STANDING IN THIRD-PARTY CUSTODY DISPUTES IN ARIZONA: BEST INTERESTS TO PARENTAL RIGHTS—AND SHIFTING THE BALANCE BACK AGAIN

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INTRODUCTION

With more than half of all marriages in America ending in divorce,[1] children are increasingly being raised in nontraditional families.[2] One out of every two children will spend some time living in a stepfamily.[3] Often a nonparent is the "one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, [fulfills] the child's psychological need for a parent."[4] That person is essential to a child's development and well-being: the emotional bonds children form with these nonparents can be as strong and meaningful as bonds between biological and adoptive parents and their children,[5] and often even stronger.[6]

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1. In 1990, the United States had the highest divorce rate among advanced Western nations; 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 6.

2. MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 1 (1994). The nuclear family is no longer the dominant family model; it is now estimated that only twenty-one percent of American households are traditional nuclear families. *Id*. at 1–2 (citing 1991 STATISTICAL ABSTRACT OF THE UNITED STATES, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NO. 61 HOUSEHOLDS—STATES: 1980 and 1990, at 48 (reporting 91,947,000 households in 1990); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P23-180, MARRIAGE, DIVORCE & REMARRIAGE IN THE 1990'S, 10 tbl.L (Oct. 1992) (reporting 19,589,000 married couple households with biological and adopted children in 1992)); *see also* 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 grow up as part of a stepfamily); Jennifer Klein Mangnall, Comment, *Stepparent Custody Rights After Divorce*, 26 SW. U. L. REV. 399, 400 (1997).

3. Virginia Rutter, *Lessons from Stepfamilies*, PSYCHOL. TODAY, May–June 1994, at 30. By 1995, approximately one-third of all children under eighteen were living in stepfamilies. L.L. Bumpas et al., *The Changing Character of Stepfamilies: Implications of Cohabitation and Non-marital Childbearing*, 32 DEMOGRAPHY 425–36 (1995). Scholars predict that by the year 2010, stepfamilies will be the dominant family type. E.B. Visher & J.S. Visher, *Stepparents: The Forgotten Family Member*, Presentation at the Second World Congress on Family Law and the Rights of Children and Youth, in San Francisco, Cal. (June 1997).

4. 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 2, at 419 (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* James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. TOL. L. REV. 805, 808 (1995).

5. Arlene B. Huber, *Children at Risk in the Politics of Child Custody Suits: Acknowledging Their Needs for Nurture*, 32 U. LOUISVILLE J. FAM. L. 33 (1993–94). "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 2, at 403 (citing Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 902 (1984)). *See also* Susan H. v. Jack S., 37 Cal. Rptr. 2d 120 (Ct. App. 1994) (holding that the relationship between a child and

Unfortunately, third-party "psychological parents,"[7] those who have stood *in loco parentis*, have been faced with obstacles not faced by biological or adoptive parents.[8] They have often been precluded from petitioning for custody of a child with whom they have a meaningful bond if they cannot meet fairly rigid jurisdictional or "standing" requirements.[9] These requirements were incorporated into child custody law early in Arizona state history—and later with the adoption of the Uniform Marriage and Divorce Act ("UMDA") provisions in 1973—as a means of reinforcing the "superior rights" doctrine.[10] This doctrine creates a legal presumption of long standing in most states, including Arizona,[11] that a parent,

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the man he knows as his father does not disappear upon a divorce between him and the child's mother).

6. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (1973) (suggesting resolving custody disputes by recognizing the importance of this sort of psychological parent, rather than focusing on the biological aspects of parenting). This book, which attempted to integrate legal standards with current psychological theories, resulted in the articulation of a standard known as "the least detrimental alternative," which, it was suggested, should replace the "best interests" rule currently utilized by courts today. LEGAL RIGHTS OF CHILDREN 52–53 (Donald T. Kramer ed., 2d ed. 1994). These notions have arguably found their way into contemporary Arizona custody law.

7. *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 (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).

8. 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 5, at 912; David 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 B. Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 B.Y.U. J. PUB. L. 321, 335 (1994) (arguing that when two adults have raised a child together in the context of a nuclear family setting, there should be no significance attached to the nonexistence of a biological or legal connection between the child and one of the parents).

9. This is referred to as a "standing" requirement because, in distinguishing section 25-401 of the Arizona Revised Statutes from traditional jurisdictions, section 25-401 has been defined as *limiting* the superior court's exercise of *existing* jurisdiction. Finck v. O'Toole, 880 P.2d 624, 626 (Ariz. 1994) *superseded by statute*, ARIZ. REV. STAT. ANN. § 25-415 (2001), *as recognized in* Riepe v. Riepe, 91 P.3d 312 (Ariz. Ct. App. 2004). The trial court acting under section 25-401, in other words, lacks jurisdiction to grant custody to anyone other than a natural parent. *Id.* Further, in order to construe sections 25-401(B)(1) and 25-401(B)(2) uniformly, courts find that section 25-401(B)(2) contains a standing requirement. *See* Marshall v. Superior Court, 701 P.2d 567, 569–70 (Ariz. 1985) (holding that the third-party "standing" requirement was devised to protect the parental rights of custodial parents); *see also* Webb v. Charles, 611 P.2d 562, 564 (Ariz. Ct. App. 1980) (finding that if a nonparent wants to acquire custody of a child, he or she must commence proceedings under far more stringent standards).

10. *See infra* notes 25–41.

11. *In re* Appeal in Maricopa County Juvenile Action No. JD-4974, 785 P.2d 1248 (Ariz. Ct. App. 1990).

unless he or she is in some broad sense "delinquent," is the best person to raise and nurture a child.[12]

The Uniform Marriage and Divorce Act,[13] drafted and promulgated more than thirty years ago, contains a provision greatly strengthening the "superior rights" preference for granting standing to biologically related parents. It disallows third-party standing in custody disputes except under the most narrow circumstances. In states that have adopted the UMDA, third parties can request visitation or custody in a dissolution action only if they are parents.[14] However, someone "*other than a [biological or adoptive] parent*" can petition for custody—regardless of parental fitness—but "*only if the child is not in the physical custody of one of the child's parents*."[15] These provisions are:

> [D]evised to protect the "parental rights" of custodial parents and to insure that[, if the child is in the custody of a parent,] intrusions upon those rights will occur only when the care the parent is providing the child falls short of the minimum standard imposed by the community at large—the standard incorporated in the neglect or delinquency definitions of the state's Juvenile Court Act.[16]

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12. 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. 1958) (Tate, J., concurring). In others, it is a "prima facie right." *See, e.g.*, *In re* Custody of Hernandez, 376 A.2d 648, 654 (Pa. Super. Ct. 1997). 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 1994). This is known as the "doctrine of parental preference." *In re* Marriage of Gayden, 280 Cal. Rptr. 862, 865 (Ct. App. 1974). 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 (Ala. Civ. App. 1991), *appeal after remand*, 600 So. 2d 1034 (Ala. Civ. App. 1992); Ethredge v. Yawn, 605 So. 2d 761 (Miss. 1992); *In re* Feemster, 751 S.W.2d 772 (Mo. Ct. App. 1988); Uhing v. Uhing, 488 N.W.2d 366 (Neb. 1992); Abaire v. Himmelberger, 558 N.Y.S.2d 678 (1990); Michael T.L. v. Marilyn J.L., 525 A.2d 414 (Pa. Super. Ct. 1987); *In re* Guardianship of Sedelmeier, 491 N.W.2d 86 (S.D. 1992); Pribbenow v. Van Sambeek, 418 N.W.2d 626 (S.D. 1988); Brown v. Dixon, 776 S.W.2d 599 (Tex. App. 1989).

13. UNIF. MARRIAGE & DIVORCE ACT, §§ 101–309, 9A(1) U.L.A. 159 (1988 & Supp. 1999); §§ 310–506, 9A(2) U.L.A. 1 (1988 & Supp. 1999).

14. *See, e.g.*, Finck v. O'Toole, 880 P.2d 624, 626 (Ariz. 1994), *superseded by statute*, ARIZ. REV. STAT. ANN. § 25-415 (2001), *as recognized in* Riepe v. Riepe, 91 P.3d 312 (Ariz. Ct. App. 2004).

15. ARIZ. REV. STAT. ANN. § 25-401(B)(2) (2001) (emphasis added).

16. UNIF. MARRIAGE & DIVORCE ACT § 401, 9A(2) U.L.A. 264. One of the drafters of this provision has 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 . . . , [the alternative of] 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

This "not in the physical custody" approach to nonparental standing (with some subsequent modifications or repeals in other states),[17] was incorporated into the law of Arizona,[18] Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington.[19] Third-party custody claims that fail to meet this standing requirement never receive review under the "best interests" standard, which is ordinarily the basis for custody determinations between biological parents.[20]

There are, however, a number of other problems with the UMDA's rigid third-party standing requirement (that the child must "not [be] in the physical custody of a parent"). This language unnecessarily duplicates the efforts of state Adoption and Juvenile Court Acts,[21] which already protect the legitimate interests

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> 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) (citations omitted) (speculating on 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 additionally the difficulties with attempting to liberalize third-party standing requirements in order to use them as "aspirational legal doctrines").

17. *See, e.g.*, WASH. REV. CODE ANN. § 26.09.180 (West 1986), *repealed by* 1987 Wash. Laws ch. 460 § 61. *But see* WASH. REV. CODE ANN. § 26.10.030 (West 1997 & Supp. 1999) (augmenting the third-party standing language found in the UMDA by allowing a person other than a parent to file a petition for custody in the county where the child is a permanent resident or where the child is found "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)); *infra* Part III.A.

18. In 1973, Arizona adopted section 401(B)(2) of the Uniform Marriage and Divorce Act. *See* ARIZ. REV. STAT. ANN. § 25-401 (2001). Arizona also adopted the Uniform Child Custody Jurisdiction and Enforcement Act. *See id.* § 25-1001 (2001). It sets forth the circumstances under which a court possesses the subject matter jurisdiction necessary to make a child custody determination by initial or modification judgment. *Id.* Personal jurisdiction over the child is not required if the child's home state at the beginning of the dissolution proceedings is the same as that of the trial court. *Id.* § 25-1031(A)(1).

19. *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 n.102 (1996).

20. For quite some time, the "controlling question" in custody determinations in Arizona has been what ruling will accommodate the best interests of the child. *See, e.g.*, Dickason v. Sturdavan, 72 P.2d 584, 586–87 (Ariz. 1937); 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).

21. For example, "abandonment" such as will ordinarily invoke the neglect or dependency jurisdiction of the Juvenile Court Act is any conduct which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. *In re* Appeal in Pima County Severance Action No. S-1607, 709 P.2d 871, 872 (Ariz. 1985). *See also In re* Appeal in Maricopa County Juvenile Action No. JS-501568, 869 P.2d 1224 (Ariz. Ct. App. 1994) (affirming a grant of custody of a 5-year-old girl to the Arizona Department of Economic Security after a finding under the Juvenile Court Act that her mother abused

of parents. The "parental rights" presumption already applies at permanent custody hearings,[22] and the presumption often forces courts to focus on parental "property" rights *prior* to those hearings, unduly delaying the court's evaluation of the best interests of children *at* hearings. The UMDA, thereby, reversed the earlier inclination in Arizona to use a more liberal or practical definition of "parent" for purposes of standing in third-party custody disputes."[23]

The enactment of section 25-401 in Arizona, with its rigid standing requirements modeled on the UMDA, raises several questions: If the "superior rights" presumption is already in play in third-party custody determinations, why have an *additional* preliminary standing barrier reinforcing that presumption? If third parties rarely receive custody without proof of parental "unfitness," however defined, why require an earlier showing of "unfitness" to *ask* for custody in the first place? After all, 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.[24]

If the answer to these questions is that the standing requirement is necessary to avoid "frivolous" lawsuits by those with no "meaningful" relationships with children when it would be to a child's detriment to leave a parent, why not instead enact pleading requirements related to these issues that are more strict? How helpful is it for section 25-401(B)(2) to compel initial judicial

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drugs, failed to complete rehabilitation, and showed little interest in her child). Consequently, the petitions of parents who fail to support their children or who 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 (Sup. Ct. 1961); *see also infra* notes 169–73 and accompanying text.

22. *See supra* notes 19, 21; *infra* note 315. This is true because "[w]hether as a result of [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] that increase the probability of the natural parent winning." Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 154 (1963); s*ee also* JOHN M. 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. Note, *supra*, at 155 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 used 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).

23. *See, e.g.*, *infra* notes 118–40 and accompanying text.

24. After all, critics of GOLDSTEIN ET AL., *supra* note 6, say 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). For other criticisms of the conclusions of GOLDSTEIN ET AL., see Nanette Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304 (1974) (book review); Peter L. Strauss & Joanna B. Strauss, Book Review, 74 COLUM. L. REV. 996 (1974).

focus in child custody matters on *property* concerns—like duration of possession, the nature of acquisition, or proof of waiver of rights or interests—rather than on the nature of the existing *psychological* relationship needed to allow third-party standing to advocate a child's best interests in custody determinations?

Part I of this Article discusses the historical basis for the "superior rights" doctrine generally, and specifically in Arizona. Part II examines whether parental "unfitness" has traditionally been required for third-party custody in Arizona and how that term has been construed. Part III sets out the law that evolved in light of Arizona's 1973 adoption of the UMDA's custody provisions, focusing on the evidentiary factors that have become important in third-party standing determinations in Arizona under section 25-401(B)(2). Part III also includes a discussion of whether these parameters have served the best interests of Arizona children.

Part IV describes and discusses more recent legislative efforts in Arizona, through section 25-415, to re-focus and clarify third-party standing for visitation as well as custody, and some recent informative and important court decisions interpreting this legislation. Part V compares these recent legislative and judicial efforts in Arizona to alternatives enacted in other states that forego the UMDA "not in the physical custody of parents" language and approach. Finally, this Article offers some tentative conclusions about the wisdom and efficacy of Arizona's new approach, and what it suggests about the evolving direction of third-party custody disputes in Arizona.

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

The "superior rights" presumption in favor of biological parents has often been criticized. Ten years ago, in a Pennsylvania Supreme Court case, *Rowles v. Rowles*,[25] the plurality quoted a concurring opinion of an earlier Pennsylvania Supreme Court case which questioned the "prima facie presumption that parents have a *right* to custody of their children as against third parties":[26]

> Serious questions may be posed with respect to the soundness of the apriorism that mere biological relationship assures solicitude, care, devotion, and love for one's offspring. . . . [W]here a third party better fulfills these needs, or where other circumstances indicate third party custody to be preferable, the courts, when exercising judgment as to a child's welfare, should not be restrained solely by a presumption. [27]

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25. 668 A.2d 126 (Pa. 1995) (plurality opinion).

26. *Id.* at 127 (quoting Ellerbe v. Hooks, 416 A.2d 512, 516 (Pa. 1980) (Flaherty, J., concurring)).

27. *Id.* at 128 (quoting *Ellerbe*, 416 A.2d at 514) (Flaherty, J., concurring) (alteration in original)). "Superior rights" doctrines are usually justified by an assumption that a natural parent will most adequately fulfill her child's needs. *See, e.g.*, Newby v. Newby, 202 P. 891, 892 (Cal. 1921). There is, however, little scientific basis for the presumption that a child's best interests are best served by being in the custody of natural parents. Richard J. Gelles, *Family Reunification/Family Preservation: Are Children Really*

The plurality in *Rowles* abandoned the presumption that a parent has a prima facie right to custody as against third parties, and instead used parenthood as "a factor of significant weight."[28]

Nonetheless, even though the "superior rights" doctrine[29] may occasionally dictate standing or custody decisions contrary to important interests or desires of children, the parental interest in a relationship with their children *is* a protected fundamental right under the U.S. Constitution.[30] Many state constitutions, including Arizona's, also protect the right of a parent to raise his or her own child.[31] In several cases, the U.S. Supreme Court has even developed a loose constitutional definition of family.[32]

The Court established constitutional protection for the parent-child relationship as early as 1923 in *Meyer v. Nebraska*.[33] *Meyer* involved a Nebraska statute that prohibited the teaching of any foreign language to a child prior to

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Being Protected?, 8 J. INTERPERSONAL VIOLENCE 557, 560 (1993). *See also infra* note 88 and accompanying text.

