

“THIRD PARTY” CUSTODY DISPUTES IN ILLINOIS AND THE CONTINUING “RIDDLE” OF NON-PARENT “STANDING”

By Professor Lawrence Schlam¹

With over half of all marriages in America ending in divorce, children are increasingly being raised in non-traditional families. One out of every two children will spend some time living in a step-family. Often, a non-parent is the only father or mother a child has known, a person who on a day-to-day basis has fulfilled the child's psychological need for a parent. However, third parties, such as step-parents or grandparents who have become “psychological” parents, are faced with an obstacle in Illinois not faced by parents when seeking to gain or retain custody of children. They may be precluded from even *petitioning* for custody because of the difficulty of establishing “standing,” a jurisdictional requirement² incorporated into the law of several states,³ that adopted the child custody provisions of the Uniform Marriage and Divorce Act.

UMDA “Standing” provisions were intended to reinforce the “superior rights” doctrine, a presumption that unless a parent is at least in some broad sense “unfit,” she is the best person to raise and nurture a child.⁴ They provide that someone “other than a [biological or adoptive] parent should be allowed to petition for custody, regardless of parental fitness, only if [*the child is*] *not in the physical custody of one of his parents.*”⁵ If this rather narrow and limiting “standing” requirement can be met, however, third parties may then vie for custody under the “best interests” standard ordinarily used in custody disputes between divorcing biological parents.

¹Copyright © Lawrence Schlam 2008. Not for attribution or quotation.

² See, e.g., *In re Guardianship of Alexander O.*, 336 Ill.App.3d 325 (2d Dist. 2003) (“standing” does not refer to whether a litigant has a justiciable interest in the controversy, but, rather, whether the litigant has satisfied the threshold statutory requirements).

³With some subsequent modifications or repeals in several states, this approach to third party custody disputes was incorporated into the law of not just Illinois, but Arizona, Colorado, Kentucky, Minnesota, Montana, and Washington as well.

⁴See, e.g., *In re Custody of Ayala*, 344 Ill.App.3d 574 (1st Dist. 2003) (standing requirement is intended to preserve the presumed superior rights of natural parents, although that right is not absolute and does not require a rigid and unthinking construction of the provision); *In re A.W.J.*, 197 Ill.2d 492 (2001).

⁵750 ILCS 5/602(b)(West 2008).

Historically, third party custody cases were handled through habeas corpus petitions brought apart from, or after, the statutory “marital dissolution” process, and were based on a common sense “balancing” of parties’ claims. However, during the 50s through the early 70s, courts became significantly more receptive to non-parent demands and less deferential toward parental rights. The UMDA third party “standing” provision of the early 70s, therefore, was a “backlash:”

“devised 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.”¹

One problem with this “standing” requirement, however, is that it lends itself to confusing and occasionally contradictory construction. On at least three occasions, including relatively recently in *In re Marriage of Archibald*,² the phrase “not in the physical custody of [a] parent” has, contrary to the plain meaning of the words, been construed to mean “not in the *legal* custody” of a parent.”³ Yet, in other opinions, courts have held to the contrary, taking the position that non-parent “standing” does not require lack of “legal custody” in parents, only lack of parental “possession” as a result of parental intent to indefinitely relinquish parent rights, which is not *necessarily* the same as parental loss or transfer of “legal custody.”⁴ The confusion would seem to arise from the fact that this later finding (parental intent to indefinitely relinquish parent rights) is arguably a basis for at least a *finding* of abandonment and neglect, and thus a predicate to at least *potential* transfer of “legal custody.” (This, of course, leads to the additional objection that the “standing” provision arguably duplicates the function of the Juvenile Court

¹Unif. Marriage and Divorce Act, Sec. 401, 9A(2) U.L.A. 264 (1998).

²*In re Marriage of Archibald*, 363 Ill.App.3d 725, 843 N.E.2d 446 (5th Dist. 2006).

³*In re Marriage of Archibald*, 363 Ill.App.3d 725 (5th Dist. 2006) (to show that the minor “is not in the physical custody of one of his parents” the nonparent must show that the natural parent has relinquished legal custody, instead of just physical possession, and thus, a stepfather could seek custody of a step-child from whose mother he was divorcing because his indefinite temporary legal custody had been agreed to by the mother). See also: *In re Marriage of Siegel*, 648 N.E.2d 607 (2d Dist. 1995); *In re Marriage of Dile*, 618 N.E.2d 1165, 1168 (5th Dist. 1993).

