NOTE

Visitation Beyond the Traditional Limitations

INTRODUCTION

The traditional image of the American family unit is one consisting of a mother and father raising children who, in turn, form their own families, raise children and maintain a lasting and beneficial relationship with grandparents, aunts, uncles, and close friends. In reality, however, the typical contemporary American family falls well short of this stereotyped image.

Indicative of the demise of the traditional family unit is the fact that an ever-increasing number of divorces have resulted in children being placed in the custody of one parent. Additionally, the increased incidence of women in the work force has resulted in greater reliance on babysitters as caretakers of children. As a result of these factors, third parties often contribute significantly, sometimes more so than the mother or father, to the child's development. Yet the rights of these third parties to visitation with a child have generally not been recognized. Only recently have visitation rights been extended beyond the noncustodial parent. Thus, while the traditional family has undergone dramatic changes, family law has been slow to react.

This Note investigates recent statutory and common law developments in the area of visitation. It examines the concept of visitation rights, the standards applicable to the granting of these rights, and the application of these standards to various classes of individuals. The Note concludes that visitation should extend beyond parents and grandparents to any third party who has an in loco parentis[1] relationship with the child or, in the alternative, to any third party with whom visitation would be in the best interests of the child. It advocates a liberal interpretation of visitation rights so as to provide for the best interests of the child.

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1. The term "in loco parentis" means in the place of a parent. A person in an in loco parentis position is a person who has put himself or herself in the situation of a lawful parent by assuming the status and obligations of a parent without formal adoption. The concept embodies two ideas: (1) the assumption of parental status, and (2) the discharging of parental duties. The concept clearly embodies more than furnishing material help to a close relative or individual who is in need. One may be willing to furnish needed assistance to such an individual, even over an indefinite period of time, without being willing at the same time to assume the legal obligation of a parent. *See* infra notes 24 and 86.

I. Toward an Understanding of Visitation

Visitation has been defined as a form[2] or limitation[3] of custody. Custody, in general, is defined as the "care and control of a . . . person."[4] More specifically, custody of a child is defined as "[t]he care, control, and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding."[5] The power of a court to award custody of a child derives from the premise that such custody is the parent's[6] right and that this right is a natural right.[7]

Being a natural right, custody originates neither in the legislature nor the judiciary; rather, it flows from the very nature of man.[8] It has been determined that "custody" has no fixed legal significance, but is rather an equitable concept which serves as a conduit for a variety of parental rights

2. *See* Jackson v. Fitzgerald, 185 A.2d 724, 726 (D.C. 1962) (stating that "[t]he right of visitation derives from the right of custody."); Collins v. Gilbreath, 403 N.E.2d 921, 925 (Ind. 1980) (Judge Young in dissent stated that "[t]he right of visitation derives from the right of custody."); Commonwealth *ex rel.* Williams v. Miller, 254 Pa. Super. 227, 230, 385 A.2d 992, 994 (1978) (stating that "visitation is correlative to custody"); and *see generally* Comment, *Visitation for Nonparents: Following the Polestar,* 11 Stetson L. Rev. 586, 594 (1982).

3. *See* Simpson v. Simpson, 586 S.W.2d 33, 35 (Ky. 1979) (stating that "[v]isitation is a limitation on exclusive custody. . . .") (quoting Phillips v. Horlander, 535 S.W.2d 72 (Ky. 1975)).

4. Black's Law Dictionary 347 (5th ed. 1979).

5. *Id.* A more detailed definition of custody is found in 25 C.J.S. *Custody* § 88 (1966), which provides: "As applied to children, 'custody' includes within its meaning every element of provision for the physical, moral, and mental well being of the children and it implies that the person having custody has the immediate personal care and control of the children."

It is beyond the scope of this Note to provide a detailed analysis of custody but a brief explanation may be useful. Issues of child custody generally arise in the context of a divorce proceeding. Approximately 85% of custody decisions are determined by parental agreement. Hansen, *The Role and Rights of Children in Divorce Actions,* 6 J. Fam. L. 1, 2 (1966). The other 15% are determined by courts using individual state statutory guidelines.

Generally, two types of custody are available. Sole custody may be granted to one parent usually accompanied by visitation rights of the noncustodial parent. Alternatively, joint custody, wherein both parents share child-rearing responsibilities, may be granted. In joint custody there is usually no need for visitation rights, since neither parent loses custody of the child. Consequently, the visitation right model developed in this Note applies to parents only in sole custody situations. The model is useful to third parties in either custody situation.

6. For purposes of this Note, the term "parents" includes only natural parents and not adoptive parents, stepparents, or parents of illegitimate children unless otherwise indicated.

7. *See, e.g.,* State *ex rel.* Harris v. McCall, 184 La. 1036, 1039, 168 So. 291, 292 (1936); Custody of a Minor, 389 Mass. 755, 452 N.E.2d 483 (1983); Nye v. Nye, 213 Neb. 364, 329 N.W.2d 346 (1983); Hammack v. Wise, 158 W. Va. 343, 211 S.E.2d 118 (1975).

8. Natural rights are defined as "[t]hose which grow out of the nature of man and depend upon his personality and are distinguished from those which are created by positive laws enacted by a duly constituted government to create an orderly civilized society." Black's Law Dictionary 925 (5th ed. 1979), quoting *In re* Gogabashvele's Estate, 165 Cal. App. 2d 503, 525, 16 Cal. Rptr. 77, 91 (1961). *See also* M.L.B. v. W.R.B., in which the Missouri Court of Appeals stated that natural rights "are such as appertain originally and essentially to man—such as are inherent in his nature, and which he enjoys as a man, independent of any particular act on his side." 457 S.W.2d 465, 466 (Mo. Ct. App. 1970) (quoting 14 C.J.S. *Civil Rights Supplement* § 3 (1974)).

and duties that may vary according to the circumstances of the relationship of the child to the parent.[9]

If custody is the care and control of a child, then in a situation where a child is under the care and control of someone other than her parents, that other person, if only for a short time, has custody[10] of the child. Visitation, therefore, should be viewed as a form of custody because it encroaches upon the parent's custodial domain by taking away a percentage of the parent's absolute custody of the child.

The breakdown in the traditional family unit has forced the legal system to address the issue of visitation. The law entitles an individual who becomes a parent to assume that he has the right to keep his child, to retain custody. As a part of custody he has the right to spend time with his child. If the family unit is broken by divorce, however, parents and child do not share a single home. The divorced individuals are still parents of the child and as such theoretically maintain a right of custody, but both cannot have custody of the child. The child cannot be split in two[11] This presents a dilemma in that the other parent's right of custody has apparently been extinguished.

In divorced family situations, the courts' response to this dilemma has generally been to recognize a natural right[12] of visitation for the noncustodial parent with respect to his children.[13] Since the right of custody "flows from

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9. Delgado v. Fawcett, 515 P.2d 710, 712 (Alaska 1973). Thus, "custody pertains not only to parental control of the child, but is inseparably linked to the parent's right of access and companionship with his offspring." *Id.* at 713.

10. The custody herein referred to is physical custody as opposed to legal custody. When a third party has physical custody of a child, the court-sanctioned custodial parent retains legal custody of the child. The distinction is created in recognition of the parent's continued right to make decisions for the child, e.g., consent to medical care, despite physical custody which may have been granted to a third party in the form of visitation rights.

11. Kiefer, *Custody Meanings and Considerations*, 53 CONN. B.J. 371 (1979). Kiefer quotes the following in his preface:

> Then two harlots came to the king [Solomon], and stood before him. Then the king said, "The one says, 'This is my son that is alive, and your son is dead'; and the other says, 'No; but your son is dead, and my son is the living one.' " And the king said, "Bring me a sword." So a sword was brought before the king. And the king said, "Divide the living child in two, and give half to the one, and half to the other." Then the woman whose son was alive said to the king, because her heart yearned for her son, "Oh, my lord, give her the living child, and by no means slay it." But the other said, "It shall be neither mine nor yours; divide it." Then the king answered and said, "Give the living child to the first woman, and by no means slay it; she is its mother." And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him to render justice.

1 *Kings* 3:16.

12. For a definition of natural rights, *see supra* note 8.

13. *See, e.g.,* Maxwell v. LeBlanc, 434 So.2d 375, 377 (La. 1983); Shapiro v. Shapiro, 54 Md. App. 477, 482, 458 A.2d 1257, 1260 (1983); and *M.L.B.*, 457 S.W.2d at 466.

the fact of parenthood,"[14] and visitation is a form of custody, it follows that the right of visitation flows from parenthood. Thus, the custodial right of the noncustodial parent is altered but not extinguished. This right has developed not only from the parent's right of custody but also from the perceived needs of the child. The purpose of visitation then, is not only to protect the parent's right of custody but also to benefit the child. Visitation is "important for a child's whole growth, mental, physical and spiritual."[15] Denial of visitation can cause a child to feel rejected and confused.[16] "When the child is cut off from one of his parents . . . there is, for the child [a] . . . sense of deep personal loss ... denying the child the ability to visit with and know the noncustodial parent does deep and profound violence to the child's opportunity to know himself in a whole way."[17]

Generally, courts attempt to provide an amicable visitation arrangement for parents and child[18] but the inherent stress of a separation and divorce often makes such an arrangement impossible. Faced with parents' unreasonable behavior and often escalating animosities, courts must provide specific orders[19] to achieve a forced reasonableness in the visitation conduct of both the custodial and noncustodial parent.

Visitation itself takes many forms. The noncustodial parent or individual may be awarded a specific period to "visit" the child or he may be simply granted "reasonable visitation" privileges to be determined by himself and the custodial parent. He may be granted visitation alone with the child or might be required to visit in the presence of the custodial parent or in the presence of an independent guardian appointed by a court. Furthermore, the visit itself may not be in the presence of the child, but may instead be limited to communication by telephone or letters.[20]

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14. *Maxwell,* 434 So.2d at 377. *See also* Deville v. LaGrange, 388 So.2d 696 (La. 1980) and *supra* note 8.

15. Pierce v. Yerkovich, 80 Misc. 2d 613, 621, 363 N.Y.S.2d 403, 410 (Fam. Ct. 1974).

16. *Maxwell,* 434 So.2d at 379.

17. Bishop, *Child Custody: An Overview,* 53 CONN. B.J. 269, 277 (1979).

18. *See* Chance v. Chance, 400 N.E.2d 1207, 1210 (Ind. 1980), stating that "[i]deally, the rights and privileges accorded to parents, both as to custody and visitation, should be exercised with good judgment and discretion, with mutual forbearance, and with proper regard to the rights of each other and the best interests of the child. Under such circumstances, the mere allowance of reasonable visitation privileges to the noncustodial parents would suffice." *See also* Milligan v. Milligan, 174 Ind. App. 40, 44, 365 N.E.2d 1244 (1977) (Garrard, J., concurring), stating that "[t]he flexibility allowed thereby promotes a continued spirit of cooperation between the parents and may aid the child in its right to a meaningful relationship with both mother and father . . . ."

19. *See Chance,* 400 N.E.2d at 1210, and Moutaw v. Moutaw, 420 N.E.2d 1294, 1300-01 (Ind. App. 1981).

20. For this reason Howard Zaharoff suggests the use of the word "access" rather than "visitation," since visitation has the connotation of presence. Zaharoff indicates that he has no knowledge of visitation rights being granted in the form of telephone calls but that such a possibility is reasonable. Zaharoff, *Access to Children: Toward a Model for Third Parties,* 15 FAM. L.Q. 165, 166 (1981) [hereinafter cited as Zaharoff].

Courts generally grant visitation rights to noncustodial natural parents, grandparents, and stepparents, but deny similar rights to other interested parties. The law is inconsistent in awarding these rights and consequently the child's best interests may suffer. After a discussion of the current status of family law in this area, a proposal which would provide consistency in granting visitation rights will be suggested.[21]

II. FORMULATING A MODEL

It is useful to employ a graphic model to depict visitation rights among the several classes of individuals seeking those rights. Visitation rights can be understood by analogy to concentric circles. The nucleus of these circles is the child from whom visitation rights generate to various classes of individuals represented by the circles themselves. The first and innermost circle represents the natural, noncustodial parent of the child, the second circle represents grandparents, the third stepparents, the fourth blood relatives other than the parents or grandparents, and the fifth and outermost circle depicts the rights of interested third parties.[22] There is an inverse relationship between distance from the nucleus and the probability of being awarded visitation rights. The more distant the legal relationship between adult and child, the less likely the court will uphold visitation rights for the adult.

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21. Implicit in this issue is a second issue—namely, when should such rights be asserted? This question is beyond the scope of this Note but deserves attention.