28. *Id*. *Contra* B.A. v. E.E., 741 A.2d 1227, 1229 n.1 (Pa. 1999) ("Because the *Rowles* opinion did not command a majority of the court, the presumption that parents have a right to the custody of their children as against third parties remains in effect. Whether the parents' interest in their children is referred to as a presumption or as a factor to be weighed, however, the main idea is that parents are to receive special consideration: as the court put it in *Ellerbe*, special weight and deference should be accorded the parent-child relationship.").

29. "Natural parents are said to have a superior right to the custody, care, and control of their children." LEGAL RIGHTS OF CHILDREN, *supra* note 6, at 75 (citing, *inter alia*, *In re* Appeal in Cochise County Juvenile Action No. 5666-J, 650 P.2d 459 (Ariz. 1982); *In re* Person and Estate of Newsome, 527 N.E.2d 524 (Ill. App. Ct. 1988)). "This natural parent preference rule has been enacted into law in a number of states." *Id.* at 75–76 (citing Boatwright v. Walker 715 S.W.2d 237 (Ky. App. 1986) (citing KY. REV. STAT. § 405.020)).

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

31. *See, e.g.*, *In re* Appeal in Maricopa County No. JD-6123, 956 P.2d 511, 518 (Ariz. Ct. App. 1997) (holding that a parent's right to custody and control of his or her children is guaranteed by the Arizona Constitution).

32. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (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 503. *But see* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (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).

33. 262 U.S. 390 (1923); *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).

eighth grade.[34] The Court held the statute unconstitutional, finding that it infringed on the liberties guaranteed by the Due Process Clause of the Fourteenth Amendment. 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 situation in life."[35]

Subsequently, in *Pierce v. Society of Sisters*,[36] the Court was confronted with a state statute that prohibited children from attending non-public schools.[37] The Court held that the law "unreasonably [interfered] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[38] *Meyer* and *Pierce*, therefore, established that parents' authority to rear their children as they see fit is constitutionally protected.[39] In *West Virginia State Board of Education v. Barnette*,[40] the Court reaffirmed this principle by holding that a statute requiring children to recite the Pledge of Allegiance over parental objection violated the parents' rights of free expression and religious freedom under the First and Fourteenth Amendments.[41]

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34. *Meyer*, 262 U.S. at 396. 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 eighth 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.*

35. *Id.* at 399–400.

36. 268 U.S. 510 (1925).

37. *Id.* at 529. The Compulsory Education Act required every parent or guardian having 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.*

38. *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.

39. *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 of his children'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).

40. 319 U.S. 624 (1943).

41. *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, which mandated attendance at school until the age of sixteen, was contrary to the Amish religion and way of life. The Supreme Court held this statute unconstitutional because it would contravene parents' child-rearing authority and free exercise of religion, both protected under the Due Process Clause of the Fourteenth Amendment. 406 U.S. 205, 233–34 (1972).

However, the fundamental right articulated in *Meyer*, *Pierce*, and *Barnette* has a limit. In *Prince v. Massachusetts*,[42] 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.[43] The Court upheld a Massachusetts statute restricting the times 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.[44]

In *Stanley v. Illinois*,[45] the Court addressed for the first time the rights of unwed fathers in a case where an Illinois statute presumed those fathers unfit.[46] The Court declared that unwed fathers also have a fundamental right to a parent-child relationship, and that under the Due Process Clause of the Fourteenth Amendment they cannot be deprived of that right without a hearing to determine their parental fitness.[47] However, a merely biological relationship is insufficient—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.[48]

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42. 321 U.S. 158 (1944).

43. *Id.* at 168–70 ("[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, indeed, 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 Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971).

44. *Prince*, 321 U.S. at 169. Massachusetts's child labor law prohibited a boy under twelve and a girl under eighteen from selling, exposing, or offering for sale "any newspapers, magazines, periodicals or any other articles of merchandise . . . in any street or public place." *Id.* at 160–61.

45. 405 U.S. 645 (1972).

46. The statute in *Stanley* failed to include unwed fathers as "parents." The statute only included "the father and mother of a legitimate child, or the natural mother of an illegitimate child, and includes any adoptive parent." *Id*. at 650 (citing ILL. REV. STAT. § 701-14). Accordingly, when the natural mother died Stanley had no parental rights, he was presumed unfit, and his children became wards of the state and were placed with a public guardian. *Id.* at 646.

47. *Id.* at 654–55; *see also* Santosky v. Kramer, 455 U.S. 745, 768 (1982) (holding that a "preponderance of the evidence" standard failed to comport with Due Process and that a "clear and convincing evidence" standard was required to terminate parental rights).

48. In *Lehr v. Robertson*, 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. 463 U.S. 248 (1983). The Court upheld the statute and found that Lehr failed to develop a parent-child relationship because he failed to demonstrate a commitment to the responsibilities of parenthood "by coming forward to participate in the rearing of his child." *Id.* at 261–62. The Court held that Lehr had not stepped forward because he never supported, rarely saw, and never lived with his child. *Id.* Whereas, in *Stanley* the unwed father had made positive manifestations such as living with

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.*,[49] for example, 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.[50] The biological father in the case had even lived with the child, provided financial support, and held himself out as the child's father.[51] California law, however, created a presumption that a child born to a married woman living with her husband was the husband's child.[52] 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,[53] and because an *adulterous* father lacked a fundamental right to a relationship with his child. Such a relationship, said Scalia, is not "deeply rooted in this Nation's history and tradition."[54]

Over the years, several state supreme courts have also addressed the need to protect the parent-child relationship.[55] In *In re B.G.C.*,[56] an unwed father sought to vacate a mother's adoption consent form[57] and assert his parental rights to halt an adoption proceeding. The Supreme Court of Iowa denied the unwed mother's subsequent request to vacate her consent, granted the unwed father's motion to intervene,[58] denied the adoption, and ordered the surrender of the child to the unwed father.[59] The unwed father was allowed to assert parental rights because he

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his child. *Stanley*, 405 U.S. at 645–46. As the Court explained in *Lehr*, the difference between the "developed parent-child relationship that was implicated in *Stanley* and [Caban v. Mohammed, 441 U.S. 380 (1979)], 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 261–62. *See also* Holmes, *supra* note 33, 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").

49. 491 U.S. 110 (1989) (plurality opinion).

50. *Id*. at 130.

51. *Id*. at 114. 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. *Id.*

52. *Id.* at 115. 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." *Id.*

53. *Id.* at 129–30. Such public policies include an aversion to declare children illegitimate and the promotion of peace and tranquility in the family.

54. *Id.* at 124, 129–30. Justice Stevens stated that he would "not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case [where the mother was married to and cohabitating with another man at the time of the child's conception and birth]." *Id.* at 133 (Stevens, J., concurring in judgment).

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

56. 496 N.W.2d 239 (Iowa 1992).

57. *Id.* at 241.

58. *Id.*

59. *Id.*

was the biological father, had not released his parental rights, and had not abandoned the child.[60] When the adoptive parents sought to stay the order directing them to return the child to her biological parents,[61] the United States Supreme Court ultimately denied the stay, stating that unrelated persons cannot retain custody of a child when the "natural parents have not been found to be unfit."[62]

Some state courts have also addressed parental rights in so-called nontraditional families.[63] For example, in *Alison D. v. Virginia M.*,[64] the New York Court of Appeals had to decide whether a woman, who was a member of a dissolved lesbian relationship, had a right to maintain a relationship with a child born to her partner during their relationship.[65] The woman claimed to be the child's "de facto" parent or that she should be viewed as a parent "by estoppel" in that she had provided financial and emotional support to the child for two-and-a-half years.[66] The court rejected her claim, however, declining to expand the statutory definition of parent to include "categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child."[67]

The most recent discussion of "parental rights" by the United States Supreme Court came in *Troxel v. Granville*.[68] In that case, Tommie Granville and Brad Troxel shared a relationship that produced two daughters, Isabelle and

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60. *Id.* The court reasoned that a paternity test had conclusively established that he was the biological father and his parental rights were never terminated prior to the filing of the adoption petition. *Id.*

61. The adoptive parents engaged in a vigorous legal battle including petitioning the Michigan courts to modify the Iowa Supreme Court's order. 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. *See In re* Clausen, 502 N.W.2d 649 (Mich. 1993). The adoptive parents then unsuccessfully petitioned the United States Supreme Court to stay the enforcement of the custody decision. DeBoer v. DeBoer, 509 U.S. 1301 (1993).

62. *Deboer*, 509 U.S. at 1302.

63. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (dealing with a lesbian's parental rights when one partner has a child via artificial insemination); *In re* Z.J.H., 471 N.W.2d 202 (Wis. 1991) (dealing with a lesbian's parental rights when one partner has a child through adoption), *overruled in part by In re* Custody of H.S.H.-K, 533 N.W.2d 419 (Wis. 1995).

64. 572 N.E.2d 27 (N.Y. 1991).

65. *Id.* at 29. The lesbian couple lived together for two years and decided to have children through artificial insemination. *Id.*

66. *Id.* The court agreed that she had in fact treated the child in all respects as her child and helped rear the child. *Id.*

67. *Id.*; *see also In re* Z.J.H., 471 N.W.2d at 204 (holding that Wisconsin's visitation statute did not grant a lesbian partner standing to seek custody or acquire visitation rights). *But see In re* H.S.H.-K, 533 N.W.2d at 434 (holding that "public policy considerations do not prohibit a court from relying on its equitable powers to grant visitation apart from [Wisconsin's visitation statute] on the basis of a co-parenting agreement between a biological parent and another when visitation is in a child's best interest").

68. 530 U.S. 57 (2000) (plurality opinion).

Natalie.[69] The relationship ended in 1991, but the father, Brad, who lived with his parents, regularly brought the children to his parents' home during his weekend visits.[70] The father committed suicide in May 1993,[71] but his parents continued to see their grandchildren regularly until October 1993, when the mother, Tommie, informed them that she intended to limit their visitation time to one short visit each month.[72]

The deceased father's parents objected and sought relief under a Washington statute that provided that: "*Any person* may petition the court for visitation rights *at any time* including, but not limited to, custody proceedings."[73] The statute further authorized courts to "award 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."[74] 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,[75] finding that continued contact with their grandparents was in the best interest of the children.[76] The mother appealed, and the Washington Court of Appeals reversed, holding that nonparents lacked standing to seek visitation *unless* a custody action was pending.[77] The Washington Supreme Court affirmed the appellate court's holding,[78] but based its ruling on federal constitutional grounds.[79]

In 2000, the United States Supreme Court affirmed the judgment of the Washington Supreme Court, and a four-justice plurality found the Washington statute unconstitutional as applied.[80] In a decision that was narrow and fact-specific, Justice O'Connor, writing for the plurality, focused on the long line of Supreme Court cases outlining the fundamental rights of parents to guide the "care, custody, and control of their children."[81] Based upon these fundamental rights, she held that the Washington statute was "breathtakingly broad" because it did not take into account the presumption that parents act in their child's best

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69. *Id*. at 60.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id.* (citing WASH. REV. CODE § 26.10.160(3) (1994) (emphasis added)).
74. *Id*.
75. *Id*. at 61.
76. *Id*. The trial court stated that it based its decision on "all factors regarding the best interest of the children and considered all of the testimony before it." *Id*. at 62.
77. *Id*.
78. *Id*.
79. *Id.* at 63.
80. *Id.* at 67. Six of the Justices agreed that Washington's statute was overbroad. *See id*. at 76 (Souter, J., concurring in judgment); *id*. at 80 (Thomas, J., concurring in judgment). *See* Ellen Marrus, O*ver 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 nonparental visitation is ordered, and she also agreed with Justice Kennedy that much will depend on the facts and circumstances of each suit. *Id.* at 789.
81. *Troxel*, 530 U.S. at 67.

interest and it allowed *any* person standing to petition at any time.[82] Justice O'Connor stated:

> [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 child.[83]

If a fit parent's decision becomes subject to judicial review, said Justice O'Connor, a court must accord *at least some special weight* to the parent's determination.[84] However, Justice O'Connor 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.[85]

Thus, while the Court plurality declined to rule that *all* state statutes allowing for third-party visitation would violate the fundamental right to parental autonomy, it is still unclear what factors might be constitutionally required in order to overcome the presumption favoring parents.[86]

Justices Stevens and Kennedy spoke more directly to the issue of whether harm to the child by the denial of visitation need be shown. They 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. Justice Stevens pointed out:

> 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.[87]

Justice Stevens stressed not only the nonabsolute 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, if at all,

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82. *Id.* at 73.
83. *Id.* at 68–69.
84. *Id.* at 70.
85. *Id.* at 73.
86. *See* Marrus, *supra* note 80, at 793 (stating, "[O]n the one hand, the *Troxel* plurality's fact specific approach resulted in a strangling particularity that made the opinion largely [irrelevant, while] at the same time, the vague parental rights are not absolute assertion was a 'glittering generality' that also diminished the precedential value of the opinion").
87. *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting) (citations omitted).

because they are exercised in the context of a *family*.[88] Indeed, it seems that Justice Stevens could be suggesting that, even in the context of a third-party custody dispute, whoever has created a family for a child should have a preference in becoming the parent of that child.

Justice Kennedy argued that the Court was erroneously assuming that "parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child."[89] He reasoned that, in a time when third parties are regularly asked to care for children, the prevailing law is inadequate because it affords these parties few or no legal means to obtain visitation or custody.[90]

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*—who had taken on substantial responsibility in a child's upbringing.[91] Thus, Justice Kennedy's opinion might also be taken as support for increased *in loco parentis* standing in third-party custody as well as visitation disputes. On the whole, it appears that a constitutionally valid third-party custody or visitation statute must not be unnecessarily broad (allowing the petitioning by any individual at any time), and must perform a balancing of the fundamental rights of the parents with those of the child and state.[92]

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88. *Id.* at 88 (Stevens, J., dissenting).

> 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 simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interest in a child must be balanced against the State's long-recognized interests as parens patriae . . . . [To] 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.

Id.

89. *Id.* at 98 (Kennedy, J., dissenting).

90. *Id*. at 94.

91. *Id*. at 97–98.

92. The current Arizona nonparent visitation statute, section 25-409 of the Arizona Revised Statutes, has been held to be constitutionally sound because it appropriately considers the rights of all parties. *See* Graville v. Dodge, 985 P.2d 604 (Ariz. Ct. App. 1999) (explaining that the provision is constitutional because it does not substantially infringe on parents' fundamental rights and it has a rational relationship to legitimate state purposes), *vacated by, remanded by* 533 U.S. 945 (2001) (vacating judgment and remanding to the appellate court "for further consideration in light of [*Troxel*]"); Jackson v. Tangreen, 18 P.3d 100, 103 (Ariz. Ct. App. 2001) (holding that *Troxel* did not affect its holding in *Graville* since the *Troxel* Court "refused to find nonparental visitation statutes unconstitutional per se" and because Arizona's nonparental visitation statute is more narrowly drawn than the Washington statute, limited to only grandparents and great-grandparents).

