the standing determination would look to parental behavior, the custody hearing would focus less on parental behavior than on the best interests of the child.[290] Also, as a result of the decision in *Allen*, "a step-parent [could now] commence a proceeding for custody of a stepchild in a *dissolution* action in the same manner as a parent if the stepparent stands *in loco parentis* to the child,"[291] but such a step-parent is only "entitled to parental status for standing and jurisdiction, . . . not for determining custody."[292] To obtain custody, a stepparent or other third party must still show a certain level of detriment in parental custody.

The *Allen* opinion was not without criticism. One contemporaneous commentator, Sandra R. Blair, argued that: "In reaching its decision, . . . the *Allen* court went through needless analytic contortions, applied the wrong statutory provision, and misconstrued the appropriate provision."[293] Blair also suggested that the court's holdings "could lead to unfortunate results."[294] One reason was that the holding that an *in loco parentis* relationship gives a nonparent the same standing as a parent to seek custody, while "reasonably derived from the common law," was not

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94-98, 100-01 (2000) (Kennedy, J., dissenting).

286. *See, e.g., In re* custody of Stell, 783 P.2d 615, 620 (Wash. Ct. App. 1989).

287. *Id.* at 619-20.

288. *Allen*, 626 P.2d at 23.

289. *See In re* Custody of Shields, 136 P.3d 117, 126 (Wash. 2006).

290. "[T]he most stringent test occurs at the threshold, jurisdictional level. It is at this first stage that the adequacy of the parents is an issue. Thereafter, the court can turn its attention to the child. And it is at this point that the courts have reiterated that the welfare or best interests of the child is the court's paramount concern." Blair, *supra* note 25, at 125-26.

291. *Id.* at 120 (emphasis added).

292. *Id.* at 124-125 ("[T]he best interests of the child standard, which is applied in parental custody disputes, is inapplicable to . . . custody disputes between a parent and a nonparent regardless of the nonparent's relationship to the child."); *see also, e.g.,* Chapman v. Perera, 704 P.2d 1224, 1227 (Wash. Ct. App. 1985) ("[A] custody determination between the natural parents must be made in the child's best interests. Between a parent and a nonparent, however, a more stringent test is applied: custody may be awarded to a nonparent as against a natural parent only where 'placing the child with an otherwise fit parent would be detrimental to the child . . . .'") (omission in original).

293. Blair, *supra* note 25, at 128.

294. *Id.* at 121. "The Allen court's jurisdiction and standing holdings may have unfortunate results. . . . In an extreme case, a court could even consider the custody of children from a party's prior marriage who are in the custody of the prior spouse." *Id.* at 124.

consistent with the new statute.[295] Since that statute "distinguishes parents from nonparents, but makes no special provision for nonparents who stand *in loco parentis* to children," it was argued that "stepparent[s] should not *automatically* have standing [in a *dissolution* proceeding] to seek custody [,as in *Allen*,] . . . [but] should have to separately petition the court for custody, alleging that the child is not in the custody of either parent, or that neither parent is a suitable custodian."[296]

This criticism would prove insignificant given the liberal procedural rules allowing courts to amend pleadings to conform to proof,[297] and the fact that that the stepmother in *Allen* did in fact prove unsuitability.[298] Another objection to *Allen*, perhaps of greater potential consequence, was that the holding that the "best interests" standard does not apply in parent-nonparent custody disputes, "regardless of the non-parent's relationship to the child," contradicts both case law and a careful reading of the statutes:[299]

> [Indeed, t]he court's adoption of the "actual detriment" standard [could] . . . lead to trial courts construing "detriment" to mean extreme harm. This would represent a return to the old standard under which a parent's right to custody depended solely on his or her minimal fitness. Such a return would be inconsistent with the obvious trend in Washington law toward "a premise that the child's welfare is more significant than the claim of parental rights."
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> . . . [*T*]*he court should have adopted the best interests of the child standard for [adjudicating] cases arising under [the non-parent standing provision]. Parental rights are sufficiently protected by the provision's threshold requirements and by inclusion of parental status as a factor in the balancing process.*[300]

This critique was appropriate and prescient. The "actual detriment" standard has not proven problematic in some respects, but it has in others. First, there has *not* been a

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295. *Id.* at 121, 123; *see also supra* Part III.

296. Blair, *supra* note 25, at 112, 124 (emphasis added).

297. *See, e.g.*, *In re* custody of Dombrowski, 705 P.2d 1218, 1221 (Wash. Ct. App. 1985). Another criticism, quite similar to the first and equally insignificant in practice, was that the holding in *Allen* that a trial court "has jurisdiction over all dependent children is based on misconstruction of the dissolution statues. . . . [A] court has jurisdiction only over the children of the marriage in a dissolution action. Only parents can petition for custody by filing a dissolution action . . . . [Therefore, a] stepparent must . . . invoke the court's jurisdiction over other children through the relevant procedures under the new custody provision." Blair, *supra* note 25, at 122-23. Here too, however, pleadings can be amended to conform to proof of "unsuitability" under the nonparent custody provision. *Id.* at 123.

298. *In re* Marriage of Allen, 626 P.2d 16, 22 (Wash. Ct. App. 1981).

299. Blair, *supra* note 25, at 124-25.

300. *Id.* at 127-28 (quoting Rieke, *supra* note 231, at 407).

return to the old standard in the sense that "unfitness" still does not need to be shown for third-party standing, and detriment has not been construed to mean extreme harm. Actually, subsequent interpretations of the suitability provision in a variety of contexts suggested that the court may indeed have "adopted the best interests of the child standard for [adjudicating] cases arising under [the nonparent standing provision]," at least until this approach was recently and ultimately rejected in *In re Custody of Shields.*[301]

On the other hand, the holding that nonparents must allege actual harm from parental custody for standing purposes still has the potential to unnecessarily limit participation by important third parties with significant relationships with children, and may have created an unnecessarily narrow scope for proof of the more than best interests but less than unfitness required for nonparent custody under both state statutory and federal constitutional law.[302] The term "unsuitable," after all, conceivably encompasses a wider array of potential negatives to parental custody than just emotional or physical detriment to a child. That phrase, as will be suggested below, could be easily construed to require "best interests" analysis of the "totality of the circumstances" to determine "suitability," rather than demanding of nonparents a burden of showing detriment. This would still be consistent with currently established due process rights of parents.

C. *Modern Cases and Contemporary Issues: Allen Reconstrued, Clarified and Reaffirmed*

In post-*Allen* decisions, the courts have given definition to and some clarification of the status of "de facto" parents, attempted to distinguish the "unsuitability" showing required for standing as compared to ultimate custody, illuminated the distinction between the "actual detriment" and "best interests" standards of proof, and in doing so, have indirectly resolved or responded to some early questions or concerns raised about *Allen.* Yet, at the same time, there have been decisions that have inhibited Washington's movement toward custody decisions giving support to significant and meaningful nonparent-child relationships.

As an example of the court's efforts to clarify the status of de facto parents, a few years after *Allen,* in *In re Custody of Dombrowski,*[303] a trial court refused to allow a live-in companion to amend his petition for custody brought under the parental custody statute to allege "unsuitability" of the biological mother after it was determined that he was not the biological father of the child.[304] The live-in companion had lived with the child since her birth and acted in all ways as her

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301. *See* 136 P.3d 117, 129 (Wash. 2006).

302. *See* Troxel v. Granville, 530 U.S. 57, 94-98 (2000) (Kennedy, J., dissenting); *Allen*, 626 P.2d at 23; Blair, *supra* note 25, at 127.

303. 705 P.2d 1218 (Wash. Ct. App. 1985).

304. *Id.* at 1219.

biological father, including designation on the birth certificate as the child's father.[305] Even after blood tests confirmed that he was not the biological father, he maintained the relationship with his daughter by visiting her as permitted.[306]

Dombrowski argued that, in *Allen,* "the court held that a stepparent standing in loco parentis may file for child custody as a parent."[307] However, the court said:

> We are reluctant to extend that holding to live-in companions in the face of the clear statutory distinction between parent and nonparent. Furthermore, the *Allen* court *also* based its decision on the theory that the stepparent had properly petitioned as a nonparent. [That] court held that by its finding of parental unsuitability, the trial court had inferentially deemed the pleadings amended by the proof. Thus, *Allen* does not call for the conclusion that [the live-in companion] has standing as a parent.[308]

On appeal, it was held to be reversible error to have not allowed the live-in companion to amend his pleadings to allege the "unsuitability" of the mother, especially in light of the fact that he was the only "father" the child had ever known.[309] "The trial judge apparently believed that by 'person other than a parent' the legislature meant only stepparents and blood relatives.[310] However, there is no indication of such a limitation in either Washington statutory or case law. Courts cannot read into a statute words which are not there."[311]

Thus, as a nonparent, the de facto father had standing to request custody, certainly a just result under these circumstances, but he would, presumably, still have to meet the more demanding "actual detriment" standard rather than the "best interests" standard to gain custody.[312] It is, however, not clear why as a matter of public policy the sudden revelation that a "father" is not a *biological* parent should disallow use of "best interests" criteria (the standard between parents) in the trial of

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305. *Id.* at 1219-20. Also, the live-in companion cared for the child during the day while the mother worked. *Id.* at 1220.

306. *Id.*

307. *Id.*

308. *Id.* (citation omitted) (emphasis added).