The alternative approaches to this issue can be conceptualized as a spectrum. At one end is the extreme position that such rights should never be addressed and at the other end is the opposite extreme that such rights should always be addressed. As is typical of extremes, neither is logical. Clearly, the issue must be addressed at some times but it need not and should not be addressed at all times, lest the court interfere with the very nature of the family.

Between the two extremes, moving from "never" to "always," might be instances where a parent dies, the parents are divorced, the parents have neglected the child, the parents are separated, or when the best interests of the child so dictate. The issue then is at what point of this spectrum the child's best interests, and the obligation of the state as parens patrie to protect those interests, become strong enough to overcome the strong presumption of a parent's right to raise his child independent of state intrusion.

For the purposes of this Note, instances in which visitation would be granted to third parties would be limited to the traditional proceedings at which visitation rights are determined. Namely, actions stemming from divorce, death of a parent or extraordinary circumstances such as neglect or abuse.

Note in this regard a New York case wherein a domestic relations judge ruled that grandparents have the right to visit their grandchildren over the objections of their son and daughter-in-law. The case involved an intact family, one "without divorces, adoptions by stepparents, or deaths." The judge utilized a New York statute that provided for the family court to allow visitation where "equity would see fit to intervene," to allow visitation rights. Nat'l L.J., Sept. 17, 1984, at 7, col. 1.

22. The order of the five specified groups on the concentric circle model is directly related to judicial and/or legislative recognition of visitation rights for each group. Noncustodial natural parents, for example, are represented on the innermost circle because they have generally been afforded greater visitation rights than grandparents, stepparents, blood relatives, or other third parties. Further, stepparents are represented on the third circle because they have had better

While this model accurately portrays the current status of visitation rights, it fails to recognize the theories from which these rights evolved. Two theories are predominant in granting visitation rights. First, the "best interests of the child" theory provides that visitation be granted only where it is in the best interests of the child to do so.[23] Second, visitation rights have been granted where an in loco parentis relationship is present.[24] After developing the traditional model of visitation, changes in that model recognizing these two theories will be proposed.[25]

A. The Innermost Circle: Noncustodial Natural Parents

Visitation rights are rarely denied the noncustodial parent. "The denial of the right of a parent to visit or see his child is a drastic remedy which should be based on substantial evidence."[26] These rights are protected by both the legislature and judiciary.

This right of visitation with the child is so highly regarded that courts are reluctant to divest a noncustodial parent of that right absent clear and

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success in acquiring visitation rights than blood relatives or other third parties but they have not had the success enjoyed by noncustodial natural parents or grandparents in acquiring these rights.

While other orderings maybe logically appealing—noncustodial natural parents, stepparents, grandparents, blood relatives, and other third parties for example—they do not represent the established judicial and legislative pattern in granting visitation rights.

23. The "best interests" of the child are judicially determined by the application of various statutory guidelines. *See* notes 168-176 *infra* and accompanying text. This "best interests" standard is a difficult standard to apply and one that necessarily requires a case-by-case determination. Although it is beyond the scope of this Note to present an in-depth analysis of this standard, it is discussed *infra* notes 157-176 and accompanying text.

24. "In loco parentis" is defined as a relationship wherein an person who is not the natural parent of a child has placed himself in the position of a lawful parent by assuming obligations incident to a parental relationship while not fulfilling the formalities necessary for a legal adoption. 59 AM. JUR. 2D *Parent and Child* § 88 (1971). For a further definition see *supra* note 1 and *infra* note 86. See also notes 177-181 *infra.*

25. A controversial issue beyond the scope of this Note is the set-off between the right of the custodial parent to determine where to live and the right of the noncustodial parent to visitation rights. Can the custodial parent who moves a great distance from the non-custodial parent be forced to pay transportation costs or offset those costs against support payment? *See generally* Balbirer, *Rights and Obligations of Custodial and Noncustodial Parents in Connecticut,* 53 CONN. B.J. 356 (1979), suggesting that the court's analysis should give greater weight to the non-custodial parent's right of visitation than to financial agreements as to the cost of visitation; and Note, *Visitation Rights: Providing Adequate Protection for the Noncustodial Parent,* 3 CARDOZO L. REV. 431 (1982), suggesting a case-by-case determination of the noncustodial parent's desire to have access to his children in relation to the custodial parent's need to relocate.

26. Lory v. Lory, 119 Misc. 2d 205, 212, 462 N.Y.S.2d 744, 747 (1983). *See also* Somers v. Somers, 474 A.2d 630, 631 (Pa. Super. Ct. 1984), providing that "[a] parent's visitation rights should not be limited in the absence of record evidence that the parent 'possess[es] such severe mental or moral deficiencies as to constitute a grave threat to the welfare of the child' "(quoting Nancy E.M. v. Kenneth D.M., 316 Pa. Super. 351, 357, 462 A.2d 1386, 1389 (1983)).

substantial evidence of her lack of fitness. The statutory standard, typified by the Indiana statute on visitation, provides that "a parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation by the parent might endanger the child's physical health or significantly impair his emotional development."[27] Notably, this standard makes denial of rights more difficult than a general best interests[28] standard which allows visitation where such visits are in the best interests of the child.[29] There may be situations in which it is not in the best interests of the child to visit his mother although such a visit does not endanger his physical or emotional health.[30] In such a situation the noncustodial parent is still entitled to visitation.

Further protection of the noncustodial parent's right of visitation is found in statutes authorizing modification of original visitation rights when such modification is judged to be in the best interests of the child.[31] The standard in modification is identical to the standard for the original order.[32] Thus, even in the unlikely event that a parent is denied visitation rights in the original custody order, she may still be allowed visitation rights if she can later show that modification of the original order would be in the best interests of the child. A showing that the best interests of the child are met is a showing that visitation would not endanger the child's health or impair his emotional development since the latter standard is broader than the former standard.

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27. IND. CODE § 31-1-11.5-24 (1982) provides:

> (a) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation by the parent might endanger the child's physical health or significantly impair his emotional development.
>
> (b) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restriet a parent's visitation rights unless it finds that the visitation might endanger the child's physical health or significantly impair his emotional development.

28. *See supra* note 23.

29. It is clear that the standard for visitation by noncustodial parents is narrower than the standard generally in that it is more difficult to deny a noncustodial parent visitation than it is to deny visitation to a third party.

> Although the standard is necessarily somewhat vague, it was deliberately ehosen to indicate its stringency when compared to the "best interest" standard traditionally applied to this problem. The special standard was chosen to prevent the denial of visitation to the noncustodial parent on the basis of moral judgments about parental behavior which have no relevance to the parent's interest in or capacity to maintain a close and benign relationship to the child. The same onerous standard is applicable when the custodial parent tries to have the noncustodial parent's visitation privileges restricted or eliminated.

Commissioner's Note, UNIF. MARRIAGE AND DIVORCE ACT § 407, 9A U.L.A. 208 (1973).

30. It could be argued, for instance, that it would not be in the best interest of the child to visit his noncustodial mother if she was openly promiscuous or an alcoholic, but these characteristics might not be considered dangerous to the child's physical or emotional health.

31. *See, e.g.*, IND. CODE § 31-1-11.5-24(b), *supra* note 27.

32. *See, e.g.*, IND. CODE § 31-1-11.5-24(a), (b), *supra* note 27.

Statutes often reflect the strong presumption that visitation rights for the noncustodial parent are to be enforced absent a clear showing of physical or emotional danger to the child.[33] The legislative standard suggests a strong reluctance to deny visitation rights to a noncustodial parent and court decisions provide a gauge of just how strong these parental rights are.

Since visitation rights are natural rights, imprisonment has no effect upon them. "Neither past delinquency nor former conviction and confinement nor present incarceration necessarily requires denial of the errant parent's right of access to his children."[34] Though imprisonment may suspend an individual's civil rights, those civil rights must be distinguished from natural rights[35] and imprisonment does not suspend an individual's natural rights. Thus, a father maintains visitation rights with his children despite his imprisonment.[36] "Access to the child by the parent denied custody is an important right," and the law "does not preclude repentance, reformation, and forgiveness."[37] Visitation is approved in part due to a belief that there must be a recognition of the need and a respect of the right of a parent and child "to share personal acquaintance, even though the circumstances are less than ideal."[38]

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33. Seven states have language similar to that of IND. CODE § 31-1-11.5-24. *See* ARIZ. REV. STAT. ANN. § 25-332 (1976); ILL. ANN. STAT. ch. 40, § 602 (Smith-Hurd 1980); KAN. STAT. ANN. § 60-1610(a) (1976); MO. ANN. STAT. §§ 452.375, 452.410 (Vernon 1977); WASH. REV. CODE § 26.09.190 (1961); WIS. STAT. ANN. § 767.24(1)(b) (West 1980); and WYO. STAT. § 20-2-113 (1977).

34. *See* M.L.B. v. W.R.B., 457 S.W.2d 465, 467 (Mo. Ct. App. 1970). *See also McCurdy* v. McCurdy, 173 Ind. App. 437, 440, 363 N.E.2d 1298, 1300 (1977).

35. *M.L.B.*, 457 S.W.2d at 466.

36. The mother of the children had asserted that the father had rendered himself unfit for visitation by virtue of his being convicted and sentenced to imprisonment for a crime involving "moral turpitude." Failing on this charge, she claimed concern over the "place of visitation." The court, rejecting this later argument, held:

> we are unable to subscribe to the view, unsupported by any evidence adduced or authority cited, that the father should be, for an extended period of time, absolutely foreclosed from any access to or visitation with his children by *the sole circumstance* that his confinement necessitates any such access or visitation in a penal institution.

Id. at 467 (emphasis in original).

37. Chadwick v. Chadwick, 275 Mich. 226, 228, 266 N.W. 331, 332 (1936).

38. *McCurdy*, 173 Ind. App. at 441, 363 N.E.2d at 1301. Relying on the reasoning of both *M.L.B.*, 457 S.W.2d 465, and *Chadwick*, 275 Mich. 226, 266 N.W. 331, the Indiana Court of Appeals, in *McCurdy*, granted visitation rights to a father who had pleaded guilty to four counts of rape and one count of kidnapping. The court quoted at length from *M.L.B.* and was apparently convinced by its logic, despite the testimony of two witnesses as to the child's reaction to her father's arrest and incarceration. The dissent quoted the witness' testimony:

> "And she withdrawed. (sic) She cried an awful lot; she just didn't seem to be happy with anything. She didn't want to be with other children, she didn't want to be with people; she more or less wanted to be off to herself. And when it would get dark, she wanted to make sure she was by her mother."

McCurdy, 173 Ind. App. at 443, 363 N.E.2d at 1302 (Hoffman, J., dissenting). Judge Hoffman added, "It took about six months for Tamela to return to her cheerful self as a happy and content child, who likes to be with other children and have a good time." *Id.*

Similarly, the federal witness protection program has been held to be no bar to the visitation rights of a noncustodial natural parent.[39] A custodial father, protected by the program, was forced to allow his ex-wife visitation with their son despite evidence that the implicit purpose in her request for visitation rights was to lure her ex-husband into danger.[40] The court stated, "even a wicked mother has some rights that should be respected."[41]

Even the fact that the child does not wish to see his noncustodial parent is not grounds for denying those visitation rights.[42] A father was not denied visitation rights with his teenage son despite the child's wish not to see or know his father,[43] and a mother has been awarded visitation rights with her eighteen-year-old son despite his wishes to the contrary.[44]

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39. Ruffalo v. Ciocletti, 565 F. Supp. 34 (W.D. Mo. 1983).

40. *Id.* The purpose of the visitation action was suspect. The mother had accepted $1000 from underworld figures whose implicit purpose in providing the funds was to encourage the judicial action. The expectation of these individuals was that the litigation would lure the protected witness out of hiding and into danger. In addition to testimony by another protected witness that he had transmitted funds to Donna (the mother) on four separate occasions during the course of litigation, evidence was presented "showing less than normal maternal behavior by Donna in the past. . . . The primary thrust of the evidence was that with Donna's permission or on her initiative, the children have lived with other individuals, and not with her for much of their lives." *Id.* at 36. Additionally, this was the first time in a number of years that Donna indicated a desire to have full-time responsibility for one of her children. Thus, the court concluded, "the evidence as to Donna's relationship with her children in the past raises some skepticism regarding her motives in seeking the return of Mike." *Id.*

41. *Id.*

42. *See generally* Radford v. Matezuk, 223 Md. 483, 164 A.2d 904 (1960); *Nancy E.M.*, 316 Pa. Super. 351, 462 A.2d 1386; Ross v. Segrest, 421 So.2d 1234 (Miss. 1982). In *Ross*, the court stated that it was not bound by the wishes of a child as to visitation rights with a parent, yet allowed the trial court's order following the wishes of the child as to visitation with his mother at his father's house, rather than visiting his mother in Texas with her new husband. The Mississippi Supreme Court held it was unable to overturn the lower court's order based on the entire record. 421 So.2d at 1236. One author states that all but very young children should be given the opportunity to make their wishes known in a custody dispute, but it should be clear that a child's preference is only one of a number of factors to consider in the final determination. Bishop, *supra* note 17, at 270. *See also* Schowalter, *Views on the Role of the Child's Preference in Custody Litigation*, 53 CONN. B.J. 298 (1979).