Recently, the Arizona Court of Appeals, referring to Justice O'Connor's language in *Troxel*, noted that:

> [I]n instances where a fit parent's right to rear her child may conflict with the child's best interests, the extent of a parent's constitutional right has not been precisely defined . . . . [In] such cases, the extent of the parent's constitutional right can only be determined by *weighing that right against countervailing factors*, if any, pertaining to the best interests of the child.[93]

Thus, as a matter of both Arizona and federal constitutional law, parents have a fundamental right to the parent-child relationship. However, courts seeking to protect children's interests in the continuity of third-party relationships may limit the exercise of this right through a balancing of interests and through liberal statutory interpretation. Several state courts, for example, have maintained parental preferences in standing as well as custody decisions, but have also used liberal definitions of parental "unfitness," "detrimental" influence, or "unsuitability" to give increased weight to third-party advocacy in custody disputes.[94]

II. THE "SUPERIOR RIGHTS" PRESUMPTION: MUST PARENTAL "UNFITNESS" BE FOUND BEFORE ADJUDICATING THE "BEST INTERESTS" OF CHILDREN IN THIRD-PARTY CUSTODY DISPUTES—AND WHAT DOES "UNFITNESS" MEAN?

At common law, the "superior rights" doctrine evolved from early custody decisions that customarily looked only to parents' proprietary interests.[95] However, as the concept of children as property became obsolete, judicial attitudes and approaches changed.[96] Nevertheless, "[e]ven into the early twentieth century, courts in the United States held almost uniformly that a father had a right to custody of his children as a matter of property law or title."[97] Indeed, "[t]he

93. Downs v. Scheffler, 80 P.3d 775, 781 (Ariz. 2003) (emphasis added).

94. *See, e.g.*, Clifford v. Woodford, 320 P.2d 452 (Ariz. 1957) (awarding a stepfather custody of his two stepdaughters upon his wife's death following a ten year period when they resided together as a stepfamily, based only on evidence of the biological father's *absence* during this same period of time). The Minnesota Supreme Court has also said that a natural parent is entitled, as a matter of law, to the custody of his or her minor child unless such custody is not in the child's best interests. Durkin v. Hinich, 442 N.W.2d 148 (Minn. 1989). In Illinois, the preference given to natural parents is historically said to be subordinate to the "best interests of the child." *In re* J.K.F., 529 N.E.2d 92 (Ill. App. Ct. 1988) (citing Giacopelli v. Florence Crittenton Home, 158 N.E.2d 613 (Ill. 1959)). The parental preference can always be defeated, of course, if the natural parent is "unfit" or "voluntarily forfeits" custody. LEGAL RIGHTS OF CHILDREN, *supra* note 6, at 76–77 (citing Abrams v. Connolly, 781 P.2d 651 (Colo. 1989); *In re* Custody of Gonzalez, 561 N.E.2d 1276 (Ill. App. Ct. 1990); *In re* Stell, 783 P.2d 615 (Wash. Ct. App. 1989)). As a result, courts have taken the opportunity to liberally construe "voluntary forfeiture." *See generally* Levy, *supra* note 16.

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

96. *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).

97. Kaas, *supra* note 19, at 1063 (citing generally, Paul Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 675 (1942) (explaining the historic

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."[98] At present, most state courts—even those that purport to be acting in "the best interests of children"—require "extra-ordinary circumstances," such as abandonment or the forfeiture of parental rights, in order to give custody to nonparents.[99] A small minority of states still refuse to grant third-party custody unless surviving parents are legally unfit.[100]

Although the controlling question in Arizona custody determinations has long been the best interests of the child,[101] the state's courts have maintained a parental "superior rights" presumption. Before passage of the 1973 Arizona Marital and Domestic Relations Act,[102] a nonparent in Arizona could obtain custody of a child under the Probate Act,[103] the Juvenile Court Act,[104] or the Adoption Act.[105] The Probate Act was generally limited to situations where both parents had either died or lost the capacity to care for the child.[106] The Juvenile Code and the Adoption Act only allowed for third-party custody or adoption upon

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interpretation of custody as a property interest)). *See* Katherine 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 (1996–97) (arguing that deference to parental rights results in children being treated like property).

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

99. Prior to 1964, even those states that employed the best interests test in custody disputes between parents replaced it with the "fitness test" where the contest was between a parent and a nonparent. *See* Henry H. Foster, Jr. & Doris Jonas Freed, *Child Custody (Part I)*, 39 NYU L. REV. 423, 425 (l964); s*ee also* Sayre, *supra* note 97.

100. *See, e.g., In re* A.R.A., 919 P.2d 388 (Mont. 1996) (clarifying that under the UMDA, a third party may have standing, but can be awarded custody only after there has been a finding of abuse, neglect, or dependency); *see also infra* notes 104–20.

101. *See, e.g.*, Hays v. Gama, 67 P.3d 695, 698 (Ariz. 2003) ("We have repeatedly stressed that the child's best interest is paramount in custody determinations."); *see also* Fladung v. Sanford, 75 P.2d 685, 686 (Ariz. 1938). Arizona's statute enumerates nine specific factors that the court must consider in making a determination concerning a child's best interests. ARIZ. REV. STAT. ANN. § 25-403(A) (2001).

102. ARIZ. REV. STAT. ANN. § 25-403 (2001).

103. *Id.* §§ 14-5206, 14-5207.

104. *Id.* § 8-533. *See, e.g.*, Audra T. v. Ariz. Dep't of Econ. Sec., 982 P.2d 1290 (Ariz. Ct. App. 1998) (affirming termination of parental rights and award of custody to the child's biological sister after a finding, under the Juvenile Court Act, that the parents had abused the child, and were in fact serving a prison sentence for that crime, and that the best interests of the child were served by remaining in the custody of his sister).

105. ARIZ. REV. STAT. ANN. § 8-103 (2001).

106. *See* Morales v. Glenn, 560 P.2d 1234 (Ariz. 1977) (holding that the probate court does not have jurisdiction to award custody unless all parental rights have been terminated by court order). *See generally In re* Maricopa County Juvenile Action No. JD-05401, 845 P.2d 1129 (Ariz. Ct. App. 1993); *see also* Walker A. Jensen, *The Child Without a Family: Problems in the Custody and Adoption of Children*, 1962 U. ILL. L.F. 633, 634 (1962).

a showing of parental unfitness,[107] even if custody in the nonparent was in the child's best interests.[108]

These doctrines reflected the Arizona courts' decision to adopt the "superior rights" doctrine early in the twentieth century, only a few years after statehood. In *Harper v. Tipple*,[109] a 1919 habeas corpus case, the court held that a father should receive custody instead of the child's maternal grandparents, after the death of the mother, stating that:

> It is manifest that the statute vests in the appointing court or judge a very large discretion in the selection and appointment of a guardian; the paramount consideration being the welfare of the child, rather that the technical legal right of the parents. While this is true, yet the court should not invade the *natural right* of the parent to the custody and care of an infant child, except upon a clear showing of *delinquency* on the part of the parent.[110]

In *Harper*, the child went with the mother—who was then dying of tuberculosis—to live with the mother's parents,[111] who assisted the mother in caring for the child. The mother wanted her parents to raise the child after her death, and originally the father agreed. Upon the death of the mother, the father promised the maternal parents that they would have the child. However, after the father remarried, he refused to return the child to the grandparents after a visit, and petitioned for custody.[112] The Arizona Supreme Court sided with the father,[113] explaining that:

> No one can consider the request of the dying mother without a sincere wish that such a request could be legally enforced. But such is not the case. Under the law, the mother was not vested with the testamentary disposition of the child during the lifetime of the father. Neither could she give the child away without his consent.[114]

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107. It has long been the case that parents who have neglected, deserted, or abandoned their family also may forfeit their rights to custody. Foster & Freed, *supra* note 99, at 432. Family and juvenile courts in several states have long had authority to terminate and fix custody in cases of dependent or neglected children. *See* Jensen, *supra* note 106, at 634.

108. Only occasionally did courts circumvent this "fitness" rule. In *Dickason v. Sturdavan*, for example, the maternal grandparents filed a petition for permanent custody and control of minor children. The trial court granted the petition and awarded custody to the grandparents. The Arizona Supreme Court affirmed, holding that the trial court's finding that the father was a "fit" parent was not contrary to the manifest weight of the evidence, but that an award of custody to the maternal grandparents nonetheless served the "best interests" of the children. 72 P.2d 584, 587 (Ariz. 1937).

109. 184 P. 1005 (Ariz. 1919).

110. *Id*. at 1007 (emphasis added).

111. *Id.* at 1006.

112. *Id*.

113. *Id.* at 1007.

114. *Id.*; *cf. In re* Custody of R.R.K., 859 P.2d 998 (Mont. 1993) (stating that standing does not depend on who has actual, physical possession of the child at the moment a petition is filed, but rather on whether the *surviving* parent actually relinquished physical custody of the child and how long the parent and child were separated).

The court further stated that:

> [E]ven if what was said [by the father] could be held to be a contract, it would nevertheless be void as against public policy; for the father cannot make a valid and irrevocable contract which relieves him from the legal obligations to maintain, support, and educate his minor child.[115]

Thus, *Harper* not only affirmed the superior rights of parents to child custody, but also applied notions of property alienation and contract law to third-party child custody decisions. Absent any factual inference that the father intended to *indefinitely* relinquish his parental rights, the father automatically retained "physical custody" upon the mother's death. Even though the mother was the custodial parent, the father continued in "constructive" possession of his child,[116] retaining his natural rights to his child.

Fortunately, in addition to the adult-oriented "property law" reasoning, the court also explained its decision using child-oriented "best interests" considerations, which were equally compelling. The court decided that giving custody to the father was in the best interests of the child, even though the grandparents were filling the role of "parent" when the conflict arose. Because the child had only lived with the grandparents for a limited time,[117] and the grandparents would probably not be able to parent the child to adulthood,[118] the court likely believed that paternal custody was in the child's best interests, regardless of whether the father had relinquished his proprietary interests.

Nevertheless, notwithstanding *Harper*, natural parents in Arizona were occasionally deprived of custody in habeas corpus proceedings.[119] The Arizona courts maintained a relatively broad view of the kind of parental "delinquency" that would allow third-party caregivers to prevail in custody disputes to protect the

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115. *Harper*, 184 P. at 1007.

116. *See* Morales v. Glenn, 560 P.2d 1234, 1237 (Ariz. 1977) ("[U]pon the death of a party who holds legal custody pursuant to a divorce decree, the right of legal custody automatically inures to the surviving parent."); Woodford v. Superior Court, 309 P.2d 973, 974 (Ariz. 1957). Reversion, however, is not automatic in other UMDA states such as Illinois. *See, e.g.*, *In re* Marriage of Carey, 544 N.E.2d 1293 (Ill. App. Ct. 1989). Indeed, in *Milenkovic v. Milenkovic*, the court held that when a divorced custodial parent dies, courts have the power to determine further custody transfers because *legal* custody is not in *anyone* immediately following the death of the custodian. 416 N.E.2d 1140, 1145 (Ill. App. Ct. 1981); *see also* Mackie v. Mackie, 232 N.E.2d 184 (Ill. App. Ct. 1967).

117. *Harper*, 184 P. at 1005 (less than one year).

118. *Id.* at 1008.

119. Even long before the UMDA, courts on occasion awarded custody to nonparents in habeas corpus proceedings when the best interests of the child required it. *See, e.g.*, Clifford v. Woodford, 320 P.2d 452 (Ariz. 1957). *See also* Cormack v. Marshall, 17 N.E. 1077 (Ill. 1904) (explaining that parental rights are not absolute and must yield to the best interests of child); People *ex rel.* Hermann v. Jenkins, 180 N.E. 2d 359 (Ill. App. Ct. 1962) ("Persons who have had de facto custody for a substantial period of time, during which actual bonds of love and affection have been established between custodian and child, have in a number of cases prevailed over natural parents . . . .").

best interests of the child.[120] The Arizona Supreme Court, after all, had never held that a fit parent could *not* be deprived of custody.[121] For instance, as early as 1937, that court sustained a lower court's refusal to return custody of a child to its natural father, holding instead in favor of the maternal grandparents.[122]

In *Dickason v. Sturdavan*,[123] a father sued to regain custody of his children from their maternal grandparents who had custody for "seven or eight years."[124] The Arizona Supreme Court held that the children should remain with their maternal grandparents, noting that:

> The paramount consideration being the child's welfare, the parents' prima facie right to its custody is not an unconditional one. Neither does the sole fact that one is the parent and able and willing to care for it necessarily have this effect, because this could easily be true and yet the best interest of the child be subserved by placing it in the custody of another.[125]

In *Dickason*, unlike *Harper*, the grandparents had developed a stable *long-term* relationship with their granddaughters who, with their mother, had lived with them for several years until the mother died unexpectedly.[126] During that time, the grandparents were the primary caretakers.[127] The father had fulfilled his child support obligations and visited the children whenever he could;[128] thus, he was not "unfit" in any traditional sense. However, he had spent very little time with the children since they were infants, and, perhaps most importantly, the children were practically strangers to the paternal grandparents with whom they would have resided had the father been granted custody.[129]

Accordingly, the court decided that the existing relationship between the maternal grandparents and the children served the children's best interests.[130] The father was a "fit" parent under any of the standards set out in *Harper* because he did not abandon the children.[131] However, the grandparents prevailed,

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120. As will be pointed out below, the Arizona view during the 1930s through the 1950s seemed to incorporate the dicta from *Chapsky v. Wood*, in which the court cautioned parents that "ties of blood weaken, and ties of companionship strengthen, by lapse of time . . . ." 26 Kan. 650, 653 (1881).

121. *See, e.g.*, Ariz. State Dep't of Pub. Welfare v. Barlow, 296 P.2d 298 (Ariz. 1956) (cautioning that the fact that the parent is fit to care for the child does not, in all cases, mean that custody with the parent is in the best interest of the child).

122. Dickason v. Sturdavan, 72 P.2d 584 (Ariz. 1937); *see also, e.g.*, *In re* Arias, 521 P.2d 1146 (Ariz. Ct. App. 1974).

123. 72 P.2d 584.

124. *Id.* at 584.

125. *Id.* at 587.

126. *Id.* at 586.

127. *Id.*

128. *Id.*

129. *Id*. (as compared to the facts in *Harper*, where the child would have lived with its father and his new family. *Harper*, 184 P. 1005, 1007 (1819)).

130. *Id*. at 566–67.

131. A parent abandons her child by engaging in conduct indicating a settled purpose to forego all parental duties and relinquish all parental claims to the child. Anonymous v. Anonymous, 540 P.2d 741, 743 (Ariz. Ct. App. 1975).

notwithstanding the father's "fitness," because "the court [could not] say that the child's best interest [would] be subserved by placing it in [the father's] care and custody."[132] Therefore, in *Dickason*, the Arizona courts showed they were willing to qualify a father's parental rights where the grandparents had served as de facto custodial parents for a substantial period, and a custody transfer to the father would remove the child from a stable relationship with one set of grandparents only to place the child in a home with grandparents who were strangers. Notwithstanding *Harper*, it now seemed clear that an arguably "fit"[133] father's parental rights could give way to a third party's claim to protect the best interests of the child.

By 1957, in *Clifford v. Woodford*,[134] the Arizona Supreme Court had no problem siding against a natural father and in favor of a stepfather. The natural father had shown little interest in his child following the divorce,[135] and the stepfather had acted as a full parent. Thus, the child's best interests were served by continued custody with the stepfather, even though the trial court found that "[nothing in the record] in any way reflects adversely upon the character, the morals or the fine home and family of [the father and his new wife]."[136] In *Gowland v. Martin*,[137] decided in 1974, a father's youth and lack of an established career made him *presently* and *temporarily* "unfit" to care for his child, even though he had not abandoned it.[138] The court held that the child's "best interests" required the child to remain in the maternal grandparents' custody instead of the father's.[139] The court stated:

> While it is true that a father who is a proper and fit person to care for his child, is entitled to its custody above any other person, . . . [yet] he must be *so* fit and suitable for the performance of this most important function that the court can say that the child's best interest will be subserved by placing it in his care and custody.[140]

The decision to value the best interests of children over the superior right of parents in third-party custody disputes, seen in *Dickason*, *Clifford*, and *Gowland*, is more than reasonable. This is especially true considering that even in many of the conservative "parental rights" jurisdictions—those that do not even *consider* "best interests" until and unless the biological parent is first found

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132. 72 P.2d at 586.