309. *Id.* at 1221. Also, both the guardian ad litem and the court had recognized the beneficial nature of his relationship with the child. *Id.* at 1220-21. Had Dombrowski no basis for standing available to him other than the "not in the physical custody of [a] parent" language, he might not have had standing because he was no longer a "biological" parent and the child was in its mother's custody. *See, e.g., In re* Marriage of Roberts, 649 N.E.2d 1344 (Ill. App. Ct. 1995).

310. *Dombrowski*, 705 P.2d at 1221.

311. *Id.*; *see also* Finck v. O'Toole, 880 P.2d 624 (Ariz. 1994) (similar narrow construction of similar provision), *superseded by statute*, ARIZ. REV. STAT. ANN. § 25-414 (West 2007), *as recognized in* Riepe v. Riepe, 91 P.3d 312, 317 (2004).

312. *Dombrowski*, 705 P.2d at 1221 ("There is evidence on the record that Dombrowski may be able to prove the necessary allegations.").

this dispute.[313] The true distinction between and justification for these two standards of proof under these circumstances was unclear.

One might argue that requiring proof of "detriment" is justified in that it avoids allowing third parties custody simply because they may better provide materially for a child. However, such considerations have long been considered inappropriate under common law "best interests" analysis,[314] and parental preferences, already protected by the "unsuitability" standing requirement itself,[315] can also rationally be factored into a traditional "best interests" analysis. After all, what real difference is there between third-party proof of the "unsuitability" of parental custody and proof of the "best interests" of the child? Is not the former naturally subsumed within consideration of the later? Is not the critical question, assuming the court's interest in protecting both meaningful third-party relationships and parental rights, who has the burden of proof for custody and how heavy that burden should be, rather than whether a parent can be shown to be particularly harmful?

In the more recent case of *In re Custody of RRB*,[316] a court was faced with factual circumstances that, in a way, were the converse of those in the *Dombrowski* case. In *RRB*, a biological father filed a petition for custody under the nonparent custody statute.[317] The decision may have further confused the relationship between the "actual detriment" and "best interests" standards in custody determinations. Although the father had voluntarily terminated his parental rights and consented to the open adoption of his child, seven years after the adoption the child began having severe mental health problems and made allegations of emotional and physical abuse.[318] With the adoptive parents' consent, the child moved in with her biological father.[319] After her hospitalization and treatment, the biological father filed his nonparent petition for custody.[320]

In upholding the ruling below, the appellate court noted that the biological father's standing and the grant of custody were indeed appropriate.[321] The biological father was technically a nonparent under the statute since his parental rights had been properly terminated, but the court found that remaining in the custody of the adoptive parents was detrimental to *RRB* given her mental health problems and her

313. *Id.* at 1221.

314. *See, e.g.*, Wohlford v. Burckhardt, 141 Ill. App. 321 (1908) ("The mere fact that other relatives or persons might give better care, and spend more time and money upon the child, is no reason for depriving the father of its custody.").

315. *See supra* notes 285-290.

316. 31 P.3d 1212 (Wash. Ct. App. 2001).

317. *Id.* at 1214.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 1216, 1219-20.

improvement while residing with her biological father.[322] In restating the general criteria under which legal parents may lose custody, the court said:

> [I]n a nonparental custody proceeding, the child's *safety, welfare, growth or development* is always at issue; otherwise, there is no basis for awarding custody to a nonparent. The court considers the presumption that fit parents act in their children's best interests when *initially deciding* whether to award custody to someone other than the parents. This presumption requires the court to deny nonparental custody unless the court finds that the parents are *unfit or that placing the child with the parents will harm her.* Once a nonparent petitioner establishes either of these factors, the court need not defer to the parents' decision-making at every turn.[323]

It would seem, however, that the "detriment" suffered by the child in *RRB*—emotional difficulties not definitively shown to be the result of parental custody but remedied while in non-parental custody[324]—could just as easily have been characterized as the reason why it was in her "best interests" to remain with the nonparent. Indeed, one might argue that granting custody to the biological father was essentially a "best interests" determination. Construed this way, such a decision would obviate the early criticism of the harms that might flow from the "detriment" standard articulated in *Allen,*[325] and serve as an example of how the precedent of

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322. *Id.* at 1215-16, 1219-20.

323. *Id.* at 1219-20; *see also In re* Custody of Anderson, 890 P.2d 525, 526-28 (Wash. Ct. App. 1995) (a nonparent's ability to provide the minor child with consistent, family oriented, and reinforced values was not a sufficient reason to give her custody over a fit and loving parent). In *Anderson*, a mother appealed an order awarding custody of her daughter to the paternal aunt and uncle who had retrieved her from Alaska where the mother had escaped out of fear related to visitation between her child and ex-husband. *Id.* at 525-26. The appellate court reversed and held that to justify awarding custody to a nonparent, there must be a showing either of unfitness or "that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent." *Id.* at 526 (quoting *In re* Custody of Stell, 783 P.2d 615, 620 (Wash. Ct. App. 1989)). "In the absence of a finding that returning [the child] to her mother would be, by itself, an *actual detriment* to the child, the court [below] abused its discretion . . . ." *Id.* at 527-28 (emphasis added). Thus, where neither unfitness nor "unsuitability" can be shown, nonparents or other third parties will not prevail on the matter of jurisdiction or custody.

324. *RRB*, 31 P.3d at 1219.

325. Blair, *supra* note 25, at 127 ("The Court's concern that a more stringent standard is necessary in cases involving a nonparent is adequately met under the statutory best interests of the child standard. The provision directs the court to 'consider all relevant factors.' When a custody contest is between a parent and a nonparent, the additional factor of parental status is automatically included in the balancing process in favor of the parent. . . . [T]he Uniform Marriage and Divorce Act, which is 'designed to codify existing law' and to preserve familiar presumptions—such as the presumption that 'a parent is usually preferred to a nonparent.' . . . [A]dequate protection for a parent's rights and interests is already included in the statutory standard.") (footnotes omitted).

Allen might facilitate and reinforce the Washington trend toward a "best interests" standard in third-party custody litigation.[326]

Other issues were left unresolved by *Allen,* and perhaps by *Dombrowski* as well. When and how does "de facto" parental status arise? Should "superior rights" presumptions favor those merely engaged in custody and care against, say, other third parties in custody determinations? What is the relationship between the burden of proof for standing and custody in parent as compared to nonparent disputes?

These questions were raised and resolved just a few years ago in *In re Custody of S.H.B.*,[327] where a paternal grandmother and the child's cousin both brought actions for custody under the non-parent custody provision,[328] and thus *both* third parties had standing since the child was not in the physical custody of either parent.[329] The importance of *In re Custody of S.H.B.,* though, in the understanding of *Allen* and "unsuitability" grounds was the fact that the paternal grandmother argued that, since the child was living with her at the time the petitions were filed, she should have been afforded the preferential rights of a parent under the common law doctrine of *in loco parentis*.[330] In other words, her unfitness or "unsuitability" must be established.

The court of appeals held, however, that the grandmother was not entitled to the rights of parents.[331] Thus "actual detriment" from the child's current living circumstances did not need to be established, only that it was in the "best interests" of the child to grant custody to the cousin since *both* third parties had non-parent standing.[332] This, the court held, did not deprive the grandmother of any due process rights.[333] On appeal, the Supreme Court agreed, pointing out that *Allen* and its requirement of a showing of "actual detriment" was inapplicable because the grandmother was not attempting to employ the doctrine of *in loco parentis* to establish standing, but to gain a presumption of her superior fitness for custody at trial against another non-parent.[334] She did not succeed to the presumption of fitness that would have been afforded a parent because she had physical but not legal possession.[335]

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326. This view of the case, however, was subsequently disapproved by the Washington State Supreme Court. *See infra* notes 361-372 and accompanying text.

327. 74 P.3d 674 (Wash. Ct. App. 2003).

328. *Id.* at 677.

329. *See id.* at 677, 679-81.

330. *In re* Brown, 105 P.3d 991, 993-94 (Wash. 2005).

331. *S.H.B.*, 74 P.3d at 679-80.

332. *Id.* at 684.

333. *Id.* at 683. The court also held that the standard of proof for placement of child with either the cousin or the paternal grandmother was by preponderance of evidence. *Id.* at 681.

334. *Brown*, 105 P.3d at 993.

335. *Id.* at 994.

In another recent case, *In re Parentage of L.B.*,[336] the Washington State Supreme Court articulated the circumstances that *would* create "de facto" parenthood and the corollary presumption of fitness in those acting *in loco parentis*.[337] Equally important, and notwithstanding *In re Custody of S.H.B.*, the court held that such a status might exist regardless of a lack of statutory acknowledgment or specific protection of such status.[338] In *L.B.*, however, "de facto" parenthood in the petitioner meant that there were now *two* "parents" (as compared to two *nonparents* in *S.H.B.*) and, consequently, the lesser "best interests" standard was applicable to the custody dispute between them as well (as two parents).[339]

The factual context in *L.B.*, important to understand in evaluating the court's latest ruling on "de facto" parents, was that Sue Ellen Carvin brought an action seeking "co-parentage" of a minor conceived by artificial insemination during her twelve-year domestic partnership with the legal and birth mother, Page Britain.[340] During the child's first six years of life, the two women and the child lived together as a family.[341] The two women equally shared the parenting decisions including discipline, day care, schooling, and medical decisions.[342] When the child was six, however, the partners ended their relationship.[343] The partners initially shared custody of the child, but the birth mother, Britain, eventually ended Carvin's contact with the child.[344] After her contact was terminated, Carvin filed a petition asking, among other relief, to be "declared a parent by equitable estoppel or . . . be recognized as a *de facto* parent."[345] The trial court dismissed her petition.[346]

The Washington State Supreme Court ultimately held, as a matter of first impression, that notwithstanding the fact that no statute conferred parental status on a de facto parent, "the common law grants Carvin standing to prove she is a *de facto* parent and if so determined, to petition for the corresponding rights and obligations of parenthood."[347] The court held that one could establish standing as a *de facto* parent with custodial rights and presumptions equal to those of a biological or adoptive parent where the prospective parent can prove:

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336. 122 P.3d 161 (Wash. 2005).

