12-1-1982


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Joshua Allen was born profoundly deaf in 1971. When his parents, Joe and Dana Allen, were divorced, Dana was awarded custody of Joshua. Dana was unable to adjust to Joshua’s disability and therefore placed him with her mother. Dana subsequently signed a custody modification transferring Joshua’s custody to Joe. Despite the modification, Joshua remained with Dana’s mother until Joe married Jeannie. Joshua then went to live with Joe, Jeannie, and Jeannie’s three children from a prior marriage.¹

When Joshua joined his new family, he was three years old, profoundly deaf, and unable to speak or to communicate in sign language. His intellectual development was substantially behind that of normal hearing children of his age.² Four years later, at the time of Joe and Jeannie’s marriage dissolution, Joshua could communicate in sign language and his intellectual development was equivalent to that of hearing children of the same age.

The trial court found that Joshua’s remarkable achievements were due primarily to Jeannie’s dedication, determination, and love.³ Jeannie and her three children learned sign language and Jeannie taught the skills to Joshua. She arranged a special training program for Joshua in the public school, a program that is unique in the state. She took special classes herself so she could help tutor and train Joshua at home. In Joshua’s presence, she and her three children communicated exclusively in sign language so that Joshua could participate fully in family conversations. The dramatic results of Jeannie’s devotion have attracted statewide attention.⁴

Joe, on the other hand, developed only minimal sign language ability. His attitude toward Joshua’s future development was “apathetic and fatalistic.”⁵

². *Id.* at 641, 626 P.2d at 19. The severe disability of born-deaf persons is due to their speech and language deficits. The high premium placed on verbal facility in our culture means that intellectual deficits are often associated with deafness. For example, the average deaf adult in the United States scores below the fourth-grade level on standardized reading tests. On non-language tests of intelligence, however, deaf persons score at or near the mean. Deaf persons’ communication disabilities can be significantly diminished by sign language and lip reading ability, but training in these skills is usually very inadequate. Nevertheless, with proper training, deaf persons can and do succeed in intellectual pursuits. Schein, *Hearing Impairments and Deafness*, in *HANDBOOK OF SEVERE DISABILITY* 395, 398–99 (1981).
⁴. *Id.* at 641, 626 P.2d at 19.
⁵. *Id.* at 641–42, 626 P.2d at 19.
When Joe and Jeannie’s marriage disintegrated, Jeannie petitioned for dissolution and for custody of all four children. The trial court granted Jeannie’s petition. The award of Joshua’s custody was based “in part on a finding of unsuitability on the part of the father,” but also on the special family relationship between Jeannie, Joshua, and the other children and the educational program Jeannie had set up for Joshua. The trial court gave both Joe and Dana liberal visitation rights.

In upholding this custody award, Division Three of the Washington Court of Appeals answered a number of troubling questions attending parent-nonparent custody disputes in the context of dissolution actions. The court held: (1) a court has jurisdiction over all children dependent on either or both of the parties; (2) a stepparent who stands in loco parentis to a child has standing to seek custody of the child; and (3) when a custody dispute is between a parent and a nonparent, a more stringent standard than the “best interests of the child” is required. To gain custody, a nonparent must show that “actual detriment” to the child would result if custody were awarded to the parent.

This Note contends that, based on the custody statute and relevant case law, the court of appeals should have answered these questions differently. The Note first proposes that, in a dissolution action, the trial court should have automatic jurisdiction only over the children born of that marriage. The court should have jurisdiction over other children only if they are not in the custody of either of their parents or if neither parent is a suitable custodian. Second, it proposes that a stepparent should not automatically have standing to seek custody of a child based on an in loco parentis relationship. A stepparent should have to separately petition the court for custody, alleging that the child is not in the custody of either parent, or that neither parent is a suitable custodian. Finally, it proposes that the “best interests of the child” standard should apply to all custody determinations, including those between a parent and a nonparent.

This Note concludes that, under Allen, the custody of all stepchildren will be an issue in a dissolution action involving one of their parents. This holding may well increase the number of contested dissolutions and render uncertain the custody of increasing numbers of children.

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6. Joe had adopted Jeannie’s three children, but Dana, Joshua’s mother, had refused to allow Jeannie to adopt Joshua. Id. at 640, 626 P.2d at 18.
7. Id. at 642, 626 P.2d at 20 (quoting the trial court).
8. Id. at 643–44, 626 P.2d at 20–21.
9. Id. at 644, 626 P.2d at 21.
10. Id. at 649, 626 P.2d at 23.
I. LEGAL BACKGROUND

A. Jurisdiction and Standing

1. In General

Nonparents are usually involved in child custody disputes in three situations. First, the state may exercise its power as parens patriae to remove a child from a harmful home environment. In this situation, the court exercises a child-protection function. If the court determines that the child has been abused or neglected, it has jurisdiction to determine whether further state intervention is appropriate. Private third parties often become involved in the child’s custody at this stage by becoming foster parents.

Second, foster parents and other nonparents are frequently involved as defendants in suits by parents seeking to regain custody of their children. In this situation, the court exercises a private-dispute-settlement function and its jurisdiction is granted by various statutes.

Third, several states have adopted section 401(d) of the Uniform Mar-

12. Prior to the seventeenth century in England, the feudal concept of children as chattels prevailed and parents had absolute power over their children. Consequently, custody of a child was never an issue because no one had standing to intervene between a parent and child. During the seventeenth century, the concept of parens patriae developed and the Crown undertook the duty, delegated to the chancery courts, to protect subjects unable to care for themselves. Therefore, the state gained standing to intervene in the parent-child relationship on behalf of children to protect them or their property. McGough & Shindell, Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes, 27 EMORY L.J. 209, 209–10, 217–21 (1978).