133. "Fit" in the sense that the parent had not abandoned his child by engaging in conduct indicating a settled purpose to forego all parental duties and relinquish all parental claims to the child. *See supra* note 131.

134. 320 P.2d 452 (Ariz. 1957).

135. *Id.* at 458.

136. *Id.*

137. 520 P.2d 1172 (Ariz. 1974) (granting maternal grandparents custody of child because the natural mother and father were not in a position to provide adequate financial support to the child at the time).

138. *Id.* at 1174–75.

139. *Id.*

140. *Id.* at 1174 (quoting Dickason v. Sturdavan, 72 P.2d 584 (Ariz. 1937)) (emphasis added).

unfit[141]—there is rarely any concrete rationale offered for an absolute parental preference.[142] In Arkansas, for example, all citations to the "superior rights" of parents ultimately lead back to the 1881 case of *Verser v. Ford*.[143] *Verser* held that a father had a superior right to custody of his child notwithstanding the rights of the mother and the best interests of the child because of his greater ability and worldliness, and the duty and affection engendered by his biological ties.[144] However:

> The historical context of that case was clearly one different from contemporary American society . . . . Society has changed significantly; perceptions of what is real have changed and most of the assumptions upon which the paternal rights statement of *Verser* and the parental rights doctrine of later cases are based are no longer considered to be true. Yet the paternal rights position of *Verser* [continues to be used] as authority for the parental rights doctrine. In addition, the *Verser* case, used ultimately to support the position that a parent has a right to custody of his or her child 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 a children's rights standard.[145]

A decision from Georgia, which shares Arkansas's conservative approach,[146] also illustrates how forcing stepparents with long attachments to children to prove parental "unfitness" before they may even be heard can run counter to children's "best interests." In *Howell v. Gossett*,[147] a father attempted to recover custody from a stepfather after the mother's death. The court denied his petition because he neither supported nor attempted to contact his daughter for seven years prior to the lawsuit.[148] Nonetheless, the Georgia Supreme Court reversed because there was "no evidence of conduct . . . that would render [the

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141. A Montana court, for example, held that the procedure to be used where a nonparent seeks custody is contained in the child abuse, neglect and dependency statutes, rather than the Uniform Marriage and Divorce Act. *See, e.g.*, *In re* A.R.A., 919 P.2d 388 (Mont. 1996) (finding that under the UMDA, a third party may have standing to request a child custody hearing, but can be awarded custody only after there has been a finding of abuse, neglect, or dependency since a parent has a constitutionally protected right to custody); State v. McCord, 825 P.2d 194 (Mont. 1992).

142. O'Keefe, *supra* note 7, at 1092–94.

143. 37 Ark. 27 (1881); s*ee also* O'Keefe, *supra* note 7, at 1091–93.

144. *Verser*, 37 Ark. at 30.

145. O'Keefe, *supra* note 7, at 1092–93.

146. In Georgia, the early seminal case was *Miller v. Wallace*, 76 Ga. 479 (1886). There too, even though the court decided for the father, it still felt it was necessary to address the welfare of the child. O'Keefe, *supra* note 7, at 1093–94.

147. 214 S.E.2d 882 (Ga. 1975), *superseded by statute*, GA. CODE. ANN. § 19-8-10(b) (2000), *as recognized in* Mellies v. Dearborn, 558 S.E.2d 460 (2001).

148. *Id.* at 883, 884.

father] *unfit*."[149] In the absence of such conduct, presumably something worse than his neglect of many years, the father was *automatically* entitled to remove his daughter from the home she had shared with her mother and stepfather for most of her life, regardless of how destabilizing and disorienting the move may have been for the child.[150]

Therefore, it is easy to see why the Arizona Supreme Court sought to provide more flexibility in decisions such as *Dickason*, *Clifford*, and *Gowland*, holding that third parties who have meaningful relationships with children may seek custody under a "best interests" standard regardless of whether they first prove parental "unfitness." Nevertheless, by the early 1970s it became clear that parents had a constitutional right to maintain and control their relationships with their children,[151] and many state legislatures began to look at decisions such as *Dickason*, *Clifford*, and *Gowland* as dangerous invitations to arbitrarily remove children from parents in violation of parental rights.[152]

III. THE 1973 ADOPTION OF THE UMDA'S THIRD PARTY "STANDING" REQUIREMENTS: SECTION 25-401 AND CHILDREN "NOT IN A PARENT'S PHYSICAL CUSTODY"

In 1973, in an apparent effort to reinforce the "superior rights" of parents while narrowing the circumstances under which nonparents could demand custody, the Arizona legislature adopted the third-party custody provisions of the Uniform Marriage and Divorce Act.[153] As a result, for nonparents to have standing to seek custody they had to satisfy section 401(B)(2) of the Arizona Marital and Domestic Relations Act,[154] which requires that a child "not [be] in the physical custody of one of his parents" at the time a custody petition by a third party is filed.[155]

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149. *Id.* (emphasis added).

150. *Id.*; *see also*, MAHONEY, *supra* note 2, at 142.

> When the issue of stepchild custody arises . . . following the death of the custodial parent, the child's interest in stability and the continuity of family relationships are placed in serious jeopardy. First, the death of the custodial parent involves the traumatic end of what was probably the most important relationship in the child's life. Second, where family ties have been formed with the residential stepparent, the abrupt removal of the child from the family home and the stepparent's care constitute an additional threat to the child's sense of continuity in a family. Under the traditional standard, however, these matters become relevant only if the non-custodial parent is an unfit person.

Id.

151. *See supra* Part I.

152. *See infra* Part IV.

153. UNIF. MARRIAGE & DIVORCE ACT, § 401, 9A(2) U.L.A. 263 (1998).

154. ARIZ. REV. STAT. ANN. § 25-401 (1999).

155. *Id.*; s*ee also* Olvera v. Superior Court, 815 P.2d 925 (Ariz. Ct. App. 1991); Levine, *supra* note 2, at 334–35 (noting that, in other states that have adopted the UMDA, a nonparent must first show that child is not in the physical custody of one of his parents in order to have standing because there is an underlying assumption that an award of custody to a biological parent will be in the child's best interests). *See also, e.g.*, Montgomery v.

While the statutory phrase "not in the physical custody of a parent" may seem straightforward, courts have regularly required more than mere physical custody by a nonparent.[156] Instead, courts have required nonparents to prove some legally cognizable *right* to possess the child[157] before being allowed to *petition* for legal custody. The key to this significant burden lies in the meaning of the words "physical custody." Arizona courts have held that "physical custody . . . does not equate to having actual, immediate control of the physical presence of the child, rather it is the legal right to control the child."[158] Unfortunately, if a family court focuses on the relative legal property interests held by potential guardians, its decisions rarely give adequate attention to the "best interests" of the child.[159]

Nevertheless, when determining whether a nonparent has standing to petition for custody under section 25-401(B)(2), Arizona courts have generally considered a number of factors that tend to establish the "legal right" to the possession of children by a nonparent. These factors can be characterized as: (a) how the third party *acquired* possession; (b) the *duration* of possession; and (c) the *nature* of the possession anticipated by the parties. Courts examine these factors to determine whether there is a reasonable inference that one or more of the parents voluntarily[160] agreed to relinquish physical possession and parental rights to their child indefinitely.[161]

A. Means of Acquiring Custody: "Physical Custody" is More Than "Physical Possession"

In *Webb v. Charles*,[162] for example, the court found that a child's grandparents had failed to meet the "not in the physical custody of a parent"

Roudez, 509 N.E.2d 499 (Ill. App. Ct. l987); Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979).

156. *See, e.g.*, Webb v. Charles, 611 P.2d 562 (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).

157. Harper v. Tipple, 184 P. 1005, 1008 (Ariz. 1919); *see also, e.g.*, 2 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 8.06, at 418 ("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.").

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

159. *See, e.g.*, *id.*; *see also* Henderson v. Henderson, 568 P.2d 177 (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 standards] 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 H. Kay eds., 1990).

160. *Webb*, 611 P.2d 562.

161. *Id.* at 565.

162. *Id*.

requirement of section 25-401. They had given the child a home in the days after the death of the natural mother, but the limited nature and duration of their exclusive possession did not manifest legally sufficient intent on the father's part to indefinitely transfer physical custody to them.[163]

The court discounted the grandparents' actual "physical possession" of the child,[164] holding that the grandmother never had "physical custody" as defined by the statute, and therefore had no standing to petition for custody.[165] Nonparents must show that the surviving parent has relinquished *legal* custody of the child, not just physical possession, before they will satisfy the standing requirement of section 25-331(B)(2)—now section 25-401(B)(2)—of the Arizona Marital and Domestic Relations Act.[166] All courts that have interpreted the UMDA custody provisions have reached the same result—although a dissent in at least one other jurisdiction questioned the "fit" between the phrases "physical custody" and "legal custody."[167]

B. Inferring "Voluntary and Indefinite Relinquishment" of Parental Rights from the Duration and Nature of Nonparent Custody

Where a parent voluntarily relinquishes a child without giving an explicit indication of the intended period of time, the duration and nature of the nonparent's actual physical possession may be crucial in raising the inference of voluntary and indefinite relinquishment so as to allow nonparent standing. For example, in *Webb*,[168] the child was living with his parents when his mother died. During the funeral, the child stayed with the maternal grandmother, who refused to allow the father to retrieve the child when the father returned.[169] The grandmother's refusal precluded standing on her part because the father did not

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163. *Id.*

164. *Id.*; *see also In re* McCuan, 531 N.E.2d 102 (Ill. App. Ct. l988) (holding that a mother had not relinquished "physical custody" to grandparents so as to give them standing because their possession of the child at the time the petition was filed was due only to their failure to return the child to the mother after a weekend visit, even though the mother permitted the child to visit the grandparents on weekends).

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

166. *Id.* An Illinois court had also used this language and found that "[n]onparents must show that the parent has relinquished 'legal custody' of the child, rather than merely physical possession, before satisfying the standing requirement of section 601(b)(2)." *In re* Marriage of Dile, 618 N.E.2d 1165, 1168 (Ill. App. Ct. 1993).

167. *In re* Marriage of Siegel, 648 N.E.2d 607, 613 (Ill. App. Ct. 1995) (Hutchinson, J., dissenting) (arguing that while the majority refused to equate "physical custody" with mere "physical possession," it also did not hold that the terms "physical custody" and "legal custody" were interchangeable, and that, under the majority view, standing provisions would be superfluous because they would duplicate the Adoption and Juvenile Court Acts, where the termination of parental rights has always required death or unfitness, even though this has never been true for third-party *custody*, let alone third-party standing).

168. 611 P.2d 562.

169. *Id.* at 565.

voluntarily relinquish "physical custody," regardless of the amount of time his child spent with the grandparents.[170]

However, in the absence of clearly involuntary relinquishment, as in *Webb*, the duration of third-party possession often guides court decisions about the existence of voluntary and indefinite relinquishment of parental rights required for standing. Less than one week in a third party's custody will usually be insufficient,[171] but a long period, such as the seven or eight years in *Dickason v. Sturdavan*,[172] will often give nonparents standing. However, duration of possession has never been the sole determinate of nonparent standing or ultimate custody.[173] The mere passage of time does not dispositively establish the existence of a meaningful nonparent-child relationship, nor does it show that a parent has voluntarily and indefinitely relinquished parental rights.

Evidence of a "meaningful" nonparent-child relationship will favor standing for nonparents. Courts generally value continuous support relationships for children,[174] and therefore will grant standing, if not custody, to nonparents who

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170. *Id*.

171. *Id*. For a greater elaboration of the varied circumstances where this is true in other UMDA states, see *In re McCuan*, 531 N.E.2d 102 (Ill. App. Ct. l988) (noting that if they are of short duration, even periodic, nurturing visits will not support nonparent standing). In *McCuan*, a mother was held not to have relinquished "physical custody" simply because she had permitted her child to visit the grandparents on weekends. *Id.* at 106. Indeed, the grandparents' possession of the child at the time the petition was filed was due to their failure to return the child after a weekend visit. *Id.*; *see also In re* Custody of O'Rourke, 514 N.E.2d 6, 8 (Ill. App. Ct. 1987) (clarifying that despite a third party's weekly and often daily care of the children, the legal custody remained with the mother until her death, at which point it transferred to the father).

172. 72 P.2d 584 (Ariz. 1937).

173. *See, e.g.*, *In re* Groff, 774 N.E.2d 826, 830 (Ill. App. Ct. 2002*)* ("In concluding that a non-parent has physical custody of a minor child, the trial court must consider factors such as who was responsible for the child's care and welfare prior to the initiation of custody proceedings, how the physical possession of the child was acquired, and the nature and duration of the possession of the child.").

174. *See* GOLDSTEIN ET AL., *supra* note 6, at 17–20 (explaining that a child's psychological development depends on a secure, uninterrupted relationship with one caregiver which, if interrupted, will have severe psychological impacts on the child); *see also* Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 723–24 (1986) ("A family that provides stability, continuity, and enduring familial bonds increases the likelihood of producing healthy and emotionally well-adjusted children. For this reason, these courts should resolve custody disputes by determining the 'psychological parent,' that is, the person who provides companionship, shared experiences, and day-to-day interactions with the child." (citations omitted)); Vanessa L. Warsynski, Comment, *Termination of Parental Rights: The "Psychological Parent" Standard*, 39 VILL. L. REV. 737, 765–66 (1994) ("A stable, continuous and caring relationship is critical to a child's development. A child separated from his or her psychological parent may suffer separation anxiety, trauma, distress, a profound sense of loss and setbacks in the quality of his or her future emotional attachments. The long-range effects on a child victimized by a traumatic disruption of the psychological parent-child relationship include lack of self-esteem, trust and ability to care for others. These effects may ultimately lead to behavioral disorders." (citations omitted)). *But see* Martin Guggenheim, *The Political and Legal Implications of Psychological*

provide these relationships.[175] The only barrier is that courts must first find, under section 25-401, that a child is "not in the physical custody of a parent." In order to accomplish the goal of meeting a child's best interest by placing it with a third person, courts often take a broad view of when parents had "knowingly, voluntarily and indefinitely" relinquished custody.[176] These cases are problematic because the decisions focus on the parents' actions[177] and devote less time to discussing the circumstances under which nonparents should be allowed standing or, ultimately, custody. The opportunity to explore these questions, therefore, is often lost in a statutorily-imposed judicial preoccupation with indicia of legal possession.[178]

Parenting Theory, 12 N.Y.U. REV. L. & SOC. CHANGE 549 (1984) (arguing that "psychological parenting" theory disproportionately negatively impacts minority and low-income families by temporarily placing their children with child welfare agencies, and then terminating custody per a new psychological relationship that has formed). On the other hand, continuity of relationships is important, and some scholars disagree with Goldstein et al., *supra* note 6, and their tenet that a child should not have an ongoing relationship with her noncustodial parent or with several caregivers. Critics argue that children need relationships with a multitude of individuals, including non-custodial parents. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 882 (1984).

175. *See* Bryan v. Bryan, 645 P.2d 1267, 1273 (Ariz. Ct. App. 1982) (holding that the showing of an *in loco parentis* relationship between the child and a stepparent may provide a sufficient reason to limit the presumptive right of the natural parent). *But see* Mullins v. Oregon, 57 F.3d 789 (9th Cir. 1995) (finding that grandparents did not have a protected liberty interest in the adoption of their grandchildren where they had only minimal contact with the grandchildren and had not developed a familial relationship with them).