337. *Id.* at 176-77.

338. *Id.* at 176.

339. *Id.* at 178.

340. *Id.* at 163.

341. *Id.* at 164.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.* at 164-65.

347. *Id.* at 176; *see also* Blair, *supra* note 25, at 123-24; *supra* Part III (common law background on *in loco parentis*).

> (1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the [prospective parent] and the child lived together in the same household, (3) the [prospective parent] assumed obligations of parenthood without expectation of financial compensation, and (4) the [prospective parent] had been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. . . . [R]ecognition of a *de facto* parent is "limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." . . . *[R]ecognition of a person as a child's de facto parent necessarily "authorizes a court to consider an award of parental rights and responsibilities . . . based on its determination of the best interest of the child."*[348]

Consequently, although Carvin was neither a biological or adoptive parent, she had standing as a de facto parent to petition for custody.[349] In a custody dispute between the two women, they were equally entitled to the parental presumption, and at trial the "best interests" standard would apply.[350] The court explained:

> [O]ur holding . . . regarding the common law status of *de facto* parents renders the crux of Britain's constitutional arguments moot. Britain's primary argument is that the State, through judicial action, cannot infringe on or materially interfere with her rights as a biological parent in favor of Carvin's rights as a nonparent third party. However, . . . we hold that our common law recognizes the status of *de facto* parents and *places them in parity with biological or adoptive parents in our state.* Thus, if, on remand, Carvin can establish standing as a *de facto* parent, Britain and Carvin would *both* have a "fundamental liberty interest" in the "care, custody, and control" of L.B.[351]

This opinion seems to have taken a more "child-centric" approach by finally acknowledging equal rights in an equally caring third party where, as in *Allen*, a parent "consented to and fostered the parent-like relationship."[352] Significantly, this was the case even though at some subsequent point the legal mother *withdrew* her "consent to and fostering of" her former partner's parent-like relationship.[353] Nonparents who could establish the now defined *de facto* parenthood, it would seem,

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348. *Id.* at 176-77 (emphasis added) (quoting C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004)). "The criteria for determining the best interests of the child [in custody disputes] are varied and highly dependent on the facts and circumstances of the case at hand[, but] . . . continuity of established relationships is a key consideration." *Id.* at 177 n.26 (quoting McDaniels v. Carlson, 738 P.3d 254, 262 (Wash. 1987)).

349. *Id.* at 178.

350. *Id.* at 177.

351. *Id.* at 178 (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

352. *Id.* at 177.

353. *See id.* at 164.

would now have not only standing, but also rights equal to those of parents for purposes of custody determinations.[354]

However, in 2006, in *In re Custody of Shields*,[355] the Washington State Supreme Court brought into question the precedential value of *L.B.* The *Shields* court rejected *L.B.'s* "best interests" standard of proof in disputes between parents and the newly defined *de facto* parents.[356] The decision attempted, yet again, to clarify the burden of proof in third-party standing and custody determinations.[357] The court appeared to again strengthen and reinforce "parental rights," while disregarding a child's expressed interests. In *Shields*, the child had lived for six years with his father, stepmother, stepsister, and half-brother.[358] Upon the death of the father, the mother drove to Washington to take custody of her son, and had planned to return him to Oregon to live with her and her husband.[359] Soon after, the child's stepmother filed a petition for nonparent custody, suggesting that the child's "best interests" would be best met by him remaining with her and her family in Washington.[360]

The trial court ultimately awarded custody to the stepmother, and the child was removed from his biological mother's home in Oregon.[361] While the court did not find the mother unfit, it did find she had certain characteristics which made her an inappropriate placement for the child.[362] Additional evidence showed that Shields was the child's "primary residential parent," she and the child had bonded, and the child had not bonded as much with his biological mother.[363] The step-family was found to have an important place in the child's life and well-being.[364] The trial court also took into account that the child wished to reside with Shields and his siblings, with whom he had only limited contact while with his mother in Oregon.[365] Once

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354. *Id.* at 178.

355. 136 P.3d 117 (Wash. 2006).

356. *Id.* at 127-29.

357. *Id.* at 127.

358. *In re* Custody of Shields, 84 P.3d 905, 907-08 (Wash. Ct. App. 2004) (custody of the minor was placed with his father by agreement of the parties, and gave the child's mother liberal visitation rights).

359. *Shields*, 136 P.3d at 119. The biological mother requested that the stepmother meet her at a location in Washington away from their home, however, the stepmother refused, resulting in the mother driving to their home to pick up her son. *Id.*

360. *Id.* at 119-20.

361. *Id.* at 122.

362. *Shields*, 84 P.3d at 910.

363. *Shields*, 136 P.3d at 120.

364. *Id.* at 122. ("The [trial] court also discussed the concept of de facto family and concluded that here, as in *Allen*, the child was so well integrated into the nonparent's family as to constitute an established fact. The court also concluded that [the stepmother] 'was and still in [child's] psychological parent' and that 'the psychological relationship between [the stepmother], her family, and [the child], is equivalent to that of a natural family entity.'" *Shields*, 84 P.3d at 914.

365. *Shields*, 136 P.3d at 120, 122.

again, the trial and appellate courts described as detriment to the child from parental custody facts that could just as equally justify findings that the "bests interests" of the child supported custody of the stepmother:

> 'The overwhelming weight of evidence *suggests* that [the child's] mental health and his future development in adolescence *is at risk* if he remains in Oregon. On the contrary, the evidence suggests that his mental health will prosper if he is returned to [Washington].' . . . [I]t would be *detrimental* to [the child's] well-being to be separated from his siblings and . . . separating [the child] from his siblings did not 'appear to be compelling in light of the *totality of the circumstances.*'[366]

However, on appeal to the Supreme Court the mother argued, among other claims,[367] that the trial court erred by applying the "best interests" standard when it should have applied the "detriment" standard in determining custody.[368] In resolving this issue, the court went out of its way to distinguish *L.B.* and attempted to clarify what confusion remained about the standard of proof for third-party custody determinations articulated in *Allen.*[369] The court agreed with the mother, finding that:

> Although the trial court referred to the actual detriment standard, the record reflects that it applied the "best interests of the child" standard. . . . [T]he trial court applied a "totality of the circumstances" analysis, which is appropriate . . . in custody disputes between two parents (or nonparents). . . . As a result, the trial court failed to accord [the mother] the benefit of the presumption that placement . . . with her, a fit parent, would be in [the child's] best interests and failed to place a heightened burden of proof upon . . . [the] nonparent.
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> [Even] more troubling, instead of appropriately applying the presumption that . . . a fit parent will act in the best interests of her child, the trial court applied an opposite presumption against [the mother] . . . requir[ing her] to provide evidence of "compelling reasons" to *gain* custody of . . . her son.[370]

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366. *Shields*, 84 P.3d at 914.

367. The mother argued that the stepmother lacked standing and inappropriately received custody since as a parent having physical custody of the child, and as the child's biological mother, she was not shown to be unfit. *Shields*, 136 P.3d at 123. However, the court easily dismissed this argument, holding that the nonparent custody statue requires that the petitioner allege that neither parent is a suitable custodian, as opposed to a fit custodian. *Id.* at 124. The court also pointed out that the nonparent custody statue does not support that standing requirement. *Id.*

368. *Id.* at 118.

369. *Id.* at 127.

370. *Id.* at 127-28 (emphasis added). Within the bounds of this language of obvious judicial frustration may lie the true justification for the ruling, the inappropriate shifting of the burden of proof and the lack of a high enough burden of proof, rather than any problem of the *standard* of proof.

The court went on to further elaborate:

> [U]nder the actual detriment standard set forth in *Allen*, the trial court should have been *focusing primarily* on the effects on [the child's] long-term growth and development, should he be placed with his mother, and the burden should be squarely placed on [the stepmother]. *This test is not a balancing of all the aspects of each household and on [the child's] wishes; it is a focused test looking at actual detriment to the child if placed with an otherwise fit parent.*[371]

However, while the "actual detriment standard" reinforces the parental rights presumption at the standing stage, it is still difficult to know how a court serves a child's best interests in subsequent custody determinations by not balancing all aspects of the vying potential families but, instead, focusing on "actual detriment" to the exclusion of other possible "extraordinary circumstances." It is also hard to see how, in most factual situations, a court can do the latter without also doing the former.