43. *Radford*, 223 Md. at 490, 164 A.2d at 908. The mother had obtained a divorce from the father when the child was about one year old. The child was in his teens at the time of the suit and had seen his father only once, when he was two years old. *Id.* at 906.

44. *Nancy E.M.*, 316 Pa. Super. 351, 462 A.2d 1386. The separation and divorce of the parents, in this case, was "marked by allegations of physical and verbal abuse from both parties and stormy arguments sometimes witnessed by the children." *Id.* at 354, 462 A.2d at 1387. Following the divorce the mother was awarded custody of her daughter and reasonable visitation rights with her sons. Visitation with David, her eighteen-year-old son, was to be at David's discretion. Accepting the mother's argument that continuation of the order was tantamount to denial of visitation rights, the court reversed the original order and set specific visitation periods. *Id.* at 357, 462 A.2d at 1388.

David's lack of contact with his mother, noted the court, "stems from disparaging remarks she continues to make about his father and about his desire to live with his father. He testified that he loves his mother but does not want to visit her until she stops harrassing him." *Id.* at 355, 462 A.2d at 1388. Nevertheless, the court ordered visitation.

Clearly, the noncustodial parent's right of visitation with the child is securely protected through the concept of natural right, through statutory language that allows only narrow exceptions to this natural right, and through the courts' reluctance[45] to employ discretionary means to negate this right.[46] Although visitation is a limitation on the custodial parent's right of custody, it is a limitation deemed necessary by the best interests of the child. Thus, noncustodial natural parents, those individuals rcpresented by the first, the innermost circle of the model, traditionally have the strongest right of visitation.

B. The Second Circle: Grandparents

Grandparents have strong rights to visitation with their grandchildren. The strength of these rights is surpassed only by the visitation rights of noncustodial natural parents. Today, statutes in forty-seven states provide in some

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45. In addition to cases described in the preceding text, *see also* Roberts v. Roberts, 35 Md. App. 497, 371 A.2d 689 (1977), where the court held that the fact that the noncustodial mother was an alcoholic did not warrant suspension of her visitation rights; and *Radford,* 223 Md. 483, 164 A.2d 904, where the court recognized its power to deny a noncustodial parent visitation rights with his child, but professed its reluctance to do so:

> [A]n examination of the cases involving visitation rights— despite previous acts of misconduct, prior disobediences of decretal orders, repeated failures to make support payments and other derogatory circumstances—discloses that this Court, even though custody was denied, has never had an occasion to deny the right of visitation to an errant parent.

Id. at 489, 164 A.2d at 907. In this particular case, the court granted visitation rights to the noncustodial father despite allegations by the mother that: the father was the guilty party in the divorce, the father was convicted of a criminal offense, the father did not attempt to enforce his visitation rights until adoption by the stepfather was contemplated, and, the child did not wish to see or know the father.

46. This jealously protected right, however, is not reciprocal—the child does not have a right of visitation with his parent. Louden v. Olpin, 118 Cal. App. 3d 565, 173 Cal. Rptr. 447, *cert. denied,* 454 U.S. 1055 (1981). An illegitimate child who was in her mother's custody brought suit against a man adjudicated to be her father charging the father with a duty to visit the child. 118 Cal. App. 3d at 567, 173 Cal. Rptr. at 448. The child sought a ruling providing a reciprocal right of visitation. *Id.* at 568, 173 Cal. Rptr. at 449. She sought a ruling that not only did the father have a right of visitation with the child but the child had a right of visitation with the father. The court, finding neither statutory nor case law to support the contention, dismissed the case for failure to state a cause of action. *Id.* at 569, 173 Cal. Rptr. at 450. The court concluded:

> California creatcs in a parent a right and privilege to visit the child. This right is not, however, reciprocal .. . . The non-custodial parent can compel a minor child to visit . . . . [But] [n]o case has been cited in which a parent has been ordered to visit his child . . . . It [the equal protection clause of the U.S. Constitution] has not been interpreted, either by the U.S. Supreme Court or any other court, that the parents and the children have the *same* rights. . . . The child here does not have the right to compel visitation by a parent. . . .

Id. at 568-69, 173 Cal. Rptr. at 449-50 (citations omitted) (emphasis in original).

way for grandparent visitation rights.[47] This phenomenon is a recent development which has often been preceded by judicially-created visitation rights for grandparents. Indiana's history on grandparent visitation rights is illustrative of the gradual move towards approval of these rights nationwide.

Prior to the passage of Indiana's Grandparent Visitation statute,[48] the Indiana Court of Appeals allowed grandparent visitation rights despite lack of clear statutory authorization to do so.[49] *Krieg v. Glassburn*[50] involved maternal grandparents seeking visitation rights with their grandchildren. A six year marriage ended in divorce, the mother was granted custody of the children, and the father was awarded reasonable visitation rights.[51] Two years later, the father, having remarried, was awarded custody of the children and his new wife instituted adoption proceedings.[52] Fearing loss of contact with their grandchildren, the maternal grandparents brought suit seeking to intervene in the adoption proceedings or, in the alternative, to be granted visitation rights.[53] Though the grandparents were denied standing to intervene in the adoption proceeding, the court rejected the father's argument that

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47. *See* ALA. CODE § 30-3-4 (1983); ALASKA STAT. § 25.24.150 (1983); ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1984-1985); ARK. STAT. ANN. § 34-1211.1 (Supp. 1983); CAL. CIV. CODE §§ 197.5, 4601 (West 1982); COLO. REV. STAT. §19-1-116 (Supp. 1982); CONN. GEN. STAT. ANN. § 46b-59 (West Supp. 1984); DEL. CODE ANN. tit. 10, § 10-950(7) (Supp. 1984); FLA. STAT. ANN. § 61.13 (West Supp. 1970-1983); GA. CODE § 19-7-3 (1982); HAWAII REV. STAT. §571-46(7) (1976); IDAHO CODE § 32-1008 (1983); ILL. ANN. STAT. ch. 40, §607b (Smith-Hurd Supp. 1984-1985); IND. CODE § 31-1-11.7-1 (1982); IOWA CODE ANN. § 598.35 (West 1981); KAN. STAT. ANN. § 60-1616(b) (1982); KY. REV. STAT. ANN. § 405.021 (Mitchie 1984); LA. CIV. CODE ANN. art. 1578 (West 1984); ME. REV. STAT. ANN. tit. 19, § 752 (Supp. 1982); MD. FAM. LAW CODE ANN. §9-102 (1984); MASS. ANN. LAWS ch. 119, § 39D (Michie/Law. Co-op. Supp. 1984); MICH. COMP. LAWS ANN. § 722.27b (West Supp. 1984-1985); MINN. STAT. ANN. § 257.022 (West 1982); MISS. CODE ANN. § 93-16-1 (Supp. 1984); MO. ANN. STAT. §§452.400(3), 452.402 (Vernon Supp. 1982); MONT. CODE ANN. § 40-9-102 (1983); NEV. REV. STAT. § 123.123 (1979); N.H. REV. STAT. ANN. § 458:17 VI (1983); N.J. REV. STAT. § 9:2-7.1 (1976); N.M. STAT. ANN. § 40-9-1 (1983); N.Y. DOM. REL. LAW § 240 (McKinney Supp. 1977-1984); N.C. GEN. STAT. §§ 50-13.2(b)(1), 50-13.5(j) (1984); N.D. CENT. CODE § 14-09-05.1 (Supp. 1983); OHIO REV. CODE ANN. § 3109.05 (Page Supp. 1983); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1984-1985); OR. REV. STAT. §§ 109.121, 109.123 (1983); 23 PA. CONS. STAT. ANN. §§ 1011, 1012 (Purdon Supp. 1984-1985); R.I. GEN. LAWS §§ 15-5-24.1 to 24.2 (1981 & Supp. 1984); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 25-4-52 (1984); TENN. CODE ANN. § 36-1101 (1977); TEX. FAM. CODE ANN. § 14.03(e) (Vernon Supp. 1977-1983); UTAH CODE ANN. §30-3-5(1) (Supp. 1983); VA. CODE § 20-107.2 (Supp. 1984); WASH. REV. CODE ANN. § 26.09.240 (Supp. 1985); W. VA. CODE §§ 48-2-15(b)(1), 48-2B-1 (Supp. 1984); WIS. STAT. ANN. § 767.245(4) (West 1981). Note also that five states explicitly allow great-grandparent visitation rights: Arizona, Illinois, North Dakota, Pennsylvania, and Wisconsin.

48. Indiana's Grandparent Visitation statute was enacted in 1981.

49. Krieg v. Glassburn, 419 N.E.2d 1015 (Ind. App. 1981).

50. *Id.*

51. *Id.* at 1016.

52. *Id.*

53. *Id.* at 1017.

the applicable Indiana statute[54] extended only to parents[55] and granted the maternal grandparents the visitation rights they sought.

The Indiana statute[56] contains unequivocal provisions establishing the right of visitation for noncustodial parents but is silent on visitation rights for grandparents or other third parties. Nevertheless, the Indiana Court of Appeals looked beyond the language of the statute in *Krieg* and determined that such visitation rights exist. The court formulated a standard requiring parties seeking visitation rights to overcome the parent's prima facie right of custody by showing that visitation was in the best interests of the child.[57] The best interests of the child test was utilized as a standard by which to grant visitation rights beyond the traditional parental rights. The best interests of the child were deemed to be an essential consideration which would allow nonparental visitation rights even though such rights were not clear in the language of the statute.

Judicially recognized grandparent visitation rights were codified by the Indiana legislature in 1981. Indiana Code § 31-1-11.7-2 provides that a "child's maternal or paternal grandparent may seek visitation rights if: (1) the child's father or mother is deceased; or (2) the marriage of the child's parents has been dissolved." Further, Indiana law now provides that "visitation rights may be granted when the court determines that it is in the best interests of the child."[58]

Despite legislative acceptance of the result in *Krieg*, subsequent courts have failed to follow the theory of the case. The *Krieg* court provided that a statute failing to include visitation for a given party does not necessarily preclude such visitation,[59] and that the best interests of the child should be followed despite the plain meaning of the statute. But this reasoning was not followed in post-1981 cases.[60] As a result, the best interests of the child were not always furthered in visitation determinations. Failure to follow the

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54. IND. CODE § 31-1-11.5-24 (1982).
55. *Krieg*, 419 N.E.2d at 1018.
56. IND. CODE § 31-1-11.5-24.
57. *Krieg*, 419 N.E.2d at 1019.
58. IND. CODE § 31-1-11.7-3 (1982).
59. The Indiana Court of Appeals in *Krieg* stated:

> In interpreting a very similar statute [similar to IND. CODE 31-1-11.5-24], the Kentucky Supreme Court stated: "[The statute] did not prohibit the grant of visitation rights to nonparents . . . . It merely guarantees that a noncustodial natural parent will not be denied visitation privileges unless it would seriously endanger the child. Uniform Marriage and Divorce Act, Sec. 407, Commissioner's Note (1971)." *Simpson v. Simpson*, (Ky. 1979) 586 S.W.2d 33, 35 (construing Ky. Rev. Stat. § 403.320 (Supp. 1980)). The same result, that the statute does not necessarily exclude visitation rights of third parties was reached in *Collins v. Gilbreath* (4th Dist. 1980) Ind. App., 403 N.E.2d 921.

419 N.E.2d at 1018.

60. *See In re* Meek, 443 N.E.2d 890 (Ind. App. 1983) and *In re* Visitation of J.O., 441 N.E.2d 991 (Ind. App. 1982).

theory of *Krieg* has resulted in visitation determinations that follow the letter but not the spirit of the ruling.