176. Voluntary and *indefinite* parental relinquishment is the cornerstone of proof of lack of "physical custody" in a nonparent. Webb v. Charles, 611 P.2d 562 (Ariz. 1980); *see also, e.g.*, *In re* Marriage of Santa Cruz, 527 N.E.2d 131 (Ill. App. Ct. 1988) (refusing to grant maternal grandmother standing to petition where there was insufficient indication that child's mother had voluntarily relinquished physical custody of the child indefinitely).

177. "[I]n more than a few (but certainly not in all) contested cases in which the stepparent's claim seemed especially justified, courts have nonetheless managed, using a variety of often tortured and certainly circuitous routes, to award custody to the stepparent." Levy, *supra* note 16, at 194 (citations omitted); *see also*, Kathleen T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law for Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 43 n.158 (2002) (citing, as "highly creative or distracting applications of the best-interests standard," Koelle v. Zwiren, 672 N.E.2d 868, 873 (Ill. App. Ct. 1996) (awarding visitation rights to man who was misled for eight years into believing he was the father, and who was the only father that child had ever known, even though not specifically authorized by statute, under best interests standard); Quinn v. Mouw-Quinn, 552 N.W.2d 843 (S.D. 1996) (holding that although statute does not give nonparents standing to bring custody or visitation action, court could order visitation to mother's ex-husband who was the only father the child had known in her seven years of life, under court's *parens patriae* authority)).

178. *See* Chambers, *supra* note 159, at 123–24.

> A standing requirement is useful as a rough filter to prevent the filing of petitions by those who have no legitimate interest in the care of a child, but is poorly suited to resolving real disputes between those who do have such an interest. Deciding these case by a standing requirement is similar to attempting to decide every case by summary judgment. In fact, it is

Two cases, one decided before and one after the enactment of section 25-401, demonstrate the difficulties in advancing the best interests of children under that provision. In *Olvera v. Superior Court*,[179] a post-UMDA decision, a father petitioned for dissolution of marriage. The stepmother petitioned for custody of a child who had been placed in the father's custody at the dissolution of his previous marriage. The stepmother testified that she was the primary caretaker for nine years, from the time the child was three until the dissolution proceedings.[180] Nevertheless, the father had not relinquished parental rights, and the court had little choice but to hold that the stepmother had no standing to petition for custody of a child not "common to [their] marriage"[181] unless the child was "not in the physical custody of a parent." The father retained custody, and the stepmother could not present a case that it would be in the long-term best interests of the child to remain in her custody rather than the father's.

On the other hand, in *Clifford v. Woodford*,[182] a case involving a stepparent that was decided prior to Arizona's adoption of section 25-401 standing requirements, the court reached a contrary and more "child-oriented" result. The father knew that, as in *Olvera*, his children were developing a strong relationship with their stepfather during the twelve years they lived with their mother. Nevertheless, he lived in distant states, visiting his children infrequently and never attempting to modify the children's custody arrangements.[183] When the mother passed away, the stepfather immediately petitioned for custody of the children.[184] The court in *Clifford*, unlike the court in *Olvera*, was able to hear evidence about and consider the importance of fostering stability in the children's home environment. As a consequence, although there was no greater evidence of abandonment by this father than the father in *Olvera*, the *Clifford* court found that, given his past impact on the girls' lives, maintaining the children's relationship with the stepfather was in their "best interests."[185]

It was clear in *Clifford*, as it should have been in *Olvera*, that due to the lengthy and meaningful attachment between the children and the stepparent, the ultimate "best interests" of children might require that nonparents be heard on those interests. In *Clifford*, however, the court was not hampered by statutory third-party standing barriers. It could proceed to the merits of two competing claims for custody by considering the children's best interests. Even considering the general parental preference, the father should have expected a strong stepparent-child relationship to develop while he maintained only an attenuated

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> worse because a motion for summary judgment looks to the issues in the case, while the standing requirement of section 601(b)(2) will result in awards contrary to the best interests of the child.

Id.; *see also In re* Marriage of Houghton, 704 N.E.2d 409, 416 (Ill. App. Ct. 1998) (Cook, J., dissenting).

179. 815 P.2d 925 (Ariz. Ct. App. 1991).
180. *Id.* at 926.
181. *Id.* at 928.
182. 320 P.2d 452 (Ariz. 1957).
183. *Id.* at 455–57.
184. *Id.*
185. *Id*. at 457.

relationship with his children. He knew or should have known that the stepfather's relationship with the children would be stronger than his own, and therefore the children's best interest might be served by remaining in the stepfather's custody. This parental "estoppel" argument against the father might not establish that the father voluntarily and indefinitely relinquished custody to the stepfather, but the court was free to act in the children's best interests.

Parents in both cases should have realized that their children would develop parent-child relationships with their nonparent caretakers, but the nonparents in *Clifford* did not have to show relinquishment of parental rights before being allowed to argue that the children's best interests called for third-party custody. The third party in *Olvera*, on the other hand, did not have the chance to make this argument. The court concluded that the father had not relinquished his legal rights, and therefore never reached the question of the best interests of the children.[186] *Olvera*, therefore, focused on adult quasi-property interests rather than evaluating who ought to have custody of the children to further their best interests.[187] The focus on whether a biological parent maintained physical custody of the children while they developed a strong relationship with a nonparent is superficial. A child's relationship with a nonparent, obviously, does not hinge on property rights.[188] Parent-child bonds may form over a brief period, or they may never form at all.[189] Thus, in order ultimately to protect and provide for the child's best interests—particularly where there is "evidence of a mutually close and loving [nonparent-child] relationship"[190]—courts in UMDA states have circumvented the restrictive statutory "standing" language by liberally interpreting facts to find that parents have "consented" to the relinquishment of their parental interests.[191] In many of these cases, the parent's relinquishment may not have been

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186. "Courts in [some] states have candidly complained that the decisions of [their] state's courts have not been wholly consistent." Chambers, *supra* note 159, at 123 (citing, for example, *In re* Custody of N.M.O., 399 N.W.2d 700, 703 (Minn. Ct. App. 1987)).

187. Those U.S. Supreme Court cases, for example, that have attempted to discuss or define "family" have increasingly seen the significance of the parental role and familial relationships not in terms of biological connections but in terms of emotional relationships. O'Keefe, *supra* note 7, at 1098; *see also, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 504–05 (1976) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family . . . . Over the years millions of our citizens have grown up in [an extended family], and most, surely, have profited from it."). For the most recent discussion on the topic, see Troxel v. Granville, 530 U.S. 57 (2000) (Stevens, J., dissenting).

188. *See* Levine, *supra* note 2, at 330 (citing Simmons v. Simmons, 486 N.W.2d 788, 791 (Minn. Ct. App. 1992)).

189. *Id.*

190. *See id.* (discussing the recent trend that recognizes stepparent standing and custody rights through the doctrine of *in loco parentis*).

191. *See* Bartlett, *supra* note 177, at 41–42 ("Because [the superior rights doctrine] sometimes led to custody decisions interrupting long-term substitute parent relationships in favor of biological parents who had served little or no parental role in the child's life, the law was stretched in some jurisdictions to give rights to nonparents upon a showing of 'extraordinary circumstances' or 'detriment to the child' . . . ."); *supra* notes 177, 187.

truly "voluntary" and "indefinite,"[192] but the courts applied those standards liberally to reach the best interests of the children even after the enactment of laws such as section 25-401. At a minimum, these circumstances raise questions about the fairness or efficacy of section 25-401 standing requirements in third-party custody disputes.

C. Adoptive or Biological Parents as Third Parties or "Nonparents": Were the Rights Relinquished Temporarily or Indefinitely?

Adoptive parents cannot assert third-party standing in a custody dispute unless both biological parents have voluntarily and indefinitely relinquished parental rights, even if the adoptive parents have otherwise developed a psychological parent-child relationship. In *In re Appeal in Maricopa County, Juvenile Action No. JA 33794*,[193] for example, the court found that a married couple seeking to adopt a child lacked standing to contest the natural father's petition to regain custody. When the mother voluntarily placed her child in the couple's care, the father did not attend the "severance hearing." However, he did object to the adoption prior to the hearing.[194] Even though the couple cared for the child for two years and had become its "psychological parents," the court ruled that the father's right to control and custody of his child did not evaporate because he had not been a model parent.[195] The Arizona Supreme Court again considered the rights of a biological father against potential adoptive parents in *In re Appeal in Pima County Juvenile Severance Action No. S-114487*.[196] That case, of great public interest in Arizona, involved the daughter of young, unwed parents. Prior to the birth of the child, the mother suggested placing it for adoption, but the father opposed the idea. However, upon the birth of the child, under pressure from her parents, the mother placed the child for adoption without the father's knowledge.[197] The child was placed with a couple hoping to adopt it. While the father did not formally give up his parental rights, he made no attempt to have any contact with his child, nor did he provide financial support.[198] Indeed, he made no effort to assert his legal rights until he was required to respond to the adoptive parents' petition to sever.

The court found that, "[if] the adoptive parents had not acted, the evidence suggests that the father would have continued to do nothing."[199] The Supreme Court held:

> Although parents with an existing parental relationship, either in fact or law, are entitled to the highest constitutional protection, an

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192. *See supra* notes 176–78 and accompanying text.

193. 828 P.2d 1231 (Ariz. Ct. App. 1991).

194. *Id*. at 1232.

195. *Id*. at 1235. *Maricopa County Juvenile Action No. JA 33794* noted, among other things, that the termination and adoption statutes have two different purposes. Termination statutes focus on the rights of the parents; adoption statutes focus on the best interest of the child. *Id.*

196. 876 P.2d 1121 (Ariz. 1994).

197. *Id.* at 1125.

198. *Id.* at 1133.

199. *Id.*

> unwed father must first take steps to establish a parent-child relationship before he may attain the same protection. While the state may not unduly interfere with an unwed father's ability to develop this relationship, it need not protect the mere biological link that exists if the father fails to step forward . . . . [The] significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship. In defining the father's liberty interest, the [United States Supreme] Court characterized the rights of the parents as a counterpart of the responsibilities they have assumed.[200]

As a result of the biological father's failure to take affirmative steps to create a relationship with his daughter, his legal rights could be terminated on the basis of abandonment.[201]

In both of these adoption cases, the court advanced a child's best interests based on the parent's intent to create a family relationship, or at least to maintain that possibility.[202] In *Maricopa County, Juvenile Action No. JA 33794*, the court preserved the child's relationship with a parent who, through no fault of his own, never had a fair opportunity to develop a nurturing parent-child relationship.[203] There could be no standing for the adoptive parents without evidence that the biological parents clearly and permanently relinquished parental rights. In *Pima County Juvenile Severance Action No. S-114487*, however, the court allowed for standing to adopt by terminating the rights of the father who had taken no steps to protect his status as a biological father.[204]

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200. *Id.* at 1128–29, 1131 (quoting Lehr v. Robertson, 463 U.S. 1983) (internal citations omitted). *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (noting that parental rights are protected largely in the context of their exercise within a family).

201. *Id.* at 1135–36. *Pima County Juvenile Severance Action No. S-114487* was an important modern case in which the Arizona Supreme Court carefully addressed and defined the concept of parental abandonment of an infant placed for adoption. It became so prominent in the news that it led to the enactment of a very strict putative fathers registry in Arizona. Interview with Professor Barbara A. Atwood, Mary Anne Richey Professor of Law, Univ. of Ariz. James. E. Rogers Coll. of Law, in Tucson, Ariz., (Sept. 19, 2004) [hereinafter Atwood Interview]; *see also* ARIZ. REV. STAT. § 8-106.01 (2001).

202. *See also Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

203. 828 P.2d 1231 (Ariz. Ct. App. 1991) *See also In re* Petition of Kirshner, 649 N.E.2d 335 (1995) (holding that a unilateral relinquishment of custody rights by one parent cannot be used to establish standing against the other parent who has not voluntarily relinquished).

204. "Not all courts . . . go out of their way to rule for stepparents [or de facto parents]. Forced to choose between a long-term custodial stepparent and an absent biologic parent who has regularly visited, some courts have, without much explanation, decided that children are better off returned to their biologic parent." Chambers, *supra* note 159, at 124 (citing *In re* Custody of Krause, 444 N.E.2d 644 (Ill. App. Ct. 1982)). "Others, dealing with cases in which the biologic parent has had little contact with the child, seem to stretch to place custody in the biologic parent." *Id.* (citations omitted).

An interesting situation, which the Arizona courts have not yet confronted, could occur where a parent *has* indefinitely relinquished parental rights, yet later asserts standing in a custody dispute as a nonparent. In Washington, which has also adopted the UMDA, in *In re Custody of R.R.B.*,[205] a biological father voluntarily terminated his parental rights and consented to adoption. Seven years later, the child began having severe mental health problems among allegations of abuse.[206] The child, with consent of the adoptive parents, moved back in with the biological father, who eventually sued for custody as a nonparent.[207] Even though the father had relinquished his parental rights, the court granted him standing as well as custody, finding that continued custody by the adoptive parents would be detrimental to the child.[208]

IV. THE NEW SECTION 25-415 AND *IN LOCO PARENTIS* STANDING IN ARIZONA

Section 25-415 took effect on April 30, 1997, as part of an effort to help third parties who had "meaningful relationships" with a child obtain custody and visitation. The Arizona legislature amended the state's child custody law to add *in loco parentis* standing that was less burdensome than proving a child was "not in the custody of a parent"[209] under the old section 25-401. [210]

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. Currently, at least eleven states have expanded the definition of parent to include equitable parents, or persons *in loco parentis*. This bill seeks to expand the definition of parent with regard to the commencement of child custody proceedings so that courts will possess the ability to place children with non-biological parents.[211]

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205. 31 P.3d 1212 (Wash. Ct. App. 2001).
206. *Id.* at 1214.
207. *Id.*
208. *Id.*
209. *See supra* Part III.C.
210. *See* ARIZ. REV. STAT. ANN. § 25-415 (B) (2001).
211. Fact Sheet for H.B. 2470 (nonbiological parents), 43d Leg. 1st Reg. Sess. (Ariz. 1997). *See* Bartlett, *supra* note 177, at 42 n.155 (citing, for example, *In re* Gallagher, 539 N.W.2d 479 (Iowa 1995) (holding that 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 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); *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)); *see also, e.g.*, Bupp v. Bupp, 718 A.2d 1278 (Pa. Super. Ct. 1998).

As originally introduced,[212] this bill was intended as an amendment to the old section 25-401(B)(2) and, as originally proposed, would have read (with the amendments emphasized):

> [Custody may be requested by] a person other than a parent, by filing a petition for custody of the child in the county in which *the child* is permanently resident or found, but only if *either the child* is not in the physical custody of one of the *child's* parents *or the person stands in loco parentis to the child. For the purposes of this paragraph, "in loco parentis" means a presumptive father, a stepfather or another person who has been treated as a parent by the child and who has formed a meaningful parental relationship with the child*.[213]

As the bill moved through the legislative process, however, it was clear that there was some public concern about maintaining the superiority of parental rights.[214] The Arizona Senate also wished to use the House version of the legislation as a vehicle for expanding grandparent visitation rights by allowing persons *in loco parentis* to petition for visitation as well as custody,[215] thus resolving a drafting problem noted a few years earlier in an important appellate court decision.[216] According to a legislative committee report published six months after section 25-415's enactment:[217]

> Although the second paragraph [of section 25-401] appears to allow nonparents to bring a [custody] proceeding in certain circumstances in which the child is not in the physical custody of a parent, state court opinions have restricted its application. It has been held that the term "physical custody" in this context refers not merely to actual control of the child's physical presence but instead to the

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212. H.B. 2470, 43d Leg. 1st Reg. Sess. (Introduced Version) (Ariz. 1997).

213. *Id.*

214. S. Leg. Hearing Minutes, 43d Leg., 1st Reg. Sess. (Ariz. 1997) (comments of Judge Norman Davis and Arizona State Sen. Randall Gnant).