In further clarification of *Allen*, the court said:

> Although we approve the actual detriment standard articulated in *Allen*, we are concerned with references in that opinion to the concept of a "de facto family." In *Allen* the court found that the nonparent, her children, and the child consisted of a "de facto family" and that in such a case, "custody *might* lie with a nonparent." As we recently stated in L.B., incautious use of terms such as psychological parent, in loco parentis, and de facto parent has led to great confusion. . . . We found that recognizing a de facto parent . . . [does] not impermissibly interfere with a parent's constitutionally protected rights in part because of the *critical showing that the parent "consented to and fostered" the parent-child relationship*. Contrary to the suggestion in Allen, this court has not recognized "de facto family" as a *legal status*.[372]

Why exactly should *de facto* status not be recognized in this case? Unlike *L.B.*, it appears that the nonparent's standard of proof in *Shields* was held to be "detriment" rather than "best interests" because, while the custodial parent "consented to and fostered" the parent-child relationship until he died, the non-custodial parent no longer did.[373] However, the legal parent in *L.B.*, as with the non-custodial parent in

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371. *Id.* at 129 (emphasis added). For an example of how a post-*Shields* court engaged in the appropriate focus and examined the clear and extensive showing of actual detriment detailed in order, regardless of boiler-plate "best interests" language contained in court order form, see *In re Custody of A.C.*, 153 P.3d 203, 210-11 (Wash. Ct. App. 2007). The trial court in that case was also careful to use appropriate statement of standard of proof: "It's only if the detriment to [the child] outweighs [the mother's] rights that I can find that the allegations of the petition [have] been satisfied."). *Id.* at 210.

372. *Shields*, 136 P.3d at 127 (citations omitted) (quoting *In re* Marriage of Allen, 626 P.2d 16, 23 (Wash. Ct. App. 1981); *In re* Parentage of L.B., 122 P.3d 161, 168, 179 (Wash. 2005)).

373. *Id.* at 118.

Shields, also chose to revoke her "consent and fostering" after a certain point in the nonparent-child relationship.[374] This would appear to be an unfortunate example of greater concern for, and perhaps a bias toward, biological parental rights to legal possession[375] rather than either the importance of *de facto* parenthood or the need to focus on the child's "best interests."

Paradoxically, the parental relationship and the corollary rights in *Shields* were destroyed not by *withdrawal* of consent but by the *death* of the parent consenting, while in *L.B.* there was an actual withdrawal of consent by the consenting parent.[376] Yet the *de facto* parent in *L.B.* was provided the opportunity to assert an equal parental preference.[377] Did the death of the consenting parent in *Shields*, which of course undeniably had *some* legal consequences,[378] nevertheless change the situation regarding or the factors indicating the child's potential well-being? Why should this distinction (the death of the consenting parent compared to the actual withdrawal of consent by the non-custodial parent) affect the standard of proof for evaluating the appropriate custodial outcome for the children in these cases?

In any event, it now appears that a nonparent must allege some quantum of harm from parental custody in order to gain standing under the unsuitability language.[379] It appears the harm can be less than the required showing of unfitness for removal or termination of parental rights. To obtain custody based on this ground, however, the nonparent bears a higher burden of proof than the "preponderance of evidence" standard used in determining "best interests" in custody disputes between two parents or nonparents. This burden is met not merely by weighing and arguing from the "totality of circumstances," but by showing "clear and convincing" evidence of parental "unsuitability."[380] However, *de facto* parents will have rights equal to

374. *See supra* note 352 and acompanying text.

375. *See, e.g., In re* Frank, 248 P.2d 553, 554-55 (Wash. 1952) (finding that where the divorce decree awarded custody of an infant child of parties to its mother, and its father was not found to be unfit to have custody of infant, the father's right of custody of the infant as a natural parent revived automatically without any court order upon the death of the infant's mother).

376. *See supra* notes 353, 359 and accompanying text.

377. *See supra* note 350 and accompanying text.

378. *See* Ross v. Azcarate, 692 P.2d 897, 898 (Wash. Ct. App. 1984); *Frank*, 249 P.2d at 554 ("Upon the death of the mother the father's right of custody as a natural parent revived automatically without any court action."); State *ex rel.* Cummings v. Kinne, 111 P.2d 222, 224 (Wash. 1941) ("Upon the death of [the father, the mother] became immediately entitled to the custody of her sons.").

379. Under WASH. REV. CODE § 26.10.032(1) (2005), a nonparent "seeking a custody order [must] submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and set[] forth facts supporting the requested order." "The court [must] deny the [nonparent's] motion unless it finds that adequate cause for hearing the motion is established by the affidavits. *Id.* § 26.10.032(2). If adequate cause is found, the court then "set[s] a date for a hearing on an order to show cause why the requested order should not be granted." *Id.*

380. *See supra* notes 280-281.

biological parents in custody determinations if they can show parent-like commitments to the child and that the parent consented to and fostered the nonparent-child relationship.[381] In that event, common law standing will exist and a "best interests" analysis will apply in custody proceedings against a parent.[382] If, however, that consent is subsequently withdrawn by a non-consenting and non-custodial parent who succeeds to the legal custody of a deceased consenting custodial parent, the standard of proof is once again "detriment."[383]

V. ANALYSIS: COMPARING WASHINGTON'S NONPARENT STANDING AND CUSTODY APPROACH TO THAT OF OTHER STATES

The Washington Domestic Relations Code originally imposed a standing requirement quite different from that of other UMDA states.[384] Although the UMDA allows nonparents standing to petition for custody only upon an allegation that the child is "not in the custody of either parent," the Washington legislature added the alternative ground that "neither parent is a suitable custodian."[385] This additional language, as well as the subsequent ruling that "detriment" was to be the definition of "unsuitability,"[386] was intended to respect parental rights while allowing courts to consider the importance of other adults who have also provided support and nurturing to the child.[387] Recently, Washington courts have also ruled that *de facto* parents may claim common law standing and that the "best interests" analysis will apply between a parent and a *de facto* parent in custody proceedings unless legal custody suddenly reverts to a non-custodial parent who had not consented to the *in loco parentis* relationship with the third party.[388]

This early statutory approach to third-party custody disputes was commendable in that it moved away from the "adult-centric"[389] focus on parental "property rights" found in several other UMDA states.[390] Moreover, it seemed to do so on terms

381. *See supra* note 50-51 and accompanying text.

382. *See supra* notes 52-54 and accompanying text.

383. *See supra* note 355-366 and accompanying text.

384. *See* Blair, *supra* note 25, at 113-15.

385. *See* WASH. REV. CODE ANN. § 26.10.030(1) (West 2005).

386. *See In re* Marriage of Allen, 626 P.2d 16, 23 (Wash. Ct. App. 1981).

387. Blair, *supra* note 25, at 118-20.

388. *See supra* notes 347-349 and accompanying text.

389. "Law defines parenthood from a curiously adult-centric perspective that gives little currency to the ability of children to recognize and claim their mothers and fathers." Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1795 (1993) (discussing the importance of nurturing parenthood rather than biological parenthood).

390. Schlam, *supra* note 31, at 407-08. The UMDA's third-party standing provisions forced courts in several adopting states, such as Arizona, to focus primarily on whether a nonparent had sufficiently "adverse physical possession" to a parent. *See, e.g.*, Marshall v. Superior Court, 701 P.2d

consistent with common law presumptions of parental fitness, while greatly emphasizing the needs of children. A practically sole explicit concern with parental "property rights" was one of the many problems in states that simply incorporated the original UMDA third-party standing provision verbatim. In Illinois, for example, courts concern themselves with the issue of "legal possession" of children in order to protect the "superior rights" of parents.[391] Illinois courts enforce "parental preferences" as quasi-property rights.[392] There must, in other words, be clear proof of consensual and indefinite relinquishment of parental rights, often implied from parent abandonment in favor of third parties and "adverse possession" of sufficient duration, before third parties can even be *heard* on the ultimate best interests of the child.

However, the Illinois approach disparages the interests of those who, by reason of consistent nurture and day-to-day care, allow themselves to become psychological parents.[393] To pursue the best interests of the child in relationships with such adults, rather than ignoring them in favor of parental rights,[394] Illinois courts often have had to sidestep or ignore canons of statutory construction,[395] and utilize overly liberal interpretations of legal principles or concepts.[396] As a result, the nonparent custody

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567, 569 (Ariz. 1985). *See generally* Schlam, *supra* note 31 (discussing the adult-centric, property rights nature of Illinois jurisprudence in this area).

391. *See* Schlam, *supra* note 31, at 425.

392. *See id.* Parental rights are often based on notions of children as property. Kaas, *supra* note 18, at 1063. In practice, "[t]he child's [best] interests are often balanced against and frequently made subordinate to [parents'] . . . rights. GOLDSTEIN ET AL., *supra* note 7, at 54. Property concepts distort the modern focus on "best interests" in custody determinations as a result of the preservation of the archaic "superior rights" doctrine in the UMDA's third-party custody standing provision. *See, e.g.*, Eric P. Salthe, Note, *Would Abolishing the Natural Parent Preference in Custody Disputes Be in Everyone's Best Interest?*, 29 J. FAM. L. 539, 550 (1990-1991) (referring to preferences for natural parents as "archaic" and "harmful"). The UMDA's third-party standing provisions forced courts in many states, such as Arizona, to focus primarily on whether a nonparent had sufficiently "adverse physical possession" to a parent. Schlam, *supra* note 31, at 443; *see also* Levine, *supra* note 3, at 330.

393. *See* Woodhouse, *supra* note 389, at 1807.