In both *In re Visitation of J.O.*[61] and *In re Meek,*[62] the Indiana courts refused to recognize grandparent visitation rights, holding that the parties petitioning for visitation failed to meet either of the two criteria of the statute. The parties were neither grandparents of a child whose parent had died, nor were they grandparents of a child whose parents were divorced. *In re J.O.* was the first judicial interpretation of Indiana's Grandparent Visitation statute and the court opted to uphold the statute's plain meaning with a narrow interpretation. The court was not impressed with the fact that the grandmother had opened her home to her daughter and grandchild for three years[63] nor was the court impressed with the fact that the grandmother's daughter and her husband were divorced. The court held that the Grandparent Visitation statute required a child of the marriage. Since the child involved was conceived by a wife and third party rather than wife and husband, the child was not "of the marriage,"[64] and thus the grandmother was not within the statutory language. The court rejected the grandmother's contention that the legislature intended to protect all natural grandmothers' rights of visitation when their children were divorced[65] and held that the Grandparent Visitation statute "is not a codification of a grandparent's right to seek visitation under any circumstances."[66] Rather, it provides rights to the two narrow categories of individuals designated.[67]

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61. 441 N.E.2d 991.
62. 443 N.E.2d 890.
63. *In re J.O.,* 441 N.E.2d at 992.
64. IND. CODE § 31-1-11.5-2(c) (1982) provides that "[t]he term 'child' means a child or children of both parties to the marriage and includes children born out of wedlock to such parties as well as children born or adopted during the marriage of such parties." Because the mother testified that at the time of conception her husband was in the Marine Corps and the father was a third party and the husband testified that there were no children of the marriage, the court found that the grandparents did not qualify as grandparents under IND. CODE § 31-1-11.7-1 since "child" was used in that statute. 441 N.E.2d at 995.
65. 441 N.E.2d at 994.
66. *Id.* at 995.
67. This narrow interpretation of a visitation statute is in contrast to the liberal interpretation of another visitation statute in *Krieg,* 419 N.E.2d 1015. This contrast was apparently brought about by the courts' belief in the integrity of the legislative process. The legislature, according to the *In re J.O.* court, had debated the issue of grandparent rights and determined that visitation was appropriate only when it was in the best interests of the child and only then when there was a divorce or death of a parent. The grandparent in *In re J.O.,* however, was not denied visitation rights because she failed to meet one of these provisions. The grandchildren's legal parents were, in fact, divorced. Rather, the definition of "child" in another section of the code was the grandparent's undoing. The child was not of the marriage; thus, although the parents were divorced, the grandmother was denied visitation rights.

A second basis of the court's decision in *In re J.O.* was that the grandparent seeking visitation was the maternal grandparent and the mother had custody of the child. This was in contrast to *Krieg,* where the grandparent seeking visitation was from the noncustodial side.

The statute utilized in *In re J.O.* leaves just as much room for interpretation of this issue as the visitation statute left for interpretation of the grandparents' visitation rights issue in *Krieg*. Neither statute specifically addressed the issue presented in the respective cases. The general visitation statute[68] did not explicitly provide for visitation rights of grandparents and the Grandparent Visitation statute[69] did not explicitly provide for visitation rights of grandparents where the child was not a child of the marriage. Yet such rights were granted in *Krieg* and were denied in *In re J.O.* If the legislature's concern was that the state should not intervene in the family unless the family was disrupted by the déath of a parent or by divorce of the parents, then that concern was not present in *In re J.O.* The court did not even reach the issue of the child's best interests. Since the court liberally applied the general provision in order to reach the best interests of the child in *Krieg*, it should also have liberally applied the Grandparent Visitation statute so as to achieve similar ends.[70]

In *In re Meek*, the only other case to utilize the statute to date, the court simply stated that since neither condition of Indiana's Grandparent Visitation statute was met, no consideration would be given a maternal grandmother's visitation petition. Once again, strict statutory interpretation precluded the application of the best interests of the child standard, despite the fact that this standard had been the primary concern of the court in previous visitation cases. That this best interests standard should be the polestar in determining custody and visitation rights according to the legislature is clear from its inclusion in the custody statute,[71] the visitation statute,[72] and the Grandparent

The Grandparent Visitation statute however, is silent on this criterion. Thus, the court looked beyond the statute for the concept that only grandparents of noncustodial parents could seek visitation rights, the court did not use the best interests of the child concept. If the court can supplement the statute by way of this noncustodial/custodial distinction, it is reasonable to assert that it can supplement the statute by allowing for a situation such as was found in *In re J.O.*

68. IND. CODE § 31-1-I1.5-24.

69. *Id.* § 31-1-11.7-2.

70. In contrast to this borderline case is the Pennsylvania case of Herron v. Seizak, No. (Pa. Super. Ct. Dec. 2, 1983), which involved grandparents seeking visitation rights with their grandchildren where the parents of the child were alive and married. The grandparents argued, "The best interest and permanent welfare of the child will be served by granting the relief requested because the child will be hurt psychologically if she is permitted to grow up knowing that her parents forbid her to visit with her maternal grandparents and knowing that she is not permitted to speak to them when they telephone." Neverthcless, the Pennsylvania Superior Court denied visitation rights to the grandparents.

Under a statute similar to Indiana's, the *Herron* court held it was not in their purview to intervene in a family matter in which no legal rights were at issue. Clearly, the statute did not authorize intervention into a stable family where a mother and father were alive and living together. The family in *In re J.O.*, however, was anything but stable. It provided just the type of situation where legal rights, or at least equitable rights, should have been involved. For support of this equitable power see *supra* note 21.

71. IND. CODE § 31-1-11.5-21(a) (1982).

72. *Id.* § 31-1-11.5-24.

Visitation statute.[73] Yet the court did not reach this consideration due to a strict adherence to a statute that perhaps never contemplated a situation like *In re J.O.* The best interests of the child were not considered in these two cases because the court interpreted the statute as not allowing a consideration of those interests.

The best interests standard is a common theme found in grandparent visitation statutes in other states.[74] Although, like the Indiana statute, such statutes may be somewhat restrictive in that they provide for visitation only at the death of a parent,[75] or at the dissolution of the parent's marriage,[76] they recognize the paramount importance of meeting and providing for the best interests of the child by providing for consideration of those interests in assessing visitation petitions.

Presumably, the above-mentioned restrictions, which are the most common restrictions in grandparent visitation statutes, are intended to promote a policy of state noninterference in the affairs of a family. Where neither a death nor dissolution has occurred, the state has no interest in subverting the custody right of a parent. The danger inherent in these restrictions is that an instance will arise that was unanticipated by the legislature. This was arguably the case in *In re J.O.*[77] The statute in that case was simply not flexible enough, or the court was too restrictive in its interpretation of the statute, to accommodate the best interests of the child.

One solution is to make the existing statutes concerning grandparents more expansive. Examples of this are existing statutes in Idaho,[78] North Dakota,[79] and Minnesota[80] that look not to a death or divorce, but rather to the importance of continuing an established substantial relationship between the

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73. *Id.* § 31-1-11.7-3.

74. *See, e.g.,* statutes of the following states, cited *supra* note 47: Arizona, Colorado, Connecticut, Florida, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

75. *See, e.g.,* statutes of the following states, cited *supra* note 47: Alabama, Arkansas, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Tennessee, and West Virginia.

76. *See, e.g.,* statutes of the following states, cited *supra* note 47: Alabama, Arizona, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, and Tennessee.

77. *See supra* text accompanying notes 60-70.

78. IDAHO CODE § 32-1008 (1983) provides: "When a grandparent or grandparents have established a substantial relationship with a minor child, the district court may, upon a proper showing, grant reasonable visitation rights to said grandparent or grandparents."

79. N.D. CENT. CODE § 14-09-05.1 (1981) provides: "The court shall consider the amount of personal contact between the grandparents or great-grandparents and the minor. . . ."

80. MINN. STAT. ANN. § 257.022 (West 1982) provides that if a minor resides with the grandparents or great-grandparents for a period of 12 months or more, and is removed, the grandparents or great-grandparents may initiate action for visitation.

child and grandparent. A second solution is to recognize discretion in the courts to allow visitation where it is in the best interests of the child and where it is within existing legislative intent. Such was the case in *Krieg,* where the court looked beyond the plain language of the statute and provided visitation for grandparents before the Grandparent Visitation statute was enacted.[81] Either of these measures would provide the necessary flexibility in visitation issues to reach the best interests of the child. They would also recognize the psychological ties between grandparent and grandchild.[82] The alternative is strict interpretation of existing statutes that provide rigidity rather than flexibility, and that present the possibility that the best interests of the child will not always be met.

Despite the opportunity for improvement in the grandparent visitation rights area, it is clear that parents' and grandparents' visitation rights are stronger than those of other classes of individuals—both through case law and legislative action. These two classes then, are represented by the inner circles of the model. The visitation rights emanating from the nucleus of the concentric circles are strong enough to cover almost all noncustodial natural parents and grandparents.

C. The Middle Circle: Stepparents

The third, and middle, circle of the model represents stepparents. As is suggested from the circle's position, a stepparent's right to visitation is not as firmly established as a noncustodial parent's or grandparent's right, but it is more firmly established than either a blood relative, other than parent or grandparent, or other interested third party. While parental visitation rights are protected in every state, and grandparent visitation rights are protected in nearly every state, only three states have statutes providing for stepparent visitation.[83] Eight other states[84] however, including Indiana, have allowed such rights in the absence of specific statutory authority.

Only two[85] of the ten jurisdictions addressing the issue of stepparent visitation rights absent statutory authority have refused to grant such rights

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81. *See supra* notes 49-55 and accompanying text.

82. *See* Hartshorne & Manaster, *The Relationship with Grandparents: Contact, Importance, Role Conception,* 15 INT'L. J. AGING & HUM. DEV. 233 (1982), reporting the results of a study that supports the position that grandparents remain a significant factor in the lives of young adults.

83. *See* statutes of the following states, cited *supra* note 47: Kansas, Virginia and Tennessee.

84. Alaska, Arizona, Florida, Indiana, Kentucky, Oklahoma, Pennsylvania, and Utah. *See infra* notes 97-103.

85. The two cases denying stepparent visitation rights involved situations where there existed no in loco parentis relationship.

Burrell v. Burrell, 213 Pa. Super. 249, 247 A.2d 476 (1968), involved a divorced husband's petition to visit with a child born four months after the couple's separation. The court found the husband not to be the natural father, thus making him a stepfather. As such, the stepfather

to the petitioning party. These developments indicate that judicial recognition of stepparents' right of visitation is quickly becoming a national trend. This trend is predicated upon the recognized relationship between the stepparent and child, an in loco parentis relationship wherein the stepparent assumes the duties and obligations of a parent without the formality of adoption.[86] It is also indicative of the judiciary's recognition of changing family patterns. Legislatures should follow the judicial lead in recognizing and protecting stepparent visitation rights.

Indiana's history of stepparent visitation rights, as was the case with its history of grandparent's visitation rights, is illustrative of the general national trend toward recognition of such rights. In *Collins v. Gilbreath,*[87] the Indiana Court of Appeals supplemented the plain language of the Indiana visitation statute in considering the visitation rights of a stepfather. Citing a "dearth of Indiana law"[88] on the issue, the *Collins* court turned to foreign jurisdictions and rejected the argument that a parent has an absolute legal right to custody of his children.[89] It further rejected the claim that a mere protest of the custodial parent is sufficient to deny visitation rights to a third party.[90] Rather, the court held the well-being of children is paramount[91] and visitation

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had not established an in loco parentis relationship with the child and was therefore denied visitation rights. Alternatively, the court found that visits with the husband would not be in the best interests of the child.

Perry v. Superior Court, 108 Cal. App. 3d 480, 166 Cal. Rptr. 583 (1980), is the second case that did not allow stepparent visitation. Holding that the child involved was not a "child of the marriage" under California law (not unlike *In re J.O.,* 441 N.E.2d 991), the court held that it had no jurisdiction to reach the issue of the stepparent's visitation rights. In his concurring opinion, however, Justice Hopper suggested that had the father alleged an in loco parentis relationship, the result might have been different.

> If Husband had asserted in his Response to the Petition in the dissolution action that there were children of the marriage because he stood *in loco parentis* with regard to Lonnie, the superior court might have jurisdiction over the subject matter. In other words, if Husband had raised the issue and had been found by the superior court to be *in loco parentis* with regard to Lonnie, one could conclude that Lonnie was a "child of the marriage" within Civil Code section 4351.

108 Cal. App. 3d at 486, 166 Cal. Rptr. at 586 (Hopper, J., concurring) (citations omitted).

86. *See supra* note 1. Furthermore, the assumption of such a relationship does not arise by chance. Because of the resulting obligations and rights an in loco parentis relationship must be intended. Intent can be inferred by the acts of declarations of a person alleged to stand in that relation. Once the conditions are met, the rights and obligations arising from the relationship are identical to those that arise between a child and parent. There is one important limitation. Unlike natural and adoptive parenthood, the status of in loco parentis is temporary. The status may be abrogated at will by either the surrogate parent or the child. *See generally* Niewiadomski v. United States, 159 F.2d. 683 (6th Cir.), *cert. denied,* 331 U.S. 850 (1947); Spells v. Spells, 250 Pa. Super. 168, 378 A.2d 879 (1977); Gribble v. Gribble, 583 P.2d 64 (Utah 1978); 59 AM. JUR. 2D *Parent and Child* § 88 (1980).