215. Arizona's "grandparent visitation" statute was arguably the first step toward relaxing the strict ("not in the custody of parents") requirements of the UMDA approach to third-party custody. Atwood Interview, *supra* note 201. *See* ARIZ. REV. STAT. ANN. § 25-409 (2001) (formerly section 25-337.01) ("The . . . court may grant [grandparents] reasonable visitation rights to the child . . . on a finding that the visitation rights would be in the *best interests* of the child [regardless of the fitness of the parents]." (emphasis added)). Prior to the enactment of this section, grandparents had no legal rights to visitation with their grandchildren. *In re* Maricopa County, Juvenile Action No. JA-502394, 925 P.2d 738 (Ariz. Ct. App. 1996). The new visitation statute, however, did not allow for visitation simply as a result of grandparent *in loco parentis* status, but only where the marriage of the parents of the child has been dissolved for at least three months, a parent of the child has been deceased or has been missing for at least three months, or the child was born out of wedlock. *See* ARIZ. REV. STAT. ANN. § 25-409(A).

216. Finck v. O'Toole, 880 P.2d 624 (Ariz. 1994), *superseded by statute*, ARIZ. REV. STAT. ANN. § 25-415 (2001), *as recognized in* Riepe v. Riepe, 91 P.3d 312 (Ariz. Ct. App. 2004).

217. CHILD SUPPORT ENFORCEMENT AND DOMESTIC RELATIONS REFORM COMMITTEE, REPORT ON IN LOCO PARENTIS CUSTODY, VISITATION AND CHILD SUPPORT 5 (Nov. 15, 1997).

> legal right to control the child. Hence, unless 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 law.
>
> The restrictive application of this statute was recently emphasized in the decision by the Arizona Supreme Court in *Finck v. O'Toole*, 179 Ariz. 404 (1994). That case involved a divorce action between parents in [which, with regard to custody,] the wife claimed that the husband was not the biological father of the child. At the time, the child was residing with *step*-grandparents (the non-biological father's parents) who were acting as parents. When the mother was awarded custody of the child, the *step*-grandparents requested and were granted visitation rights. The mother appealed, challenging the court's jurisdiction to grant visitation. On appeal, the supreme court [denied] the request. It found that in the particular proceeding involved, jurisdiction was lacking to grant the *step*-grandparents rights of visitation under state law. The court also noted that specific laws regarding visitation (now sections 25-408 and 25-409) did not include "*unrelated* third parties" and that extension of rights was a legislative prerogative.
>
> *Finck* highlighted the need for legislative action to expand custody proceedings to persons not contemplated in section 25-401. In 1997, [H.B. 2470] was introduced in the Arizona House of Representatives to address this issue. As passed by the House, the bill simply included persons standing *in loco parentis* to the category of persons entitled under section 25-401(B) to commence a custody proceeding. In the Senate, the bill was extensively amended to add an entirely new section of [law.] New section 25-415 embodied detailed substantive and procedural requirements for permitting persons standing *in loco parentis* to petition the court for either custody *or visitation*.[218]

Under the new section 25-415, a third party may now 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 legal parents who wish to retain or obtain custody . . . [and]
>
> 4. One of the following applies:
>
> (a) One of the legal parents is deceased.
>
> (b) The child's legal parents are not married to each other at the time the petition is filed.

218. *Id.* (citations omitted) (emphasis added).

> (c) There is a pending proceeding for dissolution of marriage or for legal separation of the legal parents at the time the petition is filed.[219]

The law, however, continues to protect the superior right of parents, 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.[220]

The provision presumably means evidence is required to show that awarding custody to a legal parent would be "significantly detrimental" to the child's best interests. This language allows courts to grant third parties standing while still giving preference to biological parents' rights.

Finally, one who is *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."[221]

Recently, in *Downs v. Scheffler*,[222] the court of appeals analyzed the relationship between section 25-415, which requires proof that custody by a legal parent would lead to "significant detriment" to the child, and section 25-403, which sets out the factors for determining the "best interests" of the child in custody disputes. In *Scheffler,* a paternal grandmother petitioned for custody of Kortnee, an eleven-year-old child who had resided with the grandmother for most of her life. The child was born in August 1991, and her parents, who had never married, lived with the grandmother briefly. However, by December 1991, the mother and child left the grandmother's home. That month, the child's mother and father both petitioned for sole custody of the child, which the court awarded to the mother. The court gave supervised parenting time to the father and visitation to the grandmother.[223]

In early 1992, the mother and child moved back with the grandmother, but by the end of August 1992 the mother moved out of the grandmother's home once again. At that point, the grandmother took over Kortnee's care and support, and although the mother still had sole legal custody, she did not resume regular contact with her child until seven years later. During this time, the child remained in the physical custody of the grandmother, who continued to support her without receiving any assistance from either parent.[224]

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219. ARIZ. REV. STAT. ANN. § 25-415(A) (2001).
220. *Id.* § 25-415(B) (emphasis added).
221. *Id.* § 25-415(G)(1) (emphasis added).
222. 80 P.3d 775 (Ariz. Ct. App. 2003).
223. *Id*. at 777.
224. *Id*.

In 2000, both parents consented to the grandmother's appointment as the child's guardian, but after the mother sought to move her daughter into her new home in February 2001, the grandmother petitioned for custody pursuant to section 25-415. After an evidentiary hearing on the grandmother's petition, the family court concluded that it was in the child's best interests to remain in the mother's sole legal custody because the grandmother did not overcome the statutory presumption in favor of parental custody by establishing that it would be significantly detrimental to the child to remain with her mother.[225] The family court's decision, however, 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* . . . .[226]

Moreover, the appellate court 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 non-parent] 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 . . . [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.
>
> As a practical matter such exacting standards may be most frequently met by establishing the unfitness of a parent . . . . 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.[227]

It seems that section 25-415 has accomplished its purpose. The decision in *Scheffler*, given its facts, would likely have been the same prior to the enactment of section 25-401, a law that in the legislature's view[228] had become too narrow in its application. Under pre-1970s cases such as *Clifford v Woodford*,[229] there would more likely have been findings that the best interests of the child would lie in

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225. *Id*.

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

227. *Id.* at 781 (emphasis added). This is consistent with the mandate of the Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000).

228. *See supra* note 218 and accompanying text.

229. 320 P.2d 452 (Ariz. 1957).

nonparent custody because a far more "meaningful parental relationship" had been formed with the nonparent than the parent. The courts are once again able to respect parental rights, yet further the best interests of children as they were able to prior to the enactment of section 25-401.

More recently, in *Riepe v. Riepe*,[230] the court of appeals interpreted the term *in loco parentis* in section 25-415. There, a widowed stepmother petitioned for statutory visitation.[231] The parents were divorced in 2000 and shared joint custody. The father was the primary residential parent but the natural mother had parenting time every other weekend, one evening a week, and extended time over school vacations. The father began dating the stepmother in May 1999. The father, along with the child, Cody, moved in with the stepmother and her three sons in January 2000. The father married the stepmother in May 2001, and then died in a traffic accident in November 2001.[232]

The stepmother spent a significant amount of time with Cody before and during her marriage. One of her sons attended school with Cody and she brought both of them to and from school. She fed Cody, was involved in his classroom activities, and cared for him both before and after she married his father. All evidence showed that the stepmother was very loving and involved in Cody's life during the time she was with his father.[233] During this time, however, the mother also continued to be involved with Cody and paid child support to the father. Consequently, unlike *Scheffler*, the stepparent-child relationship was not of sufficient duration to clearly imply psychological bonding, and there was no basis for inferring intent by the mother to relinquish her parental rights.[234]

After the father died, Cody began living with his mother, who did not allow contact between the stepmother and Cody. The stepmother filed a petition for *in loco parentis* visitation pursuant to section 25-415. The superior court denied the petition, holding that the stepmother had failed to carry her burden of proving that she stood *in loco parentis* to the child. Specifically, the lower court found that:

> [The stepmother] has shown that she was a caring and supportive stepparent and that Cody did bond to her. However, throughout Cody's and [the stepmother's] relationship, and while Cody's father was alive, Cody's natural mother and father fulfilled the rights and responsibilities of parents while [the stepmother] played a supportive role to her husband[']s] role of father to Cody . . . . Although he may use the term "mom" to show affection and to give value to his relationship with [the stepmother], the Court is not persuaded that this is indicia that he views [the stepmother] as mother *in the same sense* that he views his natural mother. [Therefore,] the Court cannot factually conclude that [the

230. 91 P.3d 312 (Ariz. Ct. App. 2004).

231. This, of course, was the relief requested in *Finke*, the decision allegedly behind the reforms of section 25-415.

232. 91 P.3d at 313.

233. *Id*.

234. *Id*. at 314.

> stepmother] stood *in loco parentis* to Cody as defined by A.R.S. § 25-415(G)(1).[235]

On appeal, however, the mother disagreed with the trial court's statement that the stepmother would have *in loco parentis* standing if she could show that her relationship with Cody was "the same as or superior" to his relationship with his mother. Relying on dictionary definitions of *in loco parentis*, the mother asserted that section 25-415(G)(1) actually required the stepmother to show that she stood "in the place of" a natural parent in order to receive visitation rights. She argued, therefore, that because she and the father fulfilled the rights and obligations of parents to Cody, the stepmother could not have "stood in the place" of either parent.[236]

The appellate court disagreed, explaining that it was required to turn to commonly used definitions of statutory terms only when the legislature had not ascribed a particular meaning to the terms.[237] Here, the legislature had provided an express definition. The statute does not require a person to establish that he or she has a relationship with a child that *replaces* that child's relationship with a parent or is the *same or superior* to the child's relationship with one or both legal parents.[238] Rather, to establish *in loco parentis* status for visitation, a nonparent must only prove that the child (1) treated that person as a parent and (2) formed a "meaningful parental relationship" with that person for a substantial period of time.[239] Thus, the stepmother could establish *in loco parentis* status even if the child continued to enjoy parental relationships with both natural parents.[240]

There was an unusually long dissent in *Riepe* by Judge Barker,[241] raising questions *inter alia* about the effect of the majority's opinion on the definition of a

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235. *Id*.

236. *Id*. at 314–15. This argument raised some material questions as well. After all, one can obviously stand *in loco parentis* at given points of time, like a teacher stands *in loco parentis* to a child at school, albeit temporarily, even though the child has two fit custodial parents. Visitation is a temporary impingement on custody rights as well, whereas custody is the legal right to control. *See, e.g.*, Olvera v. Superior Court, 815 P.2d 925, 927 (Ariz. 1991) ("Visitation rights may be viewed as a limited form of custody or as a limitation upon the custody rights of another.").

237. *Riepe*, 91 P.3d at 315 (citing State v. Wise, 671 P.2d 909, 911 n.3 (Ariz. 1983) (explaining that unless a legislature clearly expresses an intent to give a term a special meaning, the court gives words used in statutes their plain and ordinary meaning, which can be gleaned from dictionaries)).

238. *Id*.

239. *Id.* (citing ARIZ. REV. STAT. ANN. § 25-415(G)(1) (2001)). One might argue that *Riepe* has begged the question. The holding hints at a potential problem with this portion of the statute. Atwood Interview, *supra* note 201. The term "meaningful parental relationship for a substantial period of time" is fairly vague. In *Riepe*, the court was able to find such a relationship, but what if it hadn't been a stepmother but merely a person the father had been dating for a period of time or an adult babysitter? What sorts of relationships are "meaningful" and entitled to protection because of a past *in loco parentis* relationship, and why?

240. *Id*.

241. *Id*. at 318 (Barker, J., dissenting).

"parent"[242] and on the constitutional rights of legal parents to parent their children.[243] Judge Barker argued that the request for visitation in *Finck*, the case that was the catalyst for section 25-415, was based on the child's prior relationship with the step-grandparents, which had replaced the relationship with both parents, and that, therefore, "the legislature could certainly have considered the issue from *Finck* to be whether to recognize stepparents (as well as others) who had *taken the place* of legal parents."[244]

Judge Barker suggested that, in making this determination, the Arizona Supreme Court was faced with two different and conflicting lines of authority. One, expressed by *Bryan v. Bryan*,[245] where:

> This court determined that "the [trial] court could easily have concluded that the [stepfather] was 'the only genuine father [the child had] ever really known,'" [and thus] "awarded custody to the stepfather [since he] had taken the place of the father . . . . [The] second, and competing line of authority . . . was based on *Olvera v. Superior Court*, . . . where the stepmother . . . appears to have taken the place of the mother[, but] the court rejected an *in loco parentis* claim . . . because, under the statute, the court had no jurisdiction to award custody of a child who was not biologically related to or adopted by the parties . . . [even] when the stepparent had taken the natural parent's place.[246]

Thus, according to Judge Barker, the issue in *Finck* was actually whether there was jurisdiction to allow stepparent visitation when the corresponding biological parent was no longer involved in raising the child and the stepparent had effectively taken that parent's place.[247] *Finck*, in the dissenter's view, answered this question in the negative by holding that those who had taken the place of parents did not have rights under the statute to seek custody or visitation. Section 25-415, he therefore argued, was enacted to allow those who had taken the place of the parents to have such rights.[248]

However, the majority stated, "We are compelled to apply well-established principles of statutory construction to reveal the fallacy of the Dissent's interpretation of § 25-415."[249] According to the majority, Judge Barker believed that:

> [B]ecause a child can only have one mother and one father, a third party cannot obtain *in loco parentis* status unless that person serves as a same-gender substitute for one of the child's parents. The Dissent mistakenly blurs the concepts of "parent" and "*in loco parentis*" and imposes limitations on *in loco parentis* visitation that are not supported by § 25-415 . . . . The legislature did not authorize

242. *Id*. at 320.
243. *Id.* at 338–39.
244. *Id*. at 333 (emphasis added).
245. *Id*. (citing 645 P.2d 1267 (Ariz. Ct. App. 1982)).
246. *Id.* at 332–33 (citations omitted).
247. *Id.* at 333.
248. *Id*.
249. *Id.* at 316.

> *in loco parentis* visitation for a "parent," but instead bestowed authority on the court to grant such visitation to "a person" standing *in loco parentis* to a child . . . [defined by the statute as] a person (1) who a child treats as a parent, and (2) who has established a meaningful parental relationship with the child for a substantial period of time.
>
> The Dissent mistakenly assumes that "treated as a parent" and "parental relationship" are synonymous with "parent." But by choosing to authorize visitation for persons "treated as a parent," the legislature plainly intended § 25-415(C) to apply to *non-parent* visitation. The opposite conclusion would make the words "treated as" entirely superfluous. In sum, a person standing *in loco parentis* to a child for purposes of § 25-415(C) is not a "parent," and the meaning of "parent" in other contexts, therefore, is inconsequential.[250]

The majority explained that its conclusion was:

> [U]nderscored by the fact that the legislature authorized *in loco parentis* visitation even when the child has two legal parents, each with attendant parental rights . . . . Such visitation is not dependent on a finding that the child does not or did not enjoy a meaningful and healthy relationship with one or both legal parents, as suggested by the Dissent. By contrast, in order to obtain *in loco parentis custody*, a petitioning party must establish, among other things, that it would be "significantly detrimental to the child to remain or be placed in the custody of either of the child's living legal parents who wish to retain or obtain custody."[251]
>
> In short, by crafting its definition of "*in loco parentis*," the legislature did not require a showing that the child *substituted* the petitioning party for a legal parent. A person standing *in loco parentis* to a child is not a "parent," does not enjoy parental rights [at least until or unless awarded legal custody], and therefore does not become an "additional parent," as the Dissent suggests . . . . [W]hether or not [the stepmother] stands *in loco parentis* to Cody for the purpose of obtaining reasonable visitation privileges, [the mother] will remain Cody's sole parent with attendant rights and responsibilities.[252]

Further, said the majority:

> [T]he legislature enacted § 25-415 . . . in response to the supreme court's decision in *Finck v. O'Toole*, which held that the superior court was not authorized to grant visitation rights to step-grandparents who stood *in loco parentis* to a child. In *Finck*, the

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250. *Id.* (citations omitted).