394. *See* Schlam, *supra* note 31, at 443. "The bias against third-party custody . . . involves an assumption that the interests of most children are best served by protecting the rights of their parents. In some cases, however, if the best interests of children are evaluated independently, a conflict arises between the rights of parents and the welfare of their children." MAHONEY, *supra* note 3, at 140.

395. Schlam, *supra* note 31, at 443. "Absent legislative action, it is in the hands of the courts to interpret custody jurisdiction statutes in a way that protects both the stepparent and the stepchild who have established close emotional bonds." Levine, *supra* note 3, at 343 (suggesting that the *in loco parentis* doctrine operates as a means of doing so in states with UMDA-derived custody jurisdiction statutes); *see also, e.g.*, Stockwell v. Stockwell, 775 P.2d 611 (Idaho 1989).

396. "Often, [the conflict between children's and parents' rights] cannot be avoided without contorting principles of statutory construction, such as the 'plain meaning rule,' or creating irreconcilable precedent." Schlam, *supra* note 31, at 443 n.275; *see also* Joy McMillen, Note, *Begging the Wisdom of Solomon: Hiding Behind the Issue of Standing in Custody Disputes to Treat Children as Chattel Without Regard for their Best Interests*, 39 ST. LOUIS U. L.J. 699, 709 (1995)

provision in the original uniform law occasionally placed courts in the uncomfortable position of having to "cherry-pick" evidence to justify findings of voluntary and indefinite relinquishment of parental rights.[397]

Where nonparents had physical custody, and were the only parent figures that a child ever knew, they still had to show this relinquishment of rights.[398] Even if a deceased custodial parent had relinquished physical custody at some point, the other surviving non-custodial parent was free to later assert superior rights, excluding the *de facto* parents from an equal and even-handed debate over "best interests" in custody determinations.[399] Moreover, while scrutinizing competing legal rights to possession, courts often failed to engage in discourse over—let alone articulate useful reasoning regarding—which parent-child relationships ought to justify third-party standing or, for that matter, the appropriateness of standing decisions largely pre-determining custody determinations (regardless of whether or not that best serves the child's interests).[400]

Furthermore, a rigid preliminary non-parental "standing" requirement, as in the UMDA, is fundamentally unnecessary in the first place since parents already receive a presumption of entitlement in ultimate custody hearings.[401] Parents who have

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("Ironically, the same courts which purport to recognize this presumptive right to custody are also receptive to ignoring it where they deem appropriate . . . [or they] extricate themselves from a predetermined judicial conclusion by using the rubric of 'extraordinary circumstances.'").

397. As can be imagined, courts in states, such as Illinois and Arizona, often had difficulty placing children with the adults who presented the most promise for successful parenting. *See, e.g.*, Webb v. Charles, 611 P.2d 562, 565 (Ariz. Ct. App. 1980) (holding that a nonparent must show the child is not in the physical possession of one of his or her parents, even if the best interests of the child clearly seem to require custody in nonparents).

398. *See* Levine, *supra* note 3, at 328. Levine suggests as alternative criteria for standing that the third party: 1) has accepted the child into the home; 2) has supported the child emotionally and financially; 3) has involved him or herself in the day-to-day care of the child; and 4) intends to assume the burdens and duties of a parent. *Id.* at 329-31.

399. *See, e.g.*, Harper v. Tipple, 184 P. 1005, 1007-08 (Ariz. 1919); *see also, e.g., In Re* Custody of R.R.K., 859 P.2d 998, 1003 (Mont. 1993) (holding that "[s]tanding . . . does not depend on who has actual, physical possession of the child at the moment the petition is filed. Rather, the court should focus on whether the [*surviving*] parent actually relinquished physical custody of the child and how long the parent and child were separated."). Unfortunately, this has become the rule in Washington as well. *See supra* notes 295-303 and accompanying text.

400. *See, e.g.*, Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 4 (1997) ("Under contemporary approaches to child custody decisionmaking, the decision of who qualifies as a parent clearly affects the outcome of the application of the best interest of the child standard. Although the rhetoric remains centered on the child, the focus in child custody decisionmaking is, in actuality, displaced from the child's best interests to the parents' rights.").

401. The fundamental, natural right of parents is already independently given due deference when custody determinations are made. *See supra* notes 25-26 and accompanying text. In early, pre-UMDA custody cases purporting to apply a best interest test, for example, the courts used "innocent sleight-of-hand in juggling legal concepts" to avoid awarding custody to a nonparent. Sayre, *supra* note 113, at 677 & n.33. Today, "judges speak in terms of rebutting presumptions, [and] identify

properly maintained appropriate relationships with their children should, of course, clearly enjoy a preference in custody determinations.[402] However, if they have not done so, those who have become "psychological" parents should at least be able to be heard as to custody on an *equal* footing with natural or adoptive parents.[403]

Many states have long found means of awarding standing to nonparents without requirements predominantly focused on the legal rights or personal inadequacies of parents, but which are instead focused on the third-party parent-child relationship. Several states, including Illinois under extraordinary circumstances, have used an "equitable parent" doctrine,[404] and Michigan courts allow stepparent standing under this doctrine if the nonparents seek status as parents and demonstrate their willingness to provide support for the child in addition to a desire to acquire "the reciprocal rights

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those factor that justify defeating a parent's claim for custody." Kaas, *supra* note 18, at 1122-23. "Courts . . . require a showing of 'extraordinary' or 'exceptional' circumstances before they will award custody to a nonparent[,] . . . includ[ing] the duration of the parent-child separation and the adverse effect that a change in custody may have on the child." Blair, *supra* note 25, at 117.

402. If the parent has maintained regular contact with the child, the chances of regaining custody are good. *See, e.g.*, Ariz. State Dep't of Econ. Sec. v. Mahoney, 540 P.2d 153 (Ariz. Ct. App. 1975). "The only ground sufficient to overcome the preference in favor of a capable parent[, at least in a reunification case, should be] proof that the change in custody [back to the parent] will cause the child significant and long-term psychological harm." Kaas, *supra* note 18, at 1117. However, "[t]he closer the bond between the nonparent and the child, the more likely the court will be to find that a move will cause emotional trauma to the child." *Id.* at 1119. "This emphasis on the impact on the child is not a novel [or recent] concept. Justice Joseph Story recognized[, quite some time ago,] that the question [in third party custody disputes] is 'whether [returning the child to the parent] will be for the real, permanent interests of the infant.'" *Id.* at 1117 n.376 (citing United States v. Green 26 F. Cas. 30, 31 (C.C.D.R.I. 1824) (No. 15,256)).

403. Actually, those "cases in which the child is living with a nonparent as a result of the formation of a second family and the subsequent absence o[f, or abandonment by,] the biological parent . . . is one of the few third-party custody cases in which a best interests approach is constitutionally permissible." Kaas, *supra* note 18, at 1098. If frivolous suits are a concern, they can easily be avoided with reasonable pleading requirements calculated to assure that a third party has had a significant impact on the life, health and well-being of a child, is willing to make a parent-like commitment, and that continuing the third-party relationship will not be detrimental to the child. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-415(a) (2001). Legislatures might deter the bringing of frivolous claims by imposing reasonable requirements that must be met before granting standing to stepparents, including: whether the stepparents have resided with the child for a certain length of time, whether they have assumed partial or primary financial responsibility for the child, whether the relationship began with the consent of the custodial parent, whether the child wants to continue the relationship, and whether doing so would not be detrimental to the child. *See* Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 GOLDEN GATE U. L. REV. 223, 256-57 (1994). Courts might do the same by granting standing after making finding of *in loco parentis* where the stepparent accepted the child into the household, supported the child financially and emotionally, was involved in the day-to-day care of the child, and intended to establish a parental relationship. Levine, *supra* note 3, at 329-31.

404. *See, e.g., In re* Marriage of Roberts, 649 N.E.2d 1344 (Ill. App. Ct. 1995); *see also* Bartlett, *supra* note 1, at 41-43.

of custody . . . afforded to a parent."[405] This notion of "equitable parenthood" has also been rejected by several states.[406]

Other state legislatures have attempted to overcome restrictive nonparent standing requirements by essentially eliminating the requirement of parental status altogether or broadening the concept of parent. Connecticut allows standing to any individual who is interested in intervening in child custody proceedings.[407] Oregon defines the requisite relationship for standing not in terms of biology, but in terms of the nurturing and support an individual has given the child.[408] These approaches have been applied, as in Washington with the recent recognition of *de facto* parenthood,[409] to allow jurisdiction even in the absence of a marriage between the parent and a petitioning stepparent.[410] In *Buness v. Gillen,*[411] for example, the Alaska Supreme Court held that a stepfather who had lived with the child's natural mother, but had not married her, had standing to petition for custody because he was a psychological parent.[412] The child had developed a strong emotional bond with him as he had been the child's primary caregiver and "father figure."[413]

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405. *E.g.*, Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. Ct. App. 1987). However, one Michigan court held that it would be contrary to the public policy in favor of marriage, to extend the doctrine to cases in which the stepparent "was not married to the natural parent of the child at the time the child was born or conceived." Van v. Zahorik, 575 N.W.2d 566, 569 (Mich. Ct. App. 1997) (recognizing that equitable parents should be created with the utmost case, and preferable with direction from the legislature). Thus, notions of equitable estoppel have limited utility, even in Michigan.