87. 403 N.E.2d 921 (Ind. App. 1980).

88. *Id.* at 922.

89. *Id.* at 923.

90. *Id.*

91. *Id.*

rights are a necessary transition element for children who had lived with their stepfather and natural mother for two and one-half years and had ten days earlier lost their mother by suicide.[92] The stepfather had developed an in loco parentis relationship with the children and, having done so, he was entitled to visitation rights with those children.

Where a relationship of in loco parentis exists, the stepparent is generally granted visitation rights.[93] This is a logical extension, beyond the first two circles of the model, of visitation rights that recognizes the fact that a person need not be a biological parent to develop a parental relationship with a child.

To hold that a parent not be granted visitation rights just because the child is not his biological child is to champion form over substance. One court has held:

> It is our belief that a stepfather may not be denied the right to visit his stepchildren merely because of his lack of blood relationship to them. Clearly, a stepfather and his young stepchildren who live in a family environment may develop deep and lasting mutual bonds of affection. Courts must acknowledge the fact that a stepfather (or stepmother) may be the only parent that the child has truly known and loved during its minority. A stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be. Rejection of visitation privileges cannot be grounded in the mere status of a stepparent.[94]

Thus, the relationship between an individual and a child need not be one of blood to be one of love, need and dependence.[95] Denial of visitation

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92. *Id.*

93. "It is significant that the Master found appellee [stepmother] was Beverly's 'psychological mother.' "Wills v. Wills, 399 So. 2d 1130, 1131 (Fla. 1981).

In another case, the court noted that "[s]he [the stepmother] acted as Hart's mother from the time he was seventeen months old until he was removed from her care by his father almost six years later." Simpson v. Simpson, 586 S.W.2d 33, 36 (Ky. 1979). In *Gribble,* the court stated that "it appears that the appellant may have assumed the status of one in loco parentis to the child. . . ." 583 P.2d at 66.

"A stepfather who lives with his spouse and her natural children may assume the status of 'in loco parentis'." *Spells,* 250 Pa. Super. at 172, 378 A.2d at 882.

In loco parentis and best interests analysis may allow stepparent visitation. *Bryan v. Bryan,* 132 Az. 353, 645 P.2d 1267 (1982).

"Gilbreath had loved and cared for the children as a father for two and one half years." *Collins,* 403 N.E.2d at 923.

94. *Spells,* 250 Pa. Super. at 172, 378 A.2d at 881.

95. The court in Looper v. McManus held:

> Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship.
>
> Usually such an affiliation is with a natural parent. But it need not be. Those involved with domestic relations problems frequently see situations where one who is not a natural parent is thrust into a parent-figure role, and through superior and faithful performance produces a warm and deeply emotional attachment. In such a situation the court should be mindful of the affectionate bond and take care in case of a major custodial change to minimize the severance consequences through the rational use of reasonable visitational access.

rights merely on the technical basis of no blood connection makes little sense in the practical world.

To state that stepparent visitation rights are quickly becoming a national trend, however, is not to state that the trend is without its critics.[96] The primary argument advanced against stepparent visitation is that the stepparent has no legal right to visitation with his stepchild.[97] The response to this argument is that the welfare of the child is of paramount importance in visitation proceedings, and that divorce courts have broad equitable powers to safeguard that interest.[98] "When the judicial system becomes involved in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided."[99] Further, although the legal right of a parent to custody of a child is superior to the legal right of all others, the parent's right is not absolute. The well-being of the child, the best interests of the child, is paramount.[100] "It is also clear that the court would have jurisdiction to award *custody* of a stepchild to the stepparent . . . it would be inconsistent to the rule that the court has jurisdiction to grant custody to the stepparent, but lacks jurisdiction to grant visitation."[101]

A second concern of those opposing visitation rights is that there will be no end to litigation and the custodial parent will spend his waking hours attending hearings on visitation issues.[102] Visitation rights are already traditionally considered at divorce proceedings. It is unlikely that the consideration of other individuals' visitation petitions at this time would unduly tax the court's time. Further, the opinions of the respective courts on stepparent visitation have turned on the issue of in loco parentis.[103] There are

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581 P.2d 487, 488-89 (Okla. Ct. App. 1978).

96. Each of the following stepparent visitation cases dealt with arguments against granting such rights: Carter v. Brodrick, 644 P.2d 850 (Alaska 1982); *Bryan*, 132 Az. 353, 645 P.2d 1267; *Wills*, 399 So. 2d 1130; *Simpson*, 586 S.W.2d 33; *Looper*, 581 P.2d 487; *Spells*, 250 Pa. Super. 168, 378 A.2d 879; *Gribble*, 583 P.2d 64.

97. *See Bryan*, 132 Az. at 355, 645 P.2d at 1268; *Wills*, 399 So. 2d at 1131; *Collins*, 403 N.E.2d at 992; *Simpson*, 586 S.W.2d at 35; *Looper*, 581 P.2d 487; *Gribble*, 583 P.2d at 66.

98. *Gribble*, 583 P.2d at 66.

99. *Collins*, 403 N.E.2d at 923.

100. *Id.*

101. *Carter*, 644 P.2d at 855.

102. The dissent in *Simpson* described the majority opinion, granting visitation rights to stepparents, as opening the "door to the butcher, the baker and the candlestick maker to a right to a hearing on 'visitation' rights." 586 S.W.2d at 36 (Stephenson, J., dissenting). Further, Justice Stephenson stated, that "[a]ccording to the majority opinion, even if the stepmother here would not prevail at a hearing, the door is wide open. The father conceivably could spend all his time attending hearings to determine if some other person emotionally attached to the child should have 'visitation rights.' " *Id.* at 38.

103. For an explanation of in loco parentis see *supra* notes 1 and 86. It is clear that the courts have utilized this concept. The court of *Collins* stated:

> In so holding we do not intend to diminish the rights of a natural parent concerning his or her minor children. Nor do we intend to open the door and permit the granting of visitation rights to a myriad of unrelated third persons,

certainly few people who could proceed under this concept. Thus, the opposition's concern is ill-placed in the area of stepparent visitation rights.

A third argument against stepparent visitation rights has been that even if an in loco parentis relationship develops between child and stepparent during the marriage, such a relationship terminates at divorce.[104] The common law concept of in loco parentis, however, recognizes termination of that status only at the will of the surrogate parent or the child. In the absence of this explicit termination, the in loco parentis status continues.[105]

Finally, it matters not that the custodial parent protests the granting of visitation. "The mere protest of a parent who asserts that visitation by another person would somehow harm his or her child should not be enough to deny visitation in all cases."[106] Furthering the interests of the child may necessitate granting these rights to a third party over the objections of the custodial parent. The court should consider the relationship between the individual seeking the visitation rights and the child.[107]

D. The Fourth Circle: Blood Relatives

Blood relatives, other than parents and grandparents, are rarely granted visitation rights. Thus, those individuals represented by the fourth circle of the model have traditionally been held too distant from the child to be entitled to any visitation rights.[108] A Louisiana case, *LaPointe v. Menard*, illustrates this general rule. After awarding custody to the natural mother,[109]

> including grandparents, who happen to feel affection for a child. Our decision is explicitly limited to the type of factual situation presented by this case, i.e., where the party seeking visitation has acted in a custodial and parental capacity.

403 N.E.2d at 923-24 (footnote omitted) (citations omitted).

The *Simpson* court held that "[w]here a nonparent alleges such a relationship [in loco parentis] has been established in a jurisdictionally viable custody action the court should hold a hearing to determine whether the granting of visitation privileges to the nonparent would be in the best interest of the child." 586 S.W.2d at 36.

Finally, the court in *Gribble* held that "[i]f appellant is in loco parentis, he should be considered a parent. . . . It is consistent with both the statutory intent and with the requirements of due process that he, like a natural parent, grandparent, or any other relative, have a hearing to determine his rights to visitation." 583 P.2d at 68. And the *Carter* court held that "courts authorizing stepparent visitation have done so on the premise that the stepparent has become a surrogate parent. This concept, expressed in the journals as that of 'psychological parentage,' finds its legal basis either explicitly or implicitly in the common law doctrine of in loco parentis." 644 P.2d at 853 (footnote omitted).

104. *Gribble*, 583 P.2d at 67.

105. *Id. See also Carter*, 644 P.2d at 854.

106. *Collins*, 403 N.E.2d at 923 (quoting Lo Presti v. Lo Presti, 51 A.D.2d 578, 378 N.Y.S.2d 487 (1976)).

107. In Collins, 403 N.E.2d at 922, the court granted visitation rights even where none were requested but where a change in custody took the child from his stepparent.

108. *See* People *ex rel.* Scalise v. Naccari, 281 A.D. 741, 118 N.Y.S.2d 90 (1953); Acker v. Barnes, 33 N.C. App. 750, 236 S.E.2d 715, *cert. denied*, 238 S.E.2d 149 (1977); Wick v. Wick, 266 Pa. Super. 104, 403 A.2d 115 (1979); and Ryan v. DeMello, 116 R.I. 264, 354 A.2d 734 (1976).

109. LaPointe v. Menard, 412 So. 2d 223, 228 (La. Ct. App. 1982).

the Louisiana Court of Appeal refused to allow visitation rights to a maternal aunt who had been given physical custody of an illegitimate child by the child's mother,[110] and who, for nearly eight years, had raised the boy as her own.[111] Despite the obvious in loco parentis relationship, despite testimony by a psychologist in favor of the aunt,[112] and despite the child's wishes to remain with the aunt,[113] the court revised the custody order and terminated any and all contact between the aunt and the child. No investigation of the child's best interests was initiated; the court simply held that there was no law permitting visitation to collateral relatives.[114]

Visitation has been denied: to aunts and other maternal relatives with the hope that the custodial father would see the wisdom of allowing visits but with a reluctance to exercise judicial authority,[115] to an aunt and uncle who had previous visitation with the child but when challenged in appellate court were found to be without jurisdictional standing to seek visitation,[116] and to an aunt and uncle who had exercised visitation under a prior order but who lost those rights when later challenged by the natural mother.[117] In the last instance, there was no change in circumstances, the mother simply decided she did not want the aunt and uncle to visit the child anymore.[118] In both the latter case and in *Acker v. Barnes,*[119] the court emphasized the importance of the child's best interests[120] and yet refused to address the issue in relation to the aunt or uncle.[121]

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110. *Id.* at 228.
111. *Id.* at 225.
112. *Id.* at 226.
113. *Id.*
114. *Id.* at 228. The court reached this result despite the fact that they recognized "that an attachment has built up over the years between Ravis John and the defendants and we fully appreciate the hardship which will be brought to bear upon both the child and defendants by a denial of the latters' visitation rights." *Id.* Judge Stoker in his concurrence added, "There is a high probability that Ravis will not ever be permitted to visit with the Menards. Apparently we are powerless to avoid this harsh result." *Id.* at 229.
115. *Scalise,* 281 A.D. at 743, 118 N.Y.S.2d at 91.

> While it is hoped that the father will see the wisdom of permitting the children to receive visits from the maternal relatives, such visits should not be mandated by judicial order. Such judicial mandate might aggravate the conflicts that should subside in the interests of the children. Moreover, the father being a fit custodian of the children, the court should not seek to supervise that custody unless it should appear that the custody is not administered in the best interests of the children.

116. *Ryan,* 116 R.I. 264, 354 A.2d 734.
117. *Wick,* 266 Pa. Super. 104, 403 A.2d 115.
118. *Id.* at 106, 403 A.2d at 116.
119. 33 N.C. App. 750, 236 S.E.2d 715, *cert. denied,* 238 S.E.2d 149 (1977).
120. *Wick,* 266 Pa. Super. at 106, 403 A.2d at 116; *Acker,* 33 N.C. App. at 752, 236 S.E.2d at 716 (quoting Jackson v. Fitzgerald, 185 A.2d 724, 726 (D.C. 1962)).
121. *Wick,* 266 Pa. Super. at 106, 403 A.2d at 116. The court merely stated that the best interest of the child is to allow the mother to appeal the previous visitation order. It did not ask if the best interest of the child involves visitation by the aunt and uncle. *See also, Jackson,* 185 A.2d at 726:

Clearly then, visitation rights of blood relatives, other than parents or grandparents, are rarely granted. The most cited reasons for this occurrence are lack of standing, lack of judicial power, and reluctance to use judicial discretionary power.