⁴ See, e.g., *In re R.L.S.*, 218 Ill.2d 428 (2006); *In re Custody of Ayala*, 344 Ill.App.3d 574 (1st Dist. 2003) (nonparent must demonstrate that the natural parents have voluntarily and indefinitely relinquished physical custody of the child, which is not the same as temporarily relinquishing physical possession, but is also not necessarily a transfer of “legal custody”). Thus, a natural parent cannot defeat a nonparent's standing merely by executing repeated short-term guardianship appointments, since an incarcerated parent, even though he may maintain legal custody, can be found to lack physical custody. *In re A.W.J.*, 197 Ill.2d 492 (2001).

Act.)¹

Equally problematic, if a court takes the “not in the legal custody of a parent” interpretation, the “standing” provision forces courts, at the point litigation is initiated, to immediately and directly focus on evidence of the legal rights of adults, such as in *Archibald*, rather than the “best interests” of children.”² Consequently, a preliminary jurisdictional hearing may unduly bias courts even before “best interests” can be considered. Further, this “standing” requirement is unnecessary for the protection of parents’ legitimate interests, since the presumption of parental rights must still ultimately be overcome in custody determinations.

Finally, and perhaps of greatest importance, the adoption of the “model” third party custody provision at least initially reoriented the law of Illinois away from the quite reasonable early twentieth century judicial approach which, in the absence of evident unfitness, was to in effect equitably “broaden” the meaning of “parent” to accommodate non-parents who due to “extraordinary circumstances” had legitimate claims to custody that would serve children’s “best interests.” This was accomplished by exploring how custody by non-parents was initially obtained, whether meaningful “parent-child” relationships of significant duration existed, the potential harm from interference with those relationships, and whether there was plausible evidence of intentional, indefinite parental abandonment to non-parents.

Fortunately, notwithstanding the adoption of the uniform third party custody provision, Illinois courts have still been able grant standing to third parties and return to the traditional form of custody analysis,³ notwithstanding the ambiguous notion of “physical custody,” if, in the

¹The majority in *In re Marriage of Siegel*, *supra* note 8, was criticized by Justice Hutchinson, because its view of the standing requirement as lack of “legal custody” would be superfluous because it would duplicate the Adoption Act and the Juvenile Court Act. *Id.* While the termination of parental rights in Illinois has always required death or unfitness, this has never been true for third party custody, let alone third party standing. *Id.* 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. *Stalder v. Stone*, 107 N.E.2d 696 (Ill. 1952). *See, e.g., In re J.K.F.*, 529 N.E.2d 92 (Ill. App. 1988) (affirming custody of a 13-year-old boy to stepfather after a finding under the Juvenile Court Act that the mother had abused her children and the boy in question wanted to live with his stepfather).

²“Presumptions favoring biology 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, *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).

³*See, e.g., In re Custody of Groff*, 332 Ill.App.3d 1108 (5th Dist. 2002) (standing based on lack of parental physical custody depends on who was responsible for care and welfare prior to initiation of custody proceedings, how physical possession of child was acquired, and nature and duration of possession of child); *In re Estate of K.E.S.*, 347 Ill.App.3d 452 (4th Dist. 2004) (the burden of proof on the third party).

court's subjective view, the ultimate best interests of children seem to require it.¹ Often, however, as alluded to earlier, "best interests" are effectuated by contorting legal reasoning or by straining to selectively choose facts that would sustain the conclusion that rights in children have been voluntarily and permanently relinquished.² This has resulted in confusing precedent, where judges, not always reasonably, equate cherry-picked facts with an intent to permanently relinquish parental rights.³ Hopefully, the Illinois legislature, as several other states have done,⁴ will eventually attempt to conform Illinois statutory law to modern legal analysis and family life.

¹See, generally, Lawrence Schlam, *Children "Not in the Custody of One of [Their] Parents": The "Superior Rights" Doctrine and Third-Party Standing Under the Uniform Marriage and Dissolution of Marriage Act*, 24 Southern Illinois Law Journal 405 (2000).

²Id. See also, e.g., *Archibald*, *supra* note 8.

³Id.

⁴See, e.g., Lawrence, Schlam, *Standing in Third-party Custody Disputes in Arizona: From the Child's Best Interests to Parental Rights—and Back Again*, 47 Arizona Law Review 719 (2005).