406. *See, e.g.*, Perry v. Superior Court, 166 Cal. Rptr. 583, 585-86 (Cal. App. 1980), *superseded by statute*, CAL. CIV. CODE § 4351.1, *as recognized in In re* Marriage of Goetz & Lewis, 250 Cal. Rptr. 30 (Cal. Ct. App. 1988).

407. CONN. GEN. STAT. ANN. § 46b-57 (West 2007); *see also* HAW. REV. STAT. ANN. § 571-46 (LexisNexis 2007) (establishing best interests standard for third-party custody cases); N.D. CENT. CODE § 14-09-06.1 (2007) (same). These and other states dissatisfied with the parental preference standard have made the best interest standard the sole test in all third-party custody disputes. *See* David R. Fine & Mark A. Fine, *Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49, 56 (1992). This may no longer be appropriate. *See generally* Troxel v. Granville, 530 U.S. 57 (2000).

408. OR. REV. STAT. § 109.119(1) (2005). The statute defines a parent-child relationship as: "[A] relationship that exists or did exist, . . . within the six months preceding the filing of an action . . . and in which relationship a person having physical custody of a child or residing in the same household . . . supplied . . . food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay, and mutuality, that fulfilled the child's psychological needs for a parent . . . ."). *Id.* § 109.119(10)(a).

409. *See supra* notes 137, 295-303 and accompanying text.

410. *See, e.g., In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (the contending parties were not married).

411. 781 P.2d 985 (Alaska 1989).

412. *Id.* at 988.

413. *Id.* at 989.

As for broadening the definition or concept of "parent," the Wisconsin Supreme Court has developed a two-pronged test for *in loco parentis* standing,[414] which is similar to, but somewhat of a variation on, Washington's *de facto* parenthood standing. It, too, would appear to allow standing for unmarried *de facto* parents. Third parties must establish that they had a parent-like relationship with the child *and* that some "triggering event" threatened that relationship.[415] To satisfy the "parent-like" relationship prong a petitioner must establish:

> a. [T]hat the biological or adoptive parent consented to, and fostered, the petitioner's relationship with the child;
> b. [T]hat the petitioner and the child lived together in the same household;
> c. [T]hat the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing toward the child's support, without expectation of financial compensation; and
> d. [T]hat the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependant relationship, parental in nature.[416]

This Wisconsin ruling, viewed as a whole, seems to indicate that if the appropriate parent-child relationship exists in the first place, there is continuing standing where that relationship is "threatened," arguably even by the death of the consenting parent. This approach would eliminate the problematic standing consequences in Washington for third parties who have been *in loco parentis* but who have that status revoked by surviving non-custodial parents.[417]

Surely, this minor modification to current Washington law would be justified. While still preserving non-custodial parental rights, it would allow a third party with what is often a more meaningful parent-child relationship than maintained by a non-custodial parent to still retain *in loco parentis* standing and be heard under the "best interests" standard which, after all, is applicable to two custodial biological parents.[418] Why should it not be applicable between a primary third-party caretaker and a non-custodial parent?

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414. *See In Re* Custody of H.S.H.-K., 533 N.W.2d 419, 423 (Wis. 1995).

415. *Id.* at 435-36.

416. Beth Neu, Casenote, *Family Law-Visitation-Wisconsin Brings Child visitation out of the Closet by Granting Standing to Nonparents in* Custody of H.S.H.-K., *533 N.W.2d 419 (Wis.)*, cert. denied, *116 S. Ct. 475 (1995)*, 37 S. TEX. L. REV. 911, 920 (1996) (footnotes omitted). The second prong, which requires some triggering event to occur that threatens the continuation of the parent-like relationship, sets a timetable for the claims of nonparents. *Id.* at 951. Under this prong, nonparents must make their claims when the threat occurs or within a reasonable amount of time thereafter. *Id.*

417. *See supra* notes 295-303 and accompanying text.

418. This is no longer possible under the *Shields* precedent. *See supra* notes 370-375 and accompanying text.

Two other sister-UMDA states have also modified their laws in potentially useful ways. In one state, far more surgically and obviously with earlier permanent placement in mind, and in the other, far more drastically than Washington has to this point. The changes in these states might also be worth considering as part of any future effort to improve "best interests" custody outcomes for children in Washington.

In Colorado, one of the eight states that adopted the third-party standing provisions in the original uniform law,[419] there is now an additional option that allows custody proceedings to be commenced "[b]y a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care."[420] This new option expands the number of adults with a legitimate and appropriate right to request custody while moving "best interests" determinations (and permanent placement) forward more quickly where necessary to a child's (especially an infant's) well-being.[421]

Minnesota, a UMDA state, took a far more radical approach by not just adding an alternative to the not in the custody of the parents requirement but by eliminating it altogether.[422]

The efforts of states that did not adopt the UMDA, such as North Carolina, also suggest potentially helpful modifications of Washington custody law that would accomplish what Minnesota did, which was to eliminate the need for third parties to show a period of "exclusive" caretaking while "not in the custody of a parent" to gain

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419. *See* Kaas, *supra* note 18, at 1069 n.101. Eight states adopted the UMDA third-party custody provisions: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. *Id.*; *see also* Robert E. Oliphant, *Redefining a Statute Out of Existence: Minnesota's View of When a Custody Modification Hearing Can Be Held*, 26 WM. MITCHELL L. REV. 711, 719 n.29 (2000); Kathleen Nemechek, Note, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 444 (1998) (describing the different approaches in adopting the UMDA).

420. COLO. REV. STAT. § 14-10-123(1)(c) (2007).

421. *See In re* Custody of C.C.R.S., 892 P.2d 246, 253 (Colo. 1995) (finding that nonparents had "physical custody" because the natural mother "voluntarily relinquished physical custody of [her child] to [them] the day after he was born . . . . [Mother and child] were separated from one another during the crucial bond-forming time at infancy," and the child had been in the home of the nonparents and under their control for six months). There has been a similar effort in at least one non-UMDA state, Pennsylvania, where the legislature has allowed persons such as grandparents to establish standing to seek custody of child who is not dependent or at risk, if they can "demonstrate *twelve months* of in loco parentis status, in addition to other factors." *See* T.B. v. L.R.M., 786 A.2d 913, 921 (Pa. 2001) (emphasis added) (citing 23 PA. CONS. STAT. ANN. § 5313(b) (West 2001)).

422. *See* MINN. STAT. ANN. § 518.156 (West 2007). Minnesota, another state that adopted UMDA section 401, also differs from the original UMDA section 401 in that, when a nonparent commences a custody proceeding, that person no longer has the prove that the child is not in the physical custody of one of his parents. *See id.*; *see also* Lawrence Schlam, *Third-Party Custody Disputes in Minnesota: Overcoming the "Natural Rights" of Parents or Pursuing the "Best Interests" of Children?*, 26 WM. MITCHELL L. REV. 733 (2000).

standing.[423] Such changes might be beneficial to children's ultimate interests because, assuming they are necessary at all, standing requirements should focus on the extent to which a third-party child relationship has developed rather than, as in Washington, on inhibiting such an ultimate inquiry by demanding initial standing inquiry into the question of whether parental behavior may or may not be "detrimental." It would seem advantageous to allow all those with caregiving relationships—and who actually want to participate in the child's life—to at least be *heard* on "best interests." At least one state appears to provide for just that. An example of this "child-centric" approach to standing for nonparents who are actual caregivers and sensitivity to the relationship between standing and custody determinations is found in *Ellison v. Ramos*.[424]

In that North Carolina decision, the court had occasion to interpret the state's third-party custody provision which provides that "[a]ny parent, relative, or *other person* . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child."[425] In *Ellison*, a father's former companion sued him for custody of his diabetic daughter.[426] She alleged that during her relationship with the father, she, rather than the father, was responsible for rearing and caring for the child.[427] She further alleged that the father wanted to take the child to Puerto Rico to live with the child's paternal grandparents even though they were incapable of meeting the child's special needs.[428] In resolving a motion to dismiss, the court noted that the statute's goal is to "promote the best interests of the child in all custody determinations"[429] and that it was appropriate for the court to consider the relationship between the child and the third party in making its determination.[430] The court further noted that a "broad grant of standing" is not provided to any party who

423. *See* MINN. STAT. ANN. § 518.156 (current statute simply provides that a petition for custody may be filed by a person other than a parent, "where a decree of dissolution or legal separation has been entered or where none is sought, . . . by filing a petition or motion seeking custody or [visitation of] the child in the county where the child is permanently resident or where the child is found or where an earlier order for custody of the child has been entered").

424. 502 S.E.2d 891 (N.C. Ct. App. 1998).

425. N.C. GEN. STAT. § 50-13.1(a) (2005).

426. *Ellison*, 502 S.E.2d at 892.

427. *Id.* at 893.