The first issue, that of improper standing, is an issue begging the essential question of whether visitation rights should be granted to third parties. Analogizing to a similar argument against grandparent visitation, Foster and Freed[122] wrote, "[o]bviously, the first reason mentioned for withholding visitation begs the question, for it gives the result as a reason."[123] Even if one disputes this, argues another commentator,[124] the argument "does not advance discussion of whether nonparental visitation rights are a good or wise thing. . . ."[125]

As for the second argument, the lone case that supports blood relative visitation, the Wisconsin case of *Gotz v. Gotz*[126] provides the counterargument that courts do not lack the power to order visitation beyond the parents or grandparents. The court in *Gotz* allowed visitation by the noncustodial mother's two sisters and their husbands when the mother was ill.[127] The trial court stated that "it is a normal and desirable circumstance that the mother of this child, being unable to visit herself, should have her sisters make the visitations."[128] Despite the arguably narrow holding, that blood relative visitation is appropriate only where it is a substitute for a noncustodial parent's visitation, the Supreme Court of Wisconsin used the case as precedent for the proposition that

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> Courts are not insensitive to the yearnings of grandparents and other relatives for the company of children in their families. But such cannot be translated into a legal right without a showing that it is dictated by the needs and welfare of the child. In the absence of such a showing, custodial control goes along with custodial responsibility.

122. Professor Henry H. Foster, Jr. is Professor of Law Emeritus, New York University, Visiting Professor of Law, New York Law School, and past chairman of the Family Law Section of the American Bar Association. Dr. Doris Jonas Freed is co-chairman of the Family Law Section's custody committee and chairman of its research committee. Foster and Freed authored, *Grandparent Visitation: Vagaries and Vicissitudes,* 23 ST. LOUIS L.J. 643 (1979).

123. *Id.* at 647.

124. Zaharoff, supra note 20.

125. *Id.* at 174.

126. 274 Wis. 472, 80 N.W.2d 359 (1957).

127. *Id.* at 474, 80 N.W.2d at 360.

128. *Id.* at 476, 80 N.W.2d at 361. The Wisconsin Supreme Court quoted the trial court's expression of concern for the child's best interests:

> "I think that it is completely wholesome and desirable not only from the mother's standpoint, but, even more important, from Kenneth's standpoint. I see no reason for the court to sever all ties between the child and his mother's family . . . . All the more so because the child is not a normal child. That fact has also much concerned me and has had much to do with my conclusions."

Id., 80 N.W.2d at 361-62.

> [t]here is no statutory or common law rule which forbids a court in a divorce action from granting visitation rights to parents or to others. The question is not one of the power of the court but of judgment or of judicial discretion. The underlying principle or guideline for the granting of visitation privileges, as it is for granting custody, is what is for the best interest and welfare of the child.[129]

The question then, is not one of power, but of discretion.[130]

The third reason for denial of rights, reluctance to use judicial discretion, is curious in light of other uses of judicial discretion. The use of this discretion in both grandparent and stepparent cases is apparent, yet the courts have failed to extend this discretion to blood relatives and other interested third parties. The *Collins* court stated that they did not "intend to open the door and permit the granting of visitation rights to a myriad of third persons including grandparents who happen[ed] to feel affection for a child."[131] But if it is in the best interests of the child that visitation rights be granted, or if an in loco parentis relationship exists between the child and the individual seeking visitation, then the extension of such rights seems logical. In an area of law where the best interests of the child are vital, the courts seem to ignore their own standards in deciding cases based solely on the fact that the party seeking visitation is neither parent, stepparent, nor grandparent, of the child.

E. The Final Circle: Third Parties

When analysis focuses on the outermost circle, representing third parties who are neither stepparents nor blood relatives but who have an interest in the child, visitation rights are rarely granted. "Generally, where custody of a child has been awarded to a fit parent, grandparents and third persons are not entitled to visitation privileges."[132] The only success claimed by third

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129. Weichman v. Weichman, 50 Wis. 2d 731, 734, 184 N.W.2d 882, 884 (1971). This is also cited in Ponsford v. Crute, 56 Wis. 2d 407, 415, 202 N.W.2d 5, 9 (1972). *See* Bahr v. Galonski, 80 Wis. 2d 72, 79, 257 N.W.2d 869, 872 (1977) ("The anthority of a trial court to establish visitation rights has long been recognized, at common law, as an integral part of its authority to award custody.").

130. Further support for this proposition can be found in early grandparent and stepparent cases granting visitation. The courts in those cases found the respective visitation statutes to be open to interpretation and not all-inclusive. Where a statute neither grants nor denies powers to the courts, it need not be interpreted as being all-inclusive and therefore denying power. Unless a group is specifically excluded by the legislature in a visitation statute, the group should not be considered excluded. Only an unequivocal denial of rights—thus evidencing the legislature's intent and decision that a given class' visitation would not be in the best interest of the child—should prevent the court from addressing the issue. Silence is not synonymons with denial—the court should be left to its discretion.

131. *Collins*, 403 N.E.2d at 923-24.

132. 67A C.J.S. *Parent & Child* §§ 41(c), 296 (1980); *see also* 59 AM. JUR. 2D *Parent and Child* §§ 45, 130 (1980) stating: "Parents who have custody have the legal right to determine

parties is where there is statutory authority for visitation[133] or where a strong in loco parentis relationship has developed.[134] Absent these two criteria, the party seeking visitation rights has been generally unsuccessful.

Thus, in *Wilson v. Condra,*[135] where an elderly couple took care of a child during his younger years and were devoted to the child, they would be denied visitation rights when the child was returned to the custody of his mother.[136] The Florida court stated that it found no basis in the record upon which an award of visitation rights could stand.[137] In *English v. Macon,*[138] where a couple raised a child who had been removed from her natural parents due to neglect, they were denied visitation rights when the state removed the child from their home. Stating no biological kinship had been established, the Alabama Court of Appeals dismissed the couple's petition for visitation.[139]

English v. Macon is factually similar to *Collins v. Gilbreath.*[140] In *English,* the child lived with a Mr. and Mrs. Flournoy for six years; Mr. Flournoy developed a " 'great fatherly love and affection for the child.' "[141] After Mrs. Flournoy, the only mother the child ever knew, died, the court granted custody to the child's natural father. In *Collins,* the child lived with the stepfather for two and one-half years, the stepfather developed an in loco parentis relationship with the child, and after the mother died, the court granted custody to the natural father.[142] In both cases the denial of visitation rights essentially resulted in the children's loss of both parents, (since the

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with whom the child will associate. Accordingly, where a parent or parents have custody, the courts will not undertake to give visitation to a nonparent . . . over the parents' objection."

133. Leininger v. Leininger, 48 Ohio App. 2d 21, 355 N.E.2d 508 (1975).

134. *In re* Melissa M., 101 Misc. 2d 407, 421 N.Y.S.2d 300 (Fam. Ct. 1979).

135. 255 So. 2d 702 (Fla. Dist. Ct. App. 1971).

136. *Id.* at 703.

137. *Id.* It could be argued that this case would have been decided differently had the court sustained an earlier custody modification that had given custody of the child to the parent who would not allow visitation with the elderly couple. As it was, the court overturned the modification and returned custody to the father, who presumably would allow the visitation requested without the court order. But, the court showed no indication of allowing visitation rights to third parties. The court stated, "we find *no* basis in the record upon which an award to the couple of visitation rights . . . can stand . . . ." *Id.* at 703 (emphasis added).

138. 46 Ala. App. 81, 238 So. 2d 733 (1970).

139. The petition does not allege kinship with the child or that the Department placed the child in his home for adoption or that he has ever instituted adoption proceedings. We find no averment in the petition that would support any sort of custodial right or claim on the part of Flournoy, and without such allegation the petition is without equity and the court without jurisdiction of the subject matter.

Id. at 87, 238 So. 2d at 739. *See also* Rolond v. Brezenoff, 108 Misc. 2d 133, 135, 436 N.Y.S.2d 934, 935 (1981) (where a disabled mother's boyfriend was denied visitation because, among other reasons, his relationship with the child was one of friendship and not kinship).

140. 403 N.E.2d 921 (Ind. App. 1980).

141. *English,* 46 Ala. App. at 84, 238 So. 2d at 735.

142. *Collins,* 403 N.E.2d 921.

mother had died and the courts took custody away from the "fathers,") in a short time period. Yet, while the *Collins* court granted visitation rights to the stepfather in recognition that such visitation was a necessary transition for the child, the *English* court denied visitation. While *Collins* recognized an in loco parentis relationship between stepfather and child, the *English* court recognized an in loco parentis relationship not between the child and Mr. Flournoy, but between the child and the state.[143] Such a recognition defies logic. It was the Flournoys, not the juvenile court of the state, who assumed the status and obligations of parents without formal adoption. The only substantial factual difference, aside from formalistic custody determination,[144] was that neither Mr. Flournoy nor his wife was the natural parent of Sally Ann, whereas Mrs. Collins was the natural mother of the child in *Collins*. Thus, the court denied visitation because the third party was too far legally removed from the child. He was neither a natural parent nor the spouse of a natural parent. Both this result and reluctance to grant visitation rights seem arbitrary in light of the almost identical fact pattern in *Collins*.

In contrast to *English*, three cases provide for the possibility of third party visitation rights. Two did not expressly consider the granting of such rights[145] and the third denied such rights based on the best interests of the child standard.[146]

The first of the two cases which did not expressly consider the granting of visitation rights to a third party was *Leininger v. Leininger*, which held that should custody "be restored to the father, visitation rights to the present custodial need not be precluded."[147] The Ohio court based its finding on a state statute authorizing third party visitation in Ohio.[148] The second case, *Daly v. Morse*, on the other hand, allowed a hearing to determine visitation rights of a stepgrandmother because the child, at the time of the petition, was in the custody of a court-ordered guardian.[149] Holding that the guardian

143. *English*, 46 Ala. App. at 88, 238 So. 2d at 739.

144. The child, Sally Ann, was taken from her natural parents due to neglect in 1959, and was then under the jurisdiction of the State Department of Pensions until transferred to the Juvenile Court of Covington which placed Sally Ann in the home of Mr. and Mrs. Flournoy in 1963. She was removed in 1969 without ever having been formally adopted by the Flournoys. *Id.* at 83-84, 238 So. 2d at 735. The court ruled against visitation due to the failure of Mr. Flournoy to allege kinship or adoption, essentially recognizing form over substance. The court maintained that the juvenile court, not the Flournoys, stood in loco parentis to the child. *Id.* at 88, 238 So. 2d at 739.

145. *Leininger*, 48 Ohio App. 2d 21, 355 N.E.2d 508; and Daly v. Morse, 665 P.2d 797 (Nev. 1983).

146. *In re* Melissa M., 101 Misc. 2d 407, 421 N.Y.S.2d 300.

147. *Leininger*, 48 Ohio App. 2d 21, 355 N.E.2d 508.

148. OHIO REV. CODE ANN. § 3109.05 (Page 1980), provides in part, "In the discretion of the court, reasonable companionship or visitation rights may be granted to any other person having an interest in the welfare of the child. The juvenile court shall have exclusive jurisdiction to enter the orders in any case certified to it from another court."

149. Daly v. Morse, 665 P.2d 797 (Nev. 1983). This was necessitated by the death of the child's mother and father. The relationship of the appellant as stepgrandmother is best left to

was an arm of the court and that state law permitted the stepgrandmother to petition for visitation rights,[150] the Nevada Supreme Court remanded the case for determination of whether visitation rights were in the best interests of the child.

The third case concerning third party rights of visitation, was the New York case, *In re Melissa M.*,[151] which involved a petition for visitation by a former foster father and stepmother. Despite nearly five years of residence with the foster parents and the inevitable development of a close relationship, the court denied visitation rights based on the child's best interests. It is notable that the court dismissed allegations that it had no jurisdiction in the matter by citing a broad discretion in determining custody considerations.[152] The court focused on the best interests of the child and determined visitation rights to be outside those interests. Had visitation rights been within the child's best interests, they certainly would have been granted to the third party.

Only *In re Melissa M.* has recognized third party visitation rights absent clear statutory authority. This case can be included with those stepparent cases where an in loco parentis relationship prompted the court to grant visitation rights over the objection of the custodial parent. Yet application of the in loco parentis concept is not uniform. The existence of such a relationship in *English* did not prompt that court to grant visitation rights or to even consider whether visitation was in the best interests of the child.

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the description of the court:

> In December, 1958 appellant married Marcus Daly III. Prior to this marriage, Daly had been married to Kathryn Little Daly. While married to Kathryn Little Daly, Marcus Daly III fathered a child out of wedlock, Candace Marie, whom he and Kathryn Little Daly later adopted. When Marcus and Kathryn Daly divorced, Candace was left in Kathryn's custody. Marcus Daly III died in 1970.
>
> Candace married Earl Lamb, and they had a son, Marcus Daly Lamb in 1978. Earl Lamb died in 1979 and Candace died in 1981.