251. *Id.* (citing ARIZ. REV. STAT. ANN. § 25-415(C)(2)–(3) (2001) (authorizing visitation when in the child's best interests and legal parents are either not married to each other or are in the process of dissolving a marriage; *id.* § 25-415(G)(2) (recognizing that legal parents have "parental rights"); *id.* § 25-415(A)) (internal citations omitted).

252. *Id.* at 317.

> court noted that the legislature had only provided procedures for awarding visitation to noncustodial parents, grandparents, and great-grandparents. In light of the legislature's specificity in listing the classes of parties entitled to visitation, the court reasoned that the legislature did not intend to authorize visitation for unspecified third parties, including steparents and step-grandparents.[253]
>
> In response to *Finck*, rather than simply adding stepparents and step-grandparents to the classes of parties entitled to petition for visitation, the legislature enacted § 25-415(C) to broadly provide that the court may award reasonable visitation rights to persons standing *in loco parentis* to a child, including, presumably, stepparents and step-grandparents, subject to satisfaction of the listed requirements. By doing so, the legislature authorized the superior court to consider each unique circumstance and award *in loco parentis* visitation when appropriate. The legislature did not constrain the court's discretion by imposing additional limitations relating to gender or the quality of the child's relationship with his legal parents, and the Dissent errs by seeking to impose such constraints.[254]
>
> In sum, the Dissent errs by both equating parents with persons who stand *in loco parentis* to a child, and by imposing number and gender restrictions on obtaining *in loco parentis* visitation that are not supported by the language or legislative history of § 25-415. Any such restrictions must be imposed, if at all, by the legislature. [In conclusion, in] order to obtain *in loco parentis* visitation pursuant to A.R.S. § 25-415 (C), [the stepmother] was not required to prove that she usurped the role that either Father or Mother served in Cody's life. Because the superior court imposed this requirement on [the stepmother,] we reverse the judgment and remand for further proceedings.[255]

While the dissent's analysis may have been problematic for many reasons, one important reason was that the narrow holdings of *Bryan*, *Olvera*, and *Finck* are not necessarily inconsistent with one another, nor do they depend on the fact that in *Bryan* and *Olvera* stepparents had "taken the place" of a parent. That fact may have been a vivid illustration of the problems with the earlier statute, but it was not a necessary part of the holding. Under the old law, even though continued contact with the nonparents could be crucial to a child's best interests, unclear statutory drafting would often prevent that result.

In *Bryan*, the court held that even though the statute requiring certain findings in a decree of dissolution limited *child support* awards to children "common to the parties to the marriage," courts had jurisdiction to grant *visitation* to nonparents.[256] In *Olvera*, however, the court noted that "the requirement that the

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253. *Id*.
254. *Id.* at 317–18 (citation omitted).
255. *Id.* at 318.
256. 645 P.2d 1267, 1273 (Ariz. 1982); *see also* ARIZ. REV. STAT. ANN. § 25-312 (2001).

child be 'common to the parties' is not only in the clause pertinent to child support findings in a *decree* [but also] in [the provision providing] that a dissolution *petition* must 'set forth [the names] of all living [children] common to the parties.'"[257]

According to *Olvera*, this meant that:

> [T]he legislature intended . . . that custody could be awarded in a domestic relations action only if the child was common to the parties of the marriage [unless] the child is "not in the physical custody of one of his parents," in which event the stepparent or step-grandparents could file a "nonparent" petition under section 25-401(B)(2).[258]

In *Finck*, the Court agreed with *Olvera*, that section 25-401(B)(1) provided only limited visitation or custody options for third parties absent the relinquishment of rights sufficient to satisfy section 25-401(B)(2) ("nonparent" petitions).

Therefore, these decisions involved the question of whether visitation could be granted to unrelated third parties under section 25-401(B)(1) if the children were not "common to a marriage" being dissolved, not whether there was jurisdiction to grant visitation or custody to nonparents under section 25-415(B)(2), the question in *Riepe*, and certainly not whether petitioning nonparents had to have "taken the place" of a parent to obtain visitation or custody.

V. ANALYSIS

Sections 25-401(B)(1) and (2) of the Arizona Marital and Domestic Relations Act imposed what has been called an "adult-centric perspective"[259] in child custody matters. Arizona courts, especially in the last thirty years, have been obliged to define "parent," not by the existence of a meaningful parent-child relationship, but in terms of quasi-property rights that flow from biology, adoption, or marriage.[260] The courts have focused on parents' constitutional or "natural" rights[261] instead of children's important interest in maintaining relationships with other adults who provide support and nurturing that parents refuse or otherwise are

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257. 815 P.2d 925, 928–29 (Ariz. 1991).

258. *Id*. at 929.

259. "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 B. 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).

260. Parental rights are often based on notions of children as property. Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 43 (1984).

261. In practice, the child's best interests are often balanced and made subordinate to parents' rights. GOLDSTEIN ET AL., *supra* note 6, 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 (1990–91) (referring to preferences for natural parents as "archaic" and "harmful").

unable to provide.[262] This approach marginalized the interests of those other adults who, by reason of consistent nurture and day-to-day care, allow themselves to become psychological parents to children.[263]

Children develop unique attachments to adults they perceive as parents.[264] The failure to maintain a child's relationship with "psychological" parents can have a devastating effect on that child.[265] Unfortunately, the UMDA's third-party standing provisions forced courts in many states, including Arizona, to focus primarily on whether a nonparent had sufficiently "adverse physical possession" to a parent,[266] even though this determination is often unrelated to the children's best interests.

These courts demanded proof of indefinite relinquishment of parental rights to third parties and "adverse possession" of sufficient duration by those nonparents before nonparents could even be heard on the best interests of the child. In pursuing the best interests of children through this approach, courts often had to sidestep canons of statutory construction[267] and utilize overly liberal interpretations of legal concepts like abandonment.[268] UMDA placed courts in the uncomfortable position of having to selectively interpret evidence in order to find voluntary and indefinite relinquishment of parental rights. While completing this task, the courts often failed to fully articulate useful reasoning regarding the more important question: what kind of parent-child relationship *ought* to justify third-party standing?[269]

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262. "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 2, at 140.

263. Woodhouse, *supra* note 259, at 1807.

264. O'Keefe, *supra* note 7, at 1081.

265. Bartlett, *supra* note 5, at 902–06.

266. Marshall v. Superior Court, 701 P.2d 567, 569–70 (Ariz. 1985). *See also* Levine, *supra* note 2, at 330 (citing Simmons v. Simmons, 486 N.W.2d 788, 791 (Minn. Ct. App. 1992)).

267. "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 2, at 343–45 (suggesting the *in loco parentis* doctrine as a means of doing so in states with UMDA-derived custody jurisdiction statutes); s*ee also, e.g.*, Stockwell v. Stockwell, 775 P.2d 611 (Idaho 1989); *In re* Marriage of Allen, 626 P.2d 16 (Wash. Ct. App. 1981) (stepparents can be defined as "parents" under the custody jurisdiction statute).

268. Often, this problem cannot be avoided without contorting principles of statutory construction, such as the "plain meaning rule," or creating irreconcilable precedent. 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) ("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.'").

269. *See* sources cited *supra* note 119.

Thus, even if nonparents had actual custody and were the only parent figures that a child knew at the time they petitioned for custody, they still had to show that surviving parents voluntarily and indefinitely relinquished parental rights in favor of the nonparent.[270] Even if a deceased custodial parent had attempted to relinquish physical custody at some point, the other surviving noncustodial parent was free to later assert superior rights and exclude the "de facto" or "psychological" parents from the custody discourse altogether.[271]

Consequently, because the law required courts to find actual or implied waiver of parental rights under section 25-401, the nonparent's custodial *possession* of the child was determinative rather than the nature of the child's *relationship* with the nonparent. This required deference to parents' supposed "natural rights" for standing purposes obscured the important relationship between standing decisions and ultimate custody decisions, which are supposed to focus on the children's best interests.[272] Indeed, because of section 401(B)(2) of the Marital and Domestic Relations Act, courts often had difficulty placing children with the adults who presented the most promise for successful parenting.[273]

Yet, these preliminary standing requirements are unnecessary considering parents already receive a presumption of entitlement in "best interests" custody determinations.[274] Parents who have properly maintained relationships with their

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270. Levine, *supra* note 2, at 329. 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 herself in the day-to-day care of the child; and 4) intends to assume the burdens and duties of a parent. *Id.* at 328–29.

271. *See, e.g.*, Harper v. Tipple, 184 P. 1005, 1008 (Ariz. 1919); *see also, e.g.*, *In re* Custody of R.R.K., 859 P.2d 998 (Mont. 1993) (holding that standing does not depend on who has actual, physical possession of the child at the moment a petition is filed, but rather on whether the *surviving* parent actually relinquished physical custody of the child and how long the parent and child were separated).

272. *See, e.g.*, Cahn, *supra* note 98, at 2.

> 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.

Id. at 4; *see also* sources cited *supra* note 119.

273. *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 her parents, even if the best interests of the child seem to require custody in nonparents).

274. The fundamental, natural right of parents is already independently given due deference when custody determinations are made. *See supra* note 22; *infra* note 301. In early, pre-UMDA custody cases purporting to apply a best interests test, for example, the courts used "innocent sleight-of-hand in juggling legal concepts" to avoid awarding custody to a nonparent. Sayre, *supra* note 97, at 677 n.33. Today, "judges speak in terms of rebutting presumptions, [and] identify those factors that justify defeating a parent's claim for custody." Kaas, *supra* note 19, at 1022–23 (citing Look v. Look, 315 N.E.2d 623, 626 (Ill. App. Ct. 1974)). Courts require a showing of extraordinary or exceptional circumstances before they will award custody to a nonparent, such as the duration of the parent-child separation and the adverse effect that a change in custody may have on the

children should certainly enjoy a preference in custody determinations.[275] However, the "best interests" of many children require that those who have become "psychological" parents should at least be able to request custody on an equal footing with natural or adoptive parents.[276] If frivolous suits were a concern, they could easily be avoided by imposing reasonable pleading requirements calculated to assure that a petitioning third party has had a significant impact on the life, health and well-being of a child (as Arizona has now accomplished by requiring pleading of a "meaningful parental relationship" and "detriment" from parental custody).[277]

Many states, of course, have long awarded custody to nonparents in the "best interests" of children.[278] Recently, there has been a greater trend toward

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child. Note, *Jurisdiction, Standing, and Decisional Standards in Parent-Nonparent Custody Disputes*—In re Marriage of Allen, *626 P.2d 16 (1981)*, 58 WASH. L. REV. 111, 117 (1982). In *In re Allen*, for example, a stepmother was given custody of her deaf stepson at the end of a four-year marriage. Neither the father nor the mother had paid any attention to the child's needs. The stepmother, however, among other things, had helped to teach sign language to the child and his stepsiblings. The appellate court approved granting custody to the stepmother. *Id.*

275. If the parent has maintained regular contact with the child, the chances of regaining custody are good. *See, e.g.*, Arizona v. Mahoney, 540 P.2d 153 (Ariz. Ct. App. 1975); *see also* Kaas, *supra* note 19, at 1117 ("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."). However, "the 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 (citing United States v. Green 26 F. Cas. 30, 31 (C.C.D.R.I. 1824) (No. 15,256)).

276. *See supra* note 174. 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 of, 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 19, at 1098.

277. ARIZ. REV. STAT. ANN. § 25-415(A) (2001); *see* Susan L. Brooks, *A Family Systems Paradigm For Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1, 11 (1996) (citing JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD 90–91 (1986)). 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 findings of *in loco parentis* where the stepparent accepted the child into the household to establish a relationship, 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 2, at 329–31.

278. Mangnall, *supra* note 2, at 419 (citing HAW. REV. STAT. § 471-46(2) (1993) ("Custody may be awarded to persons other than the mother or father whenever the award

recognition of rights by stepparents, grandparents, and others to request custody. Courts in several states, including Illinois,[279] have used an "equitable parent" doctrine,[280] but this approach has been rejected by most states. For example, the Wisconsin Supreme Court held that a former domestic partner of an adoptive mother could not use the "equitable parent" doctrine, based on equitable estoppel, to create rights to custody or visitation.[281] The court found that although the partner may have assumed parental responsibilities, neither she nor the adoptive mother ever believed that the partner attained the legal status of parent,[282] and thus the partner had no equitable claim. In Arizona, however, the former partner would at least have standing to request visitation under section 25-415, because even though legal parental status was not contemplated by the parties, the domestic partner stood *in loco parentis* to the child.

Although other states have also denied "equitable" standing to stepparents, including those who filled the role of parent in every aspect of the child's life,[283] Michigan courts allow stepparent standing under the "equitable parent" doctrine if "nonparents desire recognition [as parents] and [are] willing to support the child as well as [want] the reciprocal rights of custody . . . afforded to a parent."[284] In *Van v. Zahorik*,[285] however, one Michigan court held that it would be contrary to the public policy in favor of marriage to extend the doctrine to cases where the stepparent was not married to the parent at the time the child was born or conceived.[286] Thus, notions of equitable estoppel have had limited utility, even in Michigan.

Other state legislatures have attempted to overcome the restrictive standing requirements by redefining the concept of "parent." Connecticut, among other states, allows standing to any individual who is "interested" in intervening in child custody proceedings.[287] In a similar approach, states such as Oregon have

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serves the best interest of the child."); N.H. REV. STAT. ANN. § 458.17(IV) (1992 & Supp. 1995); N.D. CENT. CODE § 14-09-06.1 (1991)). Michigan also gives standing to third parties and does not require parental unfitness before a claim can be asserted. *See* MICH. COMP. LAWS §§ 722.21, 722.25 (West & Supp. 1985); Ruppel v. Lesner, 339 N.W.2d 49, 51 (Mich. App. 1983); *see also* COLO. REV. STAT. § 14-10-123 (1987); OR. REV. STAT. § 109.119 (Butterworth 1990); *In re* Sorenson, 906 P.2d 838, 841 (Or. 1995) (allowing stepparents and others "who [have] established emotional ties creating a parent-child relationship with a child" to intervene in divorce proceedings or otherwise request custody).

279. *See, e.g.*, *In re* Marriage of Roberts, 649 N.E.2d 1344 (Ill. App. Ct. 1995).

280. *See* Bartlett, *supra* note 177, at 42.

281. Sporleder v. Hermes, 471 N.W.2d 202 (Wis. 1991), *overruled by In re* Custody of H.S.H.-K, 533 N.W.2d 419 (Wis. 1995).

282. *Id.* at 213.

283. *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 Lewis & Goetz, 250 Cal. Rptr. 30 (Ct. App. 1988).

284. Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. Ct. App. 1987).

285. 575 N.W.2d 566 (Mich. Ct. App. 1997).

286. *Id.* at 569 (recognizing that equitable parents should be created with the utmost care, and preferably with direction from the legislature).

287. CONN. GEN. STAT. ANN. § 46b-57 (West 1995); *see also* HAW. REV. STAT. § 571-46 (1985) (establishing best interests standard for third party custody cases); N.H. REV. STAT. ANN. § 458:17 (VI) (1992 & Supp. 1995) ("The court . . . may allow any

standing provisions that define the requisite "parental relationship" solely in terms of the nurturing and support an individual has given the child.[288] These approaches have been successful when the third party has acted *in loco parentis*, and have been applied even in the absence of a marriage between the parent and petitioning stepparent. The advantage of such schemes, perhaps over the framework in Arizona under section 25-415, is that the burden of showing "detriment" from parental custody shifts from the "standing" phase to the "custody" phase, where parental preferences are already afforded significant weight.