428. *Id.*

429. *Id.* at 894. "What is in the best interests of the child is now considered to be the most important, overriding factor in a court's decision awarding custody." KRAMER, *supra* note 7, § 2:4. "In some [of these] states, . . . [it] is said to be the exclusive factor on which a court should base its custody decisions." *Id.*

430. *Ellison*, 502 S.E.2d. at 894. "Accordingly, we hold that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." *Id.*

alleges some interest in obtaining custody of the child.[431] However, standing existed here because the petitioner had in fact alleged such a "relevant" relationship.[432]

As to whether the petitioner also stated a claim for *custody*, given "the constitutionally mandated presumption that, as between a natural parent and a third party, the natural parent should [presumably] have custody,"[433] the court reasoned that:

> [T]he parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. . . . [C]onduct . . . inconsistent with . . . [the parent's] protected status, . . . *which need not rise to the statutory level warranting termination of parental rights,* would result in application of the *"best interests of the child" test* without offending the Due Process Clause.[434]

Thus, in North Carolina, even "'a period of voluntary [and *non-exclusive*] non-parent custody' could constitute 'conduct inconsistent with a parent's protected status' where the *parent* did *not* indicate . . . [that the] non-parent custody was intended to be temporary."[435] Equally as important, under these extraordinary circumstances "best interests" analysis would apply between the parent and nonparent. Otherwise, "the action [would have been] appropriately dismissed, as the natural parent presumption . . . would defeat the claim as a matter of law."[436]

As compared to Washington's modified-UMDA approach, North Carolina reduces "parental rights" concerns from the jurisdictional or standing stage and, at the

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431. *Id.*

432. *Id.* at 895; *see also* Smith v. Barbour, Nos. COA04-792 & COA04-1144, 2005 WL 1150397, at *8 (N.C. Ct. App. May 17, 2005) ("Yet even as a third party, [Smith] had standing to bring this action because the district court's findings that the child shared [Smith]'s last name and [Smith] had visited the child since her birth two years prior to this action indicated the existence of a sufficient relationship.") (alteration in original).

433. *Ellison*, 502 S.E.2d. at 896 (emphasis added); *see also* Mahoney, *supra* note 257, at 79 (arguing that a clearly articulated and uniform standard to determine custody should be used once jurisdiction is established).

434. *Ellison*, 502 S.E.2d at 896 (emphasis added). The Due Process Clause is not offended by the application of the best interests test to recognize a family already in existence. Quilloin v. Walcott, 434 U.S. 246, 255 (1978). The United States Supreme Court has recognized a "fundamental liberty interest of natural parents in the care, custody and management of their child." Santosky v. Kramer, 455 U.S. 745, 753 (1982).

435. *Ellison*, 502 S.E.2d at 897 (emphasis added) (quoting Price v. Howard, 484 S.E.2d 528, 536-37 (N.C. 1997)). Perhaps most significant, the court sustained the petition even where the "period" of nonparent custody was *non-exclusive. See id.* Also, contrary to current Washington law, the court noted that the burden shift to the parent to show that nonparent custody was *not* intended to be temporary. *Id.*

436. *Id.*

hearing stage, emphasizes the child's "best interests" by simply determining if circumstances are such that meaningful third-party relationships should trump the presumptive rights of fit parents. It is not inconceivable that, by comparison, the Washington Supreme Court in *Allen* construed "unsuitability" too narrowly by conflating it with "actual harm or detriment,"[437] thus making an approach similar to North Carolina's impossible. Arguably, the potential harm to the child in *Ellison* was far closer to "speculative" than "actual." The child's needs could still have been served through a court order consistent with paternal custody. Thus, while North Carolina may lack a clear "definition" of the circumstances under which deference to parental rights can give way, certainly in that state circumstances other than *actual* "detriment or harm" can legitimately show the *more* than best interests but *less* than unfitness constitutionally required for non-parent custody.[438]

Arizona, yet another sister UMDA state, radically revised its child custody law ten years ago as part of an effort to help third parties who had "meaningful relationships" with a child, obtain custody and visitation.[439] The Arizona legislature added an *in loco parentis* standing requirement[440] intended to be less burdensome than proving that a child was not in the custody of a parent. In a somewhat subtle variation from the Washington standard, the status of *in loco parentis* is defined as "a person who has been treated as a parent *by the child* and who has formed a *meaningful parental relationship* with the child for a *substantial* period of time."[441] This is obviously not a status defined by parental consent, as in Washington, but by a nonparent-child relationship that may be presumed to have "bonded," and contrary to the recent Washington decision in *Shields*, the views of the child would be quite pertinent. According to the legislature, this new provision was necessary because: "Due to [the] current statute's premising of the word 'parent' almost exclusively on biology, the courts have been prevented from applying the traditional 'best interest' test in cases where a child is essentially raised by a non-biological parent."[442]

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437. *See* Blair, *supra* note 25, at 127.

438. *Ellison*, 502 S.E.2d at 896-97.

439. *See* ARIZ. REV. STAT. ANN. § 25-415(A)(1), (G)(1) (2002).

440. *Id.* § 25-415(A).

441. *Id.* § 25-415(G)(1) (emphasis added).

442. Fact Sheet for H.B. 2470 (nonbiological parents), 43d Leg. 1st Reg. Sess. (Ariz. 1997). "[U]nless a parent has surrendered legal rights to the child . . . persons other than parents are not entitled to commence a custody proceeding under this section of the law." Schlam, *supra* note *, at 752; *see also* Bupp v. Bupp, 718 A.2d 1278, 1281 (Pa. Super. Ct. 1998); Bartlett, *supra* note 1, at 42 n.155 (using the case of *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995), to exemplify equitable parenthood: "under equitable parent doctrine, husband allowed to bring claim for custody of two-year-old child whom he had treated as his own during the marriage and with whom he had developed a parent-child relationship, when wife told husband that another man was the child's father only after home placement study following dissolution proceedings favored husband's custody"); *id.* at 42 n.156 (noting that "Pennsylvania recognize[d] the doctrine of '*in loco parentis*' to afford standing to maintain a custody action (with the same substantive rights and obligations of a legal

The Arizona legislature also wished to maintain protection for parental rights. Under the Arizona provision a third party may petition for child custody regardless of whether the child is in the "physical custody" of a parent provided that:

1. The person filing the petition stands in loco parentis to the child.
2. It would be significantly detrimental to the child to remain or be placed in the custody of either of the child's living parents who wish to retain or obtain custody.
3. [And one of several additional circumstances exist].[443]

The law, however, protects the superior right of parents in custody *dispositions* by stating that:

> If a person other than a child's legal parent is seeking custody there is a *rebuttable presumption* that it is in the child's *best interest* to award custody to a legal parent because of the physical, psychological and emotional needs of the child to be reared by the child's legal parent. To rebut this presumption that person must show *by clear and convincing evidence that awarding custody to a legal parent is not in the child's best interests.*[444]

The advantages of this scheme over current Washington law are threefold. First, the "child's view" (not just a parent's "behavior") helps to define *de facto* parent relationships for standing purposes. Second, the implication, viewing the statute as a whole, is that standing from such a relationship does not simply evaporate upon the death of a custodial parent who fostered the *in loco parentis* relationship. Finally, parental rights at custody hearings are protected by simply, and explicitly, heightening the burden of proof of nonparents to show the child's "best interests" are not met through parental custody. This is met by compelling nonparents to overcome a presumption of the appropriateness of parental custody, rather than heightening the standard of proof to require not just that "best interests" be shown under the "totality of the circumstances" but that parental custody will harm the child.

A recent informative example of the application of this approach is *Downs v. Scheffler*,[445] in which an Arizona Court of Appeals (post-*Troxel*) analyzed the relationship between the state's new standing requirement and the statutory factors for determining the "best interests" of children in custody determinations.[446] After a hearing on a grandmother's petition, the trial court concluded that it was in the child's best interests to remain in the mother's sole legal custody because the grandmother

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parent) to an individual who assumed obligations for a child incident to a parental relationship with consent of the legal parent").

443. ARIZ. REV. STAT. ANN. § 25-415(A).

444. *Id.* § 25-415(B) (emphasis added).

445. 80 P.3d 775 (Ariz. Ct. App. 2003).

446. *See generally id.*

did not overcome the statutory parental presumption by establishing that it would be "significantly detrimental" to the child to remain with her mother.[447] The family court's decision was not supported by any factual findings, and on appeal the court stated that:

> The [trial] court may not decide a custody petition on the merits without findings, even when a basis for its custody award is that the petitioner failed to establish an initial statutory pleading element. . . . [*A*] *determination on the merits that a particular custody choice would or would not be "significantly detrimental" to a child also requires an evaluation of the child's best interests* . . .[448]

Further, and most pertinent, the court of appeals noted that:

> [Nothing] in the statute necessarily requires [a third party] to show that [a parent] is an inappropriate parent to overcome the presumption in favor of legal parent custody. Rather, . . . [the nonparent] must overcome the presumption . . . by clear and convincing evidence that it would *not be in [the child's] best interests* for the court to award custody to [the mother]. And . . . [presumably as part of that "best interests" showing, the non-parent] bears at least *some burden* of establishing that it would be *significantly detrimental* to [the child] to remain in her mother's custody.
>
> . . .
>
> . . . [Precluding] an examination of the child's best interests until a parent's lack of fitness is established [, however,] prevents the court from considering a child's best interests in *giving appropriate weight* to a fit parent's constitutional right to rear the child in circumstances where such rights are implicated. . . .
>
> . . . It is inappropriate to defer an examination of the child's best interests until parental inappropriateness is established.[449]

This decision is instructive in that it seems to recognize that, in practice, a determination of "unsuitability" in Arizona (and arguably, by analogy, in Washington as well) is usually intertwined with a determination of "best interests." It also suggests that the Washington court in *Shields* may have erred on the side of parental rights by demanding of nonparents a primary and exclusive focus on "detriment" instead of "best interests" as their standard of proof at trial rather than simply protecting parent's custodial rights by requiring a heightened burden of proof of "unsuitability" as part of a "best interests" analysis. In Arizona, judicial interpretation has arguably clarified the relationship between the "detriment" required for standing and the ultimate custody determination. Arizona courts have emphasized

447. *Id.* at 779.