Id. at 797.

150. Here the court was dealing with a guardianship . . . . Our statutes and cases expressly provide that third persons such as appellant may petition the district court for termination or modification of a guardianship and that the court, of which the guardian is but an administrative arm, may consider such petitions in light of its duty to promote the best interests of the child.

Id. at 798.

151. 101 Misc. 2d 407, 421 N.Y.S.2d 300.

152. *Id.* at 409, 421 N.Y.S.2d at 302. The court also held that its jurisdiction over the matter was not terminated at the moment the foster child was returned to her biological parent. "The power to order visitation for former foster parents in the service of a child's best interests even after his discharge to his natural parents, seems constitutional despite the high status of the parent's right to control the upbringing of his child . . . ." *Id.* at 410, 421 N.Y.S.2d at 302 (citation omitted).

Continuing, the court set out its reasoning in the foster care area:

> The court's powers in foster care review proceedings are triggered by the child's placement in foster care for at least 18 months; thus, due to the parent's actions the child has suffered the emotional burden of extended suspension between natural

III. Where Circles Unite

Generally, as is evident from the preceding analysis, courts have been reluctant to provide visitation rights to nonparents. A notable exception is the provision for visitation rights to stepparents. In justifying this departure from a strict interpretation of visitation rights statutes, the courts looked to the in loco parentis concept and the best interests of the child. But if the person seeking visitation is a blood relative or unrelated third party, the court is unlikely to grant visitation rights despite evidence of in loco parentis or the best interests of the child. Such a distinction appears illogical and such restrictions appear too rigid to effectively provide for the best interests of the child.

It should be noted that legislative action is not entirely absent from this issue. Legislatures are fueling and encouraging the growing trend toward liberalized visitation rights. Three states provide for stepparent visitation,[153] four provide for other relative visitation,[154] and third party visitation is either expressly allowed or suggested in at least seven states.[155] Such liberalization of visitation rights was encouraged through various commentaries[156] when grandparent visitation rights were in question. Such liberalization should continue in order to allow for equitable remedies in the judicial system. Such liberalization should continue to insure that the best interests of the child involved will be preserved. Traditional visitation rights fail to provide for such liberalization.

The model of visitation rights as developed has five concentric circles representing from the innermost to the outermost circle, noncustodial natural parents, grandparents, stepparents, blood relatives, and third parties. Two themes are clear in the extension of rights to those other than natural parents. The first is the heavy emphasis on the best interests of the child in the development of grandparent visitation rights, the second is the recognition of an in loco parentis relationship in the development of stepparent visitation

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> parents and foster parents as well as separation when parental custody is resumed from those who have been performing a lengthy continuous parental role. Whatever may have been the reason for the parent's placement of the child, upon his return it seems justifiable to realign for a reasonable period the balance between the parent's right to control his child's upbringing and the State's function as *parens patriae* to protect the child's best interests.

Id. 421 N.Y.S.2d at 303.

153. Kansas, Tennessee, and Virginia. Statutes cited *supra* note 47.

154. Nevada, Utah, Virginia, and Washington. Statutes cited *supra* note 47.

155. Alaska, California, Connecticut, Hawaii, Michigan, Ohio, and Washington. Statutes cited *supra* note 47.

156. *See* Zaharoff, *supra* note 20 at 201-03, proposing a model statute for nonparental visitation, but focusing primarily on grandparent visitation rights development; Holman, *A Law in the Spirit of Conciliation and Understanding: Washington's Marriage Dissolution Act*, 9 Gonz. L. Rev. 39 (1973); and Note, *Grandparents' Visitation Rights*, 18 J. Fam. L. 857 (1979-80).

rights. The logic behind these concepts is solid, the logic to limiting them to grandparents and stepparents is not.

A. Best Interests

The best interests of the child is undoubtedly the primary standard for custody determination and for visitation rights consideration.[157] Yet, the courts have failed to reach this standard in many third party visitation cases. Rather, the courts have generally deferred to a lack of power or to a claim that the petitioners lack standing. These procedural problems should not, however, bar the ultimate goal of achieving a custody and visitation arrangement that serves the best interests of the child. Justice Hunter, writing for the Indiana Supreme Court, recognized this problem:

> Although our procedural rules are extremely important, it must be kept in mind that they are merely a means for achieving the ultimate end of orderly and speedy justice. We must examine our technical rules closely when it appears that invoking them would defeat justice; otherwise we become slaves to the technicalities themselves and they acquire the position of being the ends instead of the means.[158]

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157. *See* Zaharoff, *supra* note 20. Zaharoff argues:

> A first principle, about which there should be widespread agreement, is that in any custody-like determination, the predominant consideration should be respect for the child's interests. Indced, in general the first concern of any court or legislature should be to further as far as possible the best interests of the child.
>
> Though this is a value judgment, it is widely shared and with good reason: In situations where the state must intervene (at least where child custody is an issue) the adult parties will be relatively capable of furthering their own interests and of recovering from adjudications adverse to their interests. Moreover, it is likely that the adults are largely responsible for these situations which call for state intervention.
>
> This is not so with children. Children are dependent on their parents, and sccondarily the state, to protect thcm from harm and to further their development into normal, healthy adults. Furthermore, children may be less able to recover from actions or evcnts adverse to their interests. Neglect, abuse, broken relationships, or poor placement may hinder children's healthy development and leave permanent scars, whereas occurrences contrary to an adult's interests are less likely to do so. Finally, the child is typically least responsible for the situation which demands state intervention, and as the putative "victim" seems more worthy of protection. As one court has suggested: "Divorced parents and their kin should remember it is not their wishes or desires which are at stake but the welfare of the child who did not ask to be placed in the tragic circumstances he finds himself." In short, children's helplessness, vulnerability, and innocent victimization justify a policy of making their interests the predominant consideration in custodial disputes.

Id. at 190-91 (footnotes omitted).

158. American States Ins. Co. v. State *ex rel.* Jennings, 258 Ind. 637, 640, 283 N.E.2d 529, 531 (1972). Note also Judge Chipman's comment in Collins v. Gilbreath that "[w]hen the judicial system becomes involved in family matters concerning relationships between parent and child, simplistic analysis and strict application of absolute legal principles should be avoided." 403 N.E.2d at 923.

If we are not to become slaves of concepts concerning parental rights developed for past generations, we must recognize the ever-changing structure and makeup of the family and adapt to those social changes with legal changes.

It is clear that the ultimate goal of visitation rights is the fulfillment of the best interests of the child.[159] Perhaps recognition of an absolute parental right to custody of a child and the concurrent barring of any visitation right sought by third parties was appropriate in past generations. Children in those generations were typically born to a married couple who together raised those children to maturity. But the family structure in contemporary society takes a myriad of forms. Single-parent households, surrogate mothers, test-tube babies, embryo implants, artificial insemination and lesbian couples wishing to raise children have challenged the traditional norms.[160] In facing the reality of ever-changing family concepts through social and scientific developments, the law must adapt to these situations. But adaptation should be in keeping with the ultimate goal sought through visitation rights, the best interests of the child.

It is equally clear that these interests are interests of the child and not of the parent. Visitation is, to be sure, a benefit to the adult who is granted visitation rights with a child. But it is not the adult's benefit about which courts should be concerned. It is the benefit of the child that is vital. "Visitation," stated the Oklahoma Court of Appeals, "is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well being by permitting partial continuation of an earlier established close relationship."[161] If continuation of this established relationship is in the best interests of the child, then parental rights should yield to such interests.[162]

That the standard of best interests of the child is controlling should be axiomatic. Such a standard is broad enough to cover existing gaps in visitation proceedings, gaps that include blood relatives and third parties, and

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159. Bennett v. Jeffreys, 40 N.Y.2d 543, 546, 387 N.Y.S.2d 821, 825, 356 N.E.2d 277, 281 (1976), states that "in the extraordinary circumstance where there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody." Extraordinary circumstances are illustratively defined as "surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time." *Id.* at 546, 387 N.Y.S.2d at 824, 356 N.E.2d at 281.

160. One need look no further than California, where a lesbian "father" won the right to seek visitation to a child who was conceived by her former lover through artificial insemination while the couple was living together, to find proof of our changing society. Nat'l L.J., Oct. 1, 1984, at 9, col. 1.

161. Looper v. McManus, 581 P.2d 487, 488 (Okla. Ct. App. 1978).

162. *See* Perez v. Perez, 418 So. 2d 743, 744 (La. Ct. App. 1982) ("parental rights must yield when the exercise of the right is not in the child's best interest."). *See also* Simpson v. Simpson, 586 S.W.2d 33, 35 (Ky. 1979) ("visitation is an exclusive limitation on custody to be granted where it is in the best interest of the child"); and Muraskin v. Muraskin, 336 N.W.2d 332, 336 (N.D. 1983) ("In matters pertaining to custody and visitation rights, we are concerned primarily with the best interests of the children and not the wishes and desires of either parent. . . . Visitation privileges are created to promote the best interests of the child.").

is flexible enough to adapt to the ever-changing family structure. A test for implementing this standard need be somewhat general since the standard itself is broad and flexible. Thus, a test, such as one fashioned by the Pennsylvania Superior Court in *Commonwealth ex. rel. Williams v. Miller,*[163] provides realistic guidelines. The *Miller* test provides:

> When seeking visitation, a third party must show reasons to overcome the parent's prima facie right to uninterrupted custody. However, the reasons need not be so convincing as in a custody case. In a custody case, the third party must convince the court that it is in the child's best interest *to take custody* from a parent and award it to the third party. In a visitation case, the third party need only convince the court that it is the child's best interest to *give some time* to the third party. As the amount of time requested moves the visit further from a visit and closer to custody, the reasons offered in support of the request must become correspondingly more convincing.[164]

Thus, despite the fact that third parties have no inherent legal right of visitation,[165] the court created a judicial right of visitation so long as the best interest of the child was met.

Of course, the key phrase in this standard is "the best interest of the child." Much has been written about this phrase[166] and justifiably so, since the determination of the child's best interest affects the entire life of that child. It is a standard that allows for a broader view of the needs of a child in relationship to a parent, grandparent, or other person than the traditional fall-back position of absolute parental right of uninterrupted custody. Yet despite efforts to provide objectivity through commentary and through guidelines provided by most states,[167] the standard turns on subjective case-by-case determinations. Perhaps the best that can be done is to set forth the

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163. 254 Pa. Super. 227, 385 A.2d 992 (1978).

164. *Id.* at 230, 385 A.2d at 994.

165. Commonwealth ex rel. Zaffarano v. Genaro, 286 Pa. Super. 436, 439, 429 A.2d 17, 19 (1981).

166. *See, e.g.,* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973); Comment, *The Best Interest of the Child Doctrine in Wisconsin Custody Cases,* 64 MARQ. L. REV. 343 (1980); and Comment, *Grandparents' Visitation Rights in Georgia,* 29 EMORY L.J. 1083 (1980).

167. *See, e.g.,* ALASKA STAT. § 25.20.110 (1983); ARIZ. REV. STAT. ANN. §25-332 (1976); COLO. REV. STAT. § 14-10-124 (1974); CONN. GEN. STAT. ANN. §46b-56 (1983); FLA. STAT. ANN. § 61.13 (West 1982); HAWAII REV. STAT. §571-46 (1976); IDAHO CODE § 32-717 (1985); ILL. ANN. STAT. ch. 40, § 602 (Smith-Hurd 1980); IND. CODE § 31-1-11.5-21 (1982); KAN. STAT. ANN. §60-1610(a) (1976); KY. REV. STAT. ANN. § 403.270 (Bobbs-Merrill 1982); LA. CIV. CODE ANN. art. 146 (West 1984); MASS. ANN. LAWS ch. 3, § 208.31 (Michie/Law. Co-op. 1981); MICH. COMP. LAWS ANN. § 722.23 (West 1984); MINN. STAT. ANN. § 518.17(1), (2) (West 1984); MO. REV. STAT. §§ 452.375, 452.410 (1977); MONT. CODE ANN. § 40-4-212 (1984); NEB. REV. STAT. § 42-364(1), (2) (1978); NEV. REV. STAT. § 125.480 (1983); N.H. REV. STAT. ANN. § 458.17 (Supp. 1983): N.M. STAT. ANN. §40-4-9 (1978); WASH. REV. CODE § 26.09.190 (1985); and WIS. STAT. § 767.24(1)(b), (2) (1981).

predominant guidelines adopted by state legislatures in respective best interests statutes.