In *Buness v. Gillen*,[289] for example, the Alaska Supreme Court held that a stepfather who had lived with the child's natural mother but had never married her had standing to petition for custody. The child had developed a strong emotional bond with the stepfather, who had been the child's primary caregiver and "father figure."[290] As a result, he fit the definition of "parent" and had standing because he was a "psychological parent."[291] This approach is appealing because it is "child-centric" rather than "adult-centric." There is no rigid standing "detriment" limit placed on those who have established meaningful parent-child relationships, and the doctrine does not require proof that the parents intended to indefinitely relinquish custody.

The Wisconsin Supreme Court developed a similar two-pronged test for *in loco parentis* standing, but it is less helpful to third parties than the implementation of section 25-415 in Arizona.[292] To have standing in Wisconsin, third parties must establish that they had a parent-like relationship with the child *and* that some "triggering event" has *threatened* that relationship.[293] To meet the parent-like relationship prong a petitioner still must establish:

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interested third party or parties to intervene upon motion" and an award of custody may be made to a stepparent if the court determines that such an award is in the best interest of the child; the presumption in favor of the parent can be rebutted by "showing that it would be detrimental to the child to permit the parent to have custody."); N.D. CENT. CODE § 14-09-06.1 (1991) (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 (1992–93).

288. 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, as well as the child's physical needs.

OR. REV. STAT § 109.119(4) (1990).

289. 781 P. 985 (Alaska 1989).

290. *Id.* at 988.

291. *Id.*

292. *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435 (Wis. 1995).

293. *Id.* at 436.

> a) That the biological or adoptive parent *consented to, and fostered,* the petitioner's relationship with the child;
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> b) That the petitioner and the child lived together in the same household;
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> c) That the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and
>
> d) That the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.[294]

Thus, even though *in loco parentis* standing requirements may prove more effective in providing nonparents access to court,[295] the Wisconsin rule continues to give a preference to the legal or "superior rights" of parents by requiring an intentional relinquishment of custody as a preliminary pleading matter. However, it does not provide the alternative of proof of "detriment" as in Arizona, thus preventing nonparents from receiving their day in court in many cases. The rule insists on parental consent to and fostering of the nonparent's relationship with the child, a potentially difficult hurdle for a non-custodial surviving parent, and one that has the potential to serve as an unnecessarily restrictive barrier by focusing on duration of possession and legal relinquishment.[296]

Colorado, unlike Wisconsin, was another one of the eight states that originally adopted the UMDA's third-party standing provisions.[297] Unlike Arizona, however, the Colorado legislature modified the original UMDA provision to minimize the importance of duration of possession in determining standing. In Colorado, there is now an additional option that allows custody proceedings to be commenced "[by] 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

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294. Beth Neu, Case Note, In re 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) (citing *H.S.H.-K*, 533 N.W.2d at 435–36) (emphasis added). 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.*

295. Levine, *supra* note 2, at 328.

296. For example, among the ambiguities on the face of the provision are questions of whether a parent must "consent to" the stepparent, or is consent to the other parent enough.

297. Eight states adopted the UMDA third-party custody provisions: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. *See* Kaas, *supra* note 19, at 1069, n.102. *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, 731 n.29 (2000); Kathleen Nemecheck, 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).

months of the termination of such physical custody."[298] To some extent, this new, concrete minimum time requirement helps move the focus toward the actual relationship that has evolved. Minnesota, another UMDA state with a far more reformist bent, has even more effectively shifted the focus by eliminating the "not in the custody of the parents" requirement altogether.[299] Arizona's approach, like Washington's, is more radical and "child-oriented." Arizona chose to focus on the "meaningful relationships" that can be proven and the detriment from parental custody, rather than the relative property rights of adults.

Ideally, as within Arizona, all state standing requirements should focus on the extent to which a parent-child relationship has developed.[300] Indeed, it would seem advantageous to allow all those with such relationships—and who actually want to participate in the child's life—to at least argue the best interests of the child from their diverse perspectives. Broadening the definition of those third parties with standing should present no problem for parental rights. Parental preferences are still universally factored into the ultimate custody decision.[301]

One sample solution arises in *Ellison v. Ramos*,[302] a recent North Carolina decision in which the court had occasion to interpret that state's non-UMDA liberal third-party custody statute that encourages a wide-open approach to participation in custody determinations. The provision provides that "[a]ny parent,

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298. COLO. REV. STAT. ANN. § 14-10-123(1)(c) (1987).

299. *See, e.g.*, *In re* Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995), *cert. denied*, 516 U.S. 837 (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 of infancy, and the child had been in their home under their control for six months). 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 to prove that the child is not in the physical custody of one of his parents. MINN. STAT. ANN. § 518.156 (West & Supp. 1996).

300. *See, e.g.*, Ellison v. Ramos, 502 S.E.2d 891, 894 (N.C. Ct. App. 1998); *see also supra* notes 168–78 and accompanying text.

301. "A standing requirement is unnecessary to protect the natural rights of the parent. Even where a court decides the case under the best interests of the child standard, it will still give considerable weight to the right of the natural parent." *In re* Marriage of Houghton, 704 N.E.2d 409, 416 (Ill. App. Ct. 1999) (Cook, J., dissenting); *see also* Rose v. Potts, 577 N.E.2d 811, 813–14 (Ill. App. Ct. 1991) (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 (1980) (quoting *In re* Hernandez, 376 A.2d 648, 653 (Pa. 1977)). The burden of proof is not equal between parents and third parties; the burden is on the third party. *In re* Custody of Townsend, 427 N.E.2d 1231, 1237 (Ill. 1981); *see also supra* note 22.

302. 502 S.E.2d 891.

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 . . . ."[303] In *Ellison*, therefore, the father's former companion sued him for custody of his diabetic daughter. The companion alleged that during her relationship with the father she, rather than the father, was responsible for rearing and caring for the child. 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.[304]

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,"[305] and that "the relationship between the third party and the child is the relevant consideration."[306] The court pointed out, however, that a "broad grant of standing does not convey an absolute right upon every person who allegedly has an interest in the child to assert custody,"[307] but there *was* standing here because the petitioner had in fact alleged such a relationship. The court then went on to discuss 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."[308] 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.[309]

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303. N.C. GEN. STAT. § 50-13.1 (1995).

304. *Ellison*, 502 S.E.2d at 893.

305. *Id*. at 896. "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." LEGAL RIGHTS OF CHILDREN, *supra* note 6, at 38 (citing, *inter alia*, *In re* Marriage of Sepmeier, 782 P.2d 876 (Colo. Ct. App. 1989); Nolte v. Nolte, 609 N.E.2d 381 (Ill. App. Ct. 1993); *In re* Marriage of Diehl, 582 N.E.2d 281 (Ill. App. Ct. 1991); Osmun v. Osmun, 842 S.W.2d 932 (Mo. Ct. App. 1992); *In re* Marriage of Johansen, 863 P.2d 407 (Mont. 1993)). "In some of these states, it is said to be the exclusive *factor* on which a court should base its custody decisions." *Id.* (citing, *inter alia*, *In re* Ashley K., 571 N.E.2d 905 (Ill. App. Ct. 1991); M.D.R. v. P.K.R., 716 S.W.2d 866 (Mo. Ct. App. 1986)).

306. *Ellison*, 502 S.E.2d. at 896. "Accordingly, [though we believe it would be unwise to draw a bright line at this time], 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.* at 894–95.

307. *Id.* at 894 (citation omitted).

308. *Id.* at 896; *see* Mahoney, *supra* note 260, at 79 (arguing that the more child-centered "best interests" standard to determine custody should be used once jurisdiction has been established).

309. *Ellison*, 502 S.E.2d at 896 (emphasis added). The due process clause is not offended by the application of the best interest test to recognize a family already in existence. Quilloin v. Walcott, 434 U.S. 246, 250–51 (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).

Thus, under this more liberal statute even "'a *period* of voluntary non-parent custody' constituted 'conduct inconsistent with a parent's protected status' where the parent did not indicate [that the] non-parent custody was intended to be temporary."[310] Most importantly, the court sustained the petition even where the "period" of nonparent custody was *non-exclusive*.[311] Otherwise, "the action [should have been] appropriately dismissed, as the natural parent presumption [would] defeat the claim as a matter of law."[312] This approach to both jurisdiction and ultimate decisions on the merits—where the burden can shift to the parent to show the indefinite relinquishment did *not* occur—seems farthest reaching in terms of advancing "best interests" adjudication and minimizing the impact of parental preferences at the standing stage of the proceedings. Arizona has not yet taken this step: removing "parental rights" concerns from the jurisdictional or standing decision. However, North Carolina, a non-UMDA state, lacks a balanced formula articulating the circumstances in which deference to parental rights can give way to nonparental custody on the merits. Such a formula is necessary to avoid litigation and help judges decide standing issues.

Arizona accomplished this goal with its radical revision of its custody laws over the past ten years. Moving away from the rigid application of the "superior rights" doctrine fostered by the former section 25-401, section 25-415—as interpreted by *Scheffler* and *Riepe*—has allowed courts to hear from third parties under fair criteria that respond to the questions that are truly important to the merits of all third-party custody disputes. These include whether a "meaningful relationship" has been formed and whether that relationship is important enough to the child's development that failing to supercede parental custody rights would be "detrimental" to the well-being of the child. The *Clifford* court took this approach even before Arizona's adoption of UMDA standards in section 25-401. Additionally, as the *Scheffler* court noted, with regard to section 25-415, although a nonparent has the burden of proving that the presumption in favor of legal parent custody would be significantly detrimental to the child, it would be inappropriate for the court to "defer the examination of the child's best interests until parental inappropriateness is established."[313]

Indeed, instead of preventing third parties from participating in "best interests" considerations on the merits—as was often the case under section 25-401—Arizona, under section 25-415, now reduces potential litigation on the merits by *advancing* a preliminary consideration of the merits to the standing stage.

CONCLUSION

Prior to section 25-401 and its third-party custody provisions, based on the UMDA and intended to support and maintain the "superior rights" doctrine,[314] Arizona courts were better able to grant custody to third parties where the ultimate

310. *Ellison*, 502 S.E.2d at 897 (citing Price v. Howard, 484 S.E.2d 528, 536–37 (N.C. 1997)).

311. *Id.*

312. *Id.*

313. Downs v. Scheffler, 80 P.3d 775, 781 (Ariz. Ct. App. 2003); *see also supra* note 227 and accompanying text.

314. *See supra* notes 10–12, 19.

best interests of children required it.[315] Since the 1970s, however, rather than providing evolving, "child oriented" guidance on the appropriate relationship between third-parties and the "best interests" of children in standing determinations, [316] the courts' only option to serve children's best interests was to contort their legal reasoning and statutory interpretation to fit quasi-property notions of voluntary and "indefinite" relinquishment of parental rights.[317]

These efforts involved considerations unrelated to children's "best interests,"[318] and created an unfortunate doctrinal inconsistency. State courts often never reached the children's best interests because they were restricted by standing requirements.[319] However, the courts were not entirely to blame for this failure to recognize the proper relationship between third-party standing and the best interests of children. [320] The more fundamental problem may have been that many courts in states with the UMDA's third-party standing requirements have been forced to "do the right thing" (decide "standing" questions so as to effectively accommodate the best interests of children), while being forced to justify these decisions in terms of the "wrong reasons"[321] (through findings related to property notions—such as "abandonment," "constructive possession," or "adverse possession"—contrived to negate or support the "superior rights" of parents).[322]

Thus, many states that continued to retain the basic "parents' rights" oriented UMDA third-party standing provisions, especially where stepparents were concerned, were in need of a change.[323] As a few UMDA states had already

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315. *See, e.g.*, Clifford v. Woodford, 320 P.2d 452 (Ariz. 1957).

316. *See* Chambers, *supra* note 159.

317. *See, e.g.*, *supra* note 177.

318. The continuing use of presumptions favoring parents indicates that third-party custody decisions are not so much based on the best interests of the child as they are on claims to the ownership of property "of the sort resolved by Solomon." Erin E. Wynne, Comment, *Children's Rights and the Biological Bias: A Comparison Between the United States and Canada in Biological Parent Versus Third-Party Custody Disputes*, 11 CONN. J. INT'L. L. 367, 370 (1996); *see, e.g.*, Marshall v. Superior Court, 701 P.2d 567 (Ariz. 1985) (denying standing to nonparent because children were in physical custody of biological parent); Webb v. Charles, 611 P.2d 562 (Ariz. Ct. App. 1980).

319. "[T]he 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." Cahn, *supra* note 98, at 48.

320. Courts, of course, have been criticized for failing to adequately distinguish between the different situations in which third-party custody disputes arise, at least in terms of the different decisional standards rationally required. *See* Kaas, *supra* note 19, at 1050–60. This problem was obviated somewhat, however, in UMDA third-party custody jurisdictions. *Id*. at 1069 (section 401(B)(2) "requires courts to distinguish between the two categories of [reunification] cases through the application of standing rules").

321. *See* T.S. ELIOT, MURDER IN THE CATHEDRAL 44 (Harcourt, Brace & Co. 1935) ("The last temptation is the greatest treason: To do the right thing for the wrong reason.").

322. *See supra* note 236.

323. "The incoherent pattern of outcomes and the murky and inconsistent discussions of the governing rules almost certainly reflect our society's conflicting and

done,[324] Arizona revised its standing provisions for custody and visitation in favor of a broader, more practical concept of 'parent" by including those *in loco parentis*.[325] This relatively new law, section 25-415, allows courts greater flexibility in protecting the children's interest in retaining meaningful and sustained adult relationships through nonparent custody. At the same time, it will continue to preserve the natural rights of parents, while more realistically defining those rights and the circumstances for refusing to defer to those rights in the interests of children. Most importantly, section 25-415 will advance a realistic consideration of children's best interests to the earliest stage of custody proceedings.

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unresolved attitudes about stepparents, even when loving, and about biologic parents, even when indifferent." Chambers, *supra* note 159, at 122.

324. *Compare* MINN. STAT § 518.156 (2004) *with* MINN. STAT. § 518.18(d) (2004). Additionally, the original third-party custody statute in the state of Washington based on section 401 of the UMDA provided that a custody proceeding may be initiated by a "person other than a parent" "only if the child is not in the physical custody of one of its parents or if the petitioner alleged that neither parent is a suitable custodian." *See* WASH. REV. CODE ANN. § 26.09.180 (West 1986), *repealed by* 1987 Wash. Laws ch. 460, § 61. Today, section 26.10.030 of the Washington Code says, in pertinent parts, that child custody proceedings may be commenced by a person other than a parent, but "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." WASH. CODE ANN. § 26.10.030 (West & Supp 1990).

325. As one commentator noted:

> The growing trend in third-party custody and visitation cases has been to define more explicitly in advance circumstances when nonparents may qualify for custodial or visitation rights . . . . The ALI Principles build on the recognition of the fundamental importance of functional parenthood through the definition of two categories of functional parents who may receive some allocation of custodial or decision-making responsibility. One category is a "de facto" parent, who is an individual who has lived with the child and functioned as a parent, for at least two years, regularly performing a majority of the caretaking functions for the child, with the consent or acquiescence of the legal parent . . . . A second ALI category, parent by estoppel, applies to an individual who, for one specified reason or another, warrants treatment as a parent because of his or her actions or the actions and assurances of the other parent[, for example,] a man who has a reasonable good faith belief he is the child's father, lives with the child and fully accepts parental responsibilities . . . . Finally, one who has lived with the child for at least two years, held himself or herself out as a parent, and fully accepted the rights and responsibilities of a parent, with the agreement of the child's legal parent or parents, can also qualify as a parent by estoppel.

Bartlett, *supra* note 177, at 43–45 (citations omitted).