448. *Id.* at 780 (emphasis added).

449. *Id.* at 781 (emphasis added).

the fact that the resulting "best interests" custody determination must include, but is not necessarily solely determined by proof of "some significant detriment" (not "actual harm").[450]

Washington, through its early innovative modification of the UMDA and subsequent judicial interpretations of its nonparent standing provision, better serves children's interests than do several other UMDA states. Yet this is perhaps not true as compared to all such states. In Washington, unhelpful and perhaps excessive concern for parental property rights at the jurisdictional or standing stage and impediments to advancing children's "best interests" at custody hearings still remain. One potential problem may be the lack of any explicit legislatively or judicially broadened definition of "unsuitability" beyond actual parental "detriment." Matters might also be improved by the recognition that, at custody hearings, parental preferences and *de facto* parental relationships should appropriately be factored into and included as part of a "totality of circumstances" viewed in determining "unsuitability" (the statutory standard, after all) and thus the "best interests" of children.

Moreover, it might be helpful for the legislature to make clear that a child's interests are not served by allowing a non-custodial parent, as in *Shields*, to destroy the importance and effect in custody determinations of meaningful nonparent-child relationships fostered by custodial parents. Finally, rather than solely requiring a focus on proof of "actual harm" from parental custody at trial, courts might accomplish the same purpose (preserving parental preferences) by simply placing on nonparents an increased burden of proving by clear and convincing evidence a more broadly defined "unsuitability." These modest changes in direction might more adequately take appropriate account of both parental rights and the "best interests" of children than the present regime.

VI. CONCLUSION

Although the controlling question in Washington custody determinations had long been the best interests of the child, the state had also maintained a parental "superior rights" presumption, having first articulated and employed the doctrine in the late nineteenth century. In those early years, parents continually prevailed in asserting their superior rights notwithstanding arguments that this would be to the detriment of children. However, children's interests in continued custodial relationships with caring third parties were often vindicated given "extraordinary circumstances," such as a duration of custody with nonparents sufficient to indicate voluntary and indefinite parental abandonment. Indeed, by the 1920s, judicial focus had begun to shift toward vindication of the "best interests" of children, in particular where parents sought to *regain* custody from third parties.

During the post-war period, the court continued this trend, with decisions often resulting in custody in the nonparents, and by the 1970s the Washington Supreme

450. *See supra* notes 435-437 and accompanying text.

Court expressly rejected the primacy of the "superior rights" doctrine. Parental "unfitness" was no longer required where third parties sought custody. Moreover, the nature of the "extraordinary circumstances" that might allow children to remain with or revert to third parties were essentially within the subjective discretion of trial courts. Consequently, during the 1970s, for these reasons, many state legislatures began to perceive modern custody decisions in their states as dangerous precedent which gave trial judges authority to arbitrarily remove children from parents regardless of parental rights protected both by the constitution and the common law.

In response, many states adopted the third party standing provisions of the 1973 UMDA, whose drafters were also inclined toward this view, in order to reinforce the superiority of parental rights. This new uniform law promulgated an initial standing or jurisdictional barrier, not previously required under statutory law, that would limit third parties' right to even petition for custody to only those situations where children could be shown to "not [be] in the physical custody of either parent." There have been, however, a number of legal, practical, and theoretical problems with this requirement in several states that adopted the uniform law verbatim. Moreover, in its original form, the UMDA provision would have reversed the common law in Washington, which had been trending toward a focus on the "best interests" of children in custody determinations.

Therefore, in adopting section 401(d) of the UMDA, the Washington legislature wisely added language under which a nonparent could also petition for custody when neither parent is a suitable custodian. At the time, this "unsuitability" language was seen as an effort to more accurately reflect third-party custody common law in Washington. "[T]he 'unsuitability' requirement [was characterized as] both less stringent than the old 'unfitness' requirement and a means of balancing the parents' legitimate interests with the child's needs[,] . . . a significant movement toward favoring the child's interests over the parents' absolute rights."[451] However, when this language was definitively interpreted in 1981 in the case of *In re Marriage of Allen,* the court held that a stepparent should have standing under the unsuitability standard only where parental custody can be shown to actually be detrimental to a child's interests, arguably a relatively narrow construction of unsuitability.[452]

While the *Allen* opinion was initially criticized, the criticism has proven not to be true in some respects, but it did anticipate significant confusion in subsequent interpretation of the law. A return to the old early twentieth century standard has not occurred in the sense that "unfitness" need not presently be shown for third-party standing, and "detriment," while it *has* been construed to mean "harm," has not been construed to mean *extreme* harm."[453] Indeed, a few subsequent interpretations of the "suitability" provision arguably suggested that the Washington courts had indeed "adopted the best interests of the child standard for [adjudicating] cases arising under

451. Blair, *supra* note 25, at 119-20 (footnotes omitted).

452. *See supra* notes 281-285 and accompanying text.

453. Blair, *supra* note 25, at 127.

[the nonparent standing provision]."[454] Recent Washington case law, however, has reminded the bench and the bar that strict scrutiny must be applied to judicial interferences with parental rights, and that such interferences must be narrowly tailored to satisfy the state's compelling interest in child protection and safety.

Therefore, the more demanding *Allen* standard of "detriment to the child's mental or physical health" has, in the modern era, been reinforced as an appropriate standard of proof for custody. It narrowly tailors "interferences" to achieving the clearly compelling state interest in avoiding harm to children. However, the original intent behind the statutory grant of standing and custody to a nonparent based on "unsuitability" was to insure only a showing greater than that a child's best interests will be served, but less than the unfitness that might be required to terminate parental rights, and not necessarily that detriment will be avoided by not returning a child to a parent.[455] Serving the best interests of children in custody is a compelling state interest and such a standard as applied would not only prevent potential "harm," but allow for the myriad of "extraordinary circumstances" when parental custody might no longer be appropriate, desirable, or suitable. Moreover, requiring that nonparents prove "actual harm" for *standing* purposes unnecessarily limits participation by third parties with significant parent-child relationships and, as a basis for custody determinations, conceivably leaves many deserving third-party relationships unprotected while minimizing the views of children as to their own best interests.

In any event, under the current statute nonparent *standing* in a custody action not brought under the dissolution provision exists where a parent is unfit, the child is "not in the physical (legal) custody of a parent," or where custody in a parent might be "unsuitable," a phrase construed to mean that custody in a parent would be "detrimental" to the child's physical or mental well-being.[456] Nonparents, however, may commence a proceeding for custody of a stepchild in a dissolution action in the same manner as a parent if they stand *in loco parentis* to the child. If a nonparent can allege parent-like commitments to the child and that the parent "consented to and fostered the parent-child relationship," common law standing will exist. Such *de facto* parents will have rights equal to biological parents. A "best interests" analysis, which weighs the "totality of circumstances," will apply in third-party custody proceedings between both parties with "parental rights." The burden will rest on the nonparent to show "best interests" by the "preponderance of evidence" standard, which is used between two parents or nonparents to obtain custody. On the other

454. *Id.* at 128.

455. This standard is not even required under the United States Constitution. *See supra* notes 86-101 and accompanying text.

456. *See, e.g.*, Chapman v. Perera, 704 P.2d 1224, 1227 (Wash. Ct. App. 1985) ("[A] custody determination between the natural parents must be made in the child's best interests. Between a parent and a nonparent, however, a more stringent test is applied: custody may be awarded to a nonparent as against a natural parent only where 'placing the child with an otherwise fit parent would be detrimental to the child . . .'" (quoting *In re* Marriage of Allen, 626 P.2d 16, 23 (Wash. 1981)).

hand, at present, should a non-custodial parent succeed to a custodial parent's legal right to custody and oppose continuing the existing *de facto* parent relationship, the standard of proof, with the burden on the nonparent, shifts back to a showing of "detriment" by clear and convincing evidence.

Arguably, however, "detriment" represents an unnecessarily high standard of proof of the "more than best interests but less than unfitness" finding required when balancing the circumstances, "extraordinary" or otherwise, to determine nonparent custody. The term "unsuitable" would seem to encompass more than just "detriment" or "harm" to children at the hands of parents. It is therefore not inconceivable that *Allen* (and perhaps subsequent courts) construed this statutory phrase too narrowly, or that the current court may have erred in its recent *Shields* opinion by demanding a third-party standard of proof focused solely on "detriment" rather than "best interests," when it could have also protected parents' rights by simply requiring a heightened *burden* of proof of "unsuitability" under the "totality of circumstances" test. This latter test would include but not be limited to proof of potential or actual physical or emotional harm.

In promoting children's welfare in custody matters, Washington's legislature or courts should explicitly acknowledge that parental superiority presumptions, *de facto* parental relationships, and any "actual harm" to children from parental custody are all simply part of a "totality of circumstances" which point to the "best interests" of children. Rather than focusing primarily on whether clear and convincing proof of "actual harm" from parental custody can be demonstrated for standing and custody, why not simply place a similarly strong burden on nonparents to prove a more broadly defined unsuitability? Perhaps such changes in the current third-party custody paradigm might more fairly and profoundly promote both parental rights and the "best interests" of children.