The child's preference is the most prevalent[168] and should be the most prominent guideline in determining a child's best interest.[169] Though often limited by qualifiers such as, "if the child is of sufficient age and capacity to form a preference,"[170] this guideline provides a child input into decisions affecting his life. Further, the old conception that the rights of a parent are superior to the wishes of a child[171] has recently come under fire.[172] The modern child is considered a person, not a sub-person over whom the parent has an absolute and irrevocable possessory right.[173] The child has rights, and one of those is the right to voice his opinion and to have that opinion heard when it concerns the persons with whom he will associate. This is not to suggest that a parent's wishes are irrelevant. Seventeen states,[174] including Indiana, consider the wishes of a parent in their statutory guidelines. But in determining what is best for the child, the court should look first to the interests of the child and then to the preference of the parent. The wishes of a child to visit an aunt, uncle, or previous neighbor should not be dismissed solely because of parental objection. Other guidelines must be examined in determinations of this type.

A second legislative concern is the need for stability in the child's life.

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168. *See, e.g.*, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Washington, and Wisconsin. Statutes cited *supra* note 167.

169. This is not to say that a child's preference should be the only guideline. *See* Schuman, *The Unreliability of Children's Expression of Preference in Domestic Relations Litigation: A Psychiatric Approach,* 69 MASS. L. REV. 14 (1984), for possible limitations on this guideline. *See supra* note 42.

170. *See, e.g.*, ALASKA STAT. § 25.24.150(c)(3) (1983).

171. "The rights of a parent will not be disregarded in order to gratify the wishes of a child." Wilson v. Condra, 255 So. 2d 702, 703 (Fla. 1971).

172. *See generally* Note, *supra* note 156, at 861; Comment, *Visitation for Nonparents: Following the Polestar,* 11 STETSON L. REV. 586, 588 (1982); and Comment, *The Best Interest of the Child Doctrine in Wisconsin Custody Cases,* 64 MARQ. L. REV. 343 (1980), arguing that the best interest standard should disregard preferences of parents.

173. The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of constitutional magnitude . . . .

Bennett v. Jeffreys, 40 N.Y.2d 543, 546, 356 N.E.2d 277, 281 (1976) (citations omitted).

174. *See* Arizona, Colorado, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Missouri, Montana, Nevada, New Mexico, Ohio, Vermont, Washington, and Wisconsin. Statutes cited *supra* note 167.

This is true especially when that child is facing an event such as the death of a parent or the divorce of parents, both of which demand significant emotional adjustment for the child. Given that a child must adjust to the initial situation, a divorce for instance,[175] it seems that termination of visitation with individuals to whom the child was close would contribute to instability rather than provide stability. The *Collins* court recognized the need for a transition period, a period to readjust emotionally, for the child. This need appears self-evident yet is not always recognized. The child should not be cut off from everyone he knows at a time when he vitally needs those individuals for emotional support.

Other guidelines and concerns of legislatures include: the mental and physical health of all individuals involved in the custody or visitation action; the interaction of the child with his siblings, parents, or others; the physical, emotional, mental, social and possibly religious needs of the child; the home, school, and community record of the child; and generally any other consideration that affects the child's interests.[176] None of these concerns precludes the granting of visitation rights to third parties. Indeed, these concerns might often be advanced by allowing third party visitation.

Thus, neither the legislative concerns evidenced by the statutes nor judicial procedural issues preclude the adoption of a best interests standard for visitation rights that would encompass third parties. If the courts are true to the concept that the child's interests are paramount, then visitation rights in the best interests of the child should not be denied merely on the basis of a third party relationship.

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175. Judith S. Wallerstein writes,

> The child's experience in divorce is comparable in several ways to the experience of the child who loses a parent through death or to the child who loses his or her community following a natural disaster. Each of these experiences strikes at and disrupts close family relationships. Each weakens the protection that the nuclear family provides, leaving in its wake a diminished, more vulnerable family structure. Each traces a pattern of time that begins with an acute, time-limited crisis, and is followed by an extended period of disequilibrium which may last several years—or even longer—past the central event. And each introduces a chain of long-lasting changes that are not predictable at the outset and that reach into multiple domains of family life. . . .
>
> Indeed, it is strikingly clear that five and ten years after the marital rupture the divorce remains for many children and adolescents the central event of their growing-up years and casts a long shadow over these years.

Wallerstein, *Children of Divorce: The Psychological Tasks of the Child*, 53 AM. J. ORTHOPSYCHIATRY 230, 230-33 (1983).

Dr. Wallerstein then sets forth six psychological tasks for children of divorce: (1) acknowledging the reality of the marital rupture, (2) disengaging from parental conflict and distress and resuming customary pursuits, (3) resolution of loss, (4) resolving anger and self-blame, (5) accepting the permanence of the divorce, and (6) achieving realistic hope regarding relationships.

For a discussion of the court's role in forced visitation and custody and its consequential affects on the child see Hoorwitz, *The Visitation Dilemma in Court Consultation*, 64 SOC. CASEWORK 231 (1983).

176. *See supra* note 167.

B. *In Loco Parentis*

A second concept prevalent in visitation cases is in loco parentis. Although this concept has been utilized to provide visitation rights for stepparents, it has not consistently been used in development of rights for other third parties. Since there are good reasons to extend the in loco parentis concept to third parties and no clear reasons not to extend it, logically, it should be extended and reformulated.

That the non-custodial natural parent is most likely to be granted visitation is due in large part to attempts by legislatures to insure that a child of two parties is afforded an opportunity to associate with each of those individuals. This is evidenced by the inclusion in several best interests statutes of a concern that the custodial parent will allow visitation and access to the noncustodial parent.[177] The continuing contact and relationship between a father or mother and child is held to be so important that the standard to deny visitation is narrower than the standard to deny visitation to other parties.[178]

The extension of visitation rights to grandparents, in addition to being predicated on the best interests of the child, is a recognition that a relationship between a child and nonparent can be as important to preserve as is a relationship between a child and parent. There seems to be a recognition of the child's right to know his family, which is in a sense a recognition of a child's right to know his identity, his heritage. This is particularly true in states that have adopted statutes limiting visitation consideration to situations where a parent has died or parents have been divorced. It is just these types of situations that are conducive to loss of contact between the child and grandparent.

In extending visitation rights to stepparents, the courts have recognized the stepparents as parents in all but the biological sense of parenthood. Where an in loco parentis relationship was found, the stepparent was generally afforded visitation rights as long as those rights were in the best interests of the child. Yet an aunt in essentially the same relationship with a child was not allowed visitation rights,[179] and other third parties with similar relationships were also denied rights.[180] Although guardians and foster parents have had limited success in obtaining visitation rights, no clear rule exists to recognize those rights. Hence, it should be recognized that any party in an in loco parentis relationship with a child should be afforded visitation rights as if that party was a noncustodial parent. The absence of

177. *See, e.g.,* Alaska, Arizona, Florida, Louisiana, Michigan, Nevada, and Pennsylvania. Statutes cited *supra* note 167.

178. *See supra* notes 28-31 and accompanying text.

179. *See supra* notes 109-114 and accompanying text.

180. *See supra* note 108.

such a rule leads to confusion and unpredictability in visitation cases, which would ultimately lead to unfairness.

A child in the care of a friend, neighbor, aunt, or lesbian couple (where one of the two individuals is the natural parent of the child), may develop an in loco parentis relationship with such persons as might a child under the care of a stepparent or natural parent.[181] Logic dictates that if the basis upon which visitation rights were allowed for stepparents, a basis of in loco parentis, is present in a case concerning another third party, then the outcome should be consistent. A person who establishes an in loco parentis relationship with a child should be granted visitation rights with that child regardless of whether that person is the child's stepparent, aunt, uncle, neighbor, or any other third party.

Further, the appropriate standard for such parties should be that used for noncustodial parents rather than the more general and less lenient test of the child's best interests. A child's best interests standard is preferable in all situations but given the current distinction between this standard and the more lenient parental standard, that parental standard should apply to in loco parentis individuals. If an individual is in a true parental role then it is arbitrary to deny that individual the rights of a parent based solely on the fact that he or she is not the biological parent. Indeed, an individual who fits the in loco parentis status and is not a biological parent of the child may present an even greater argument for the higher standard of denial than a biological parent who became a parent by accident. The third party individual actually chose his role. Of course this is not true in all situations but it does further the argument that an individual who is a parent in every sense but a biological sense should be treated as a parent for the purpose of visitation. A distinction based on physical birth makes little sense when the issue is the child's best interest.

In further support of this proposition is public policy. To deny individuals visitation rights with children they have raised, cared for, and loved as their own, encourages those individuals to avoid involvement with children. If public policy concerning children is to encourage close relationships, the threat of absolute loss of contact between the parties should be minimized. To be sure, the average child may never have to endure a custody and visitation hearing. But, the child who does should not be faced with total cutoff of contact with one side of the family or with other individuals with whom he has developed a close relationship.

C. *Visualizing the Model*

The concept of in loco parentis, as well as the concept of best interests of the child, can be visualized as intersecting lines in the concentric circle

181. *See supra* notes 94-95 and accompanying text.

model. The concentric circle plane, as developed, contains five circles at various distances from a central point on the plane. Traditional visitation rights generate from the nucleus and are strong enough to reach noncustodial natural parents, grandparents, stepparents, and, in isolated flareups, may even reach other third parties. This Note advocates the modification of this traditional structure by adding two lines which would originate at the center of the concentric circles and would extend outward, thereby intersecting each of the circles. One line represents the best interests of the child, the other represents an in loco parentis relationship. The in loco parentis line would be stationary while the best interests line would rotate on the concentric circle plane, as the hand of a clock would rotate on the face of a clock.[182]

The concentric circles would be comprised of various individuals represented by points, who were seeking visitation rights within the circle of their given class. Thus, third parties would be composed of points *A*, *B*, *C*, and *D*, each seeking visitation rights but each representing a different individual on the circle representing third parties. The granting of visitation rights would depend on whether a given point, representing an individual seeking those rights, intersected one of the two lines, or was close enough to the center of the concentric circles to be granted such rights.

Thus, a point on neither the in loco parentis line nor the best interests line would be granted visitation rights in accordance with the traditional analysis, namely, whether that party was on a circle close to the center of the concentric circles. A noncustodial natural parent would be close enough to be granted such rights unless the court determined that granting visitation rights would endanger the child's physical or emotional health. Grandparents would not be granted visitation rights because such rights would not be in the best interests of the child (the point was not on the best interests line). Likewise, stepparents, blood relatives, and other third parties would not be granted visitation rights.

If a point was on the in loco parentis line but not on the best interests line, then that party, regardless of which circle the point was on, would be granted visitation rights so long as those rights did not endanger the child's physical or emotional health. This reasoning contrasts with the traditional approach which would allow the granting of such rights only if the point is located on both the in loco parentis and best interests lines. As argued

182. It could be argued that there should be only one line in the model—the line that represents the child's best interests. Indeed, it will be a rare case when visitation will be awarded due to an in loco parentis relationship and its "endangering of the child's physical or emotional health" standard and yet not be in the child's best interests. The two standards are close but not identical. *See supra* notes 27-30 and accompanying text. Since courts recognize a distinction, the model also recognizes the distinction. The best course however, would be a strict best interests standard that would apply to all individuals—including parents—who sought visitation rights with children.

above, if a party is in the role of a parent then that party should be granted visitation rights using the same standard used for natural parents.

If a point is on the best interests line but not on the in loco parentis line, then that party should be granted visitation rights regardless of its location on the model. Finally, if a point was on both the in loco parentis line and the best interests line, visitation rights should never be denied. In essence, this is the same test as in the previous instance because if visitation is in the best interests of the child, it will *a fortiori* not endanger that child's physical or emotional health. The stricter test, best interests, is included in the broader test, endangering the health of the child.

Use of this model would facilitate meeting the best interests of the child, which is the goal of visitation rights, and at the same time benefit those individuals who cared for and raised children that were not their biological offspring. In a society that is presenting the possibility of test-tube babies, surrogate motherhood, and embryo implants, such a model protects those individuals that should be protected, the child and the parent, while not opening up the family unit to undue state intervention. The model also helps solidify an area of family law that has been confused and inconsistent.

Conclusion

While the outdated concept of absolute parental custody has given way to the realities of the 20th century, it has not done so consistently. Although stepparents have generally been accorded visitation rights based on the best interest of the child, blood relatives and other third parties have not. A changing society requires flexible laws but too often custody laws have remained rigid.

By allowing visitation rights to anyone who is in an in loco parentis relationship to the child or whose visitation would be in the best interest of the child, courts and legislatures can provide necessary flexibility in visitation while maintaining the goal of visitation—the child's best interests. Such action would also add consistency and fairness to the currently inconsistent and often harsh visitation decisions. If the child's best interests are truly the goal of visitation, outdated rigidity in visitation rights should be replaced with updated flexibility.

Michael J. Lewinski