14. Id. at 240–43.


16. Mnookin, supra note 13, at 229. The difference between the courts’ child-protection and private-dispute-settlement functions is important because different problems and remedies, and hence different standards for decision, apply in the two situations. When the state intervenes because a child has been neglected or abused, the court may terminate all parental rights. Id. at 244–46. This is a drastic remedy with constitutional implications, since “the right of the individual . . . to marry, to establish a home and bring up children” is a fundamental liberty protected by the federal Constitution. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). In a private custody proceeding, on the other hand, less than the whole bundle of rights is involved. Even if custody is awarded to a nonparent, the parent usually is awarded visitation rights, as in Allen, and the child is still legally the parent’s for such purposes as intestate succession.

riage and Divorce Act. This provision grants a nonparent standing to institute a custody proceeding against a parent defendant. Section 401(d) also grants courts jurisdiction to decide the issue, but only if the child is not in the custody of one of its parents. Therefore, although a stepparent may petition for custody in some situations, he or she is unlikely to be able to petition for custody in a dissolution action.

2. *In Washington*

Child custody proceedings in Washington must be commenced under RCW § 26.09.180. The statute has both standing and jurisdictional aspects and applies to both parents and nonparents.

A parent has standing to invoke the court’s jurisdiction over child cus-

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19. Section 401(d) of the Uniform Marriage and Divorce Act states:

A child custody proceeding is commenced in the court:

1. by a parent, by filing a petition
2. (i) for dissolution or legal separation; or
   (ii) for custody of the child in the county in which he is permanently resident or found; or
3. by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents.


20. For example, if a child has been living with one parent and a stepparent and the parent dies, the stepparent could institute a custody proceeding against the child’s surviving, noncustodial parent.


1. A child custody proceeding is commenced in the superior court:
   (a) By a parent:
      (i) By filing a petition for dissolution of marriage, legal separation or declaration of invalidity; or
      (ii) By filing a petition seeking custody of the child in the county where the child is permanently resident or where he is found; or
   (b) By a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where he is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.

2. Notice of a child custody proceeding shall be given to the child’s parent, guardian and custodian, who may appear and be heard and may file a responsive pleading. The court may, upon a showing of good cause, permit the intervention of other interested parties.
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custody by following either of two procedures. A parent may file a petition for dissolution of marriage, legal separation, or declaration of the marriage's invalidity. The court has jurisdiction over a dissolution action and attendant custody determination brought by a parent who is a Washington resident or who is a member of the armed forces stationed in Washington. The court also has jurisdiction over a custody proceeding instituted by a parent if the child is permanently residing in or is found in the county in which the petition is filed.

A nonparent only has standing to file a petition seeking child custody in two situations: (1) if the child is not in the custody of a parent; or (2) if the petitioner alleges that neither of the child's parents is a suitable custodian. The court's jurisdiction depends on the petitioner's ability to prove one of these threshold requirements. If the court finds either that the child is in the custody of a parent or that at least one parent is a suitable custodian, it must dismiss the action.

B. Standards

1. In General

When a custody dispute is between a child's parents in a dissolution action, most state courts make their determinations based on the "best interest of the child" standard. When a custody dispute is between a parent and a nonparent, however, there is no consensus among states on the standard to apply. The standards applied by various jurisdictions form a continuum between the two leading doctrines in this area: "parental rights" and "best interests of the child."

Under the parental rights doctrine, courts automatically award custody to the parent unless he or she is found to be unfit. This doctrine is based

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22. Id. § 26.09.180(1)(a)(i).
23. Id. § 26.09.180(1)(a)(ii).
24. Id. § 26.09.030.
25. Id. § 26.09.180(1)(b).
26. Id. §26.09.180(1)(b).
27. In an action brought under the dissolution statutes, "the court has no jurisdiction to grant relief unless authority to do so can be found in Washington statutes." Jones v. Minec, 77 Wn. 2d 381, 462 P.2d 927, 932 (1969) (Hunter, C.J., dissenting).
28. Mnookin, supra note 13, at 236.
on an almost mystical belief in the superiority of biological parents. Jurisdictions that apply the parental rights doctrine focus entirely on the fitness of the parent. Even if a child has been in the custody of a third party for years, courts in these jurisdictions will return the child to a "fit" parent, notwithstanding the major disruption that this action can cause in the child’s life.

At the other end of the continuum is the "best interests of the child" doctrine. This doctrine focuses on the child rather than on the parent. It incorporates the expanding knowledge of child psychology and development, most notably the "psychological parent" concept advanced in the influential book Beyond the Best Interests of the Child. The psychological parent-child relationship is based on "day-to-day interaction, companionship, and shared experiences," rather than a biological tie. Thus, any caring adult who is the parent figure in a child’s daily life will become the child’s psychological parent.

Closely allied to the psychological parent concept is the recognized importance of continuity in a child’s relationships. Virtually all psychologists and psychiatrists agree that continuity and stability are essential to children and that disruption of the parent-child relationship puts a child at

31. See, e.g., Behn v. Timmons, 345 So. 2d 388, 389 (Fla. Dist. Ct. App. 1977) (biological parent has "a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring").

32. See, e.g., Carvalho v. Lewis, 247 Ga. 44, 274 S.E.2d 471 (1981) (court is to focus solely on parent’s fitness); Herbst v. Herbst, 211 Kan. 163, 505 P.2d 294 (1973) (child returned to mother after living with grandparents for five years); Turner v. Turner, 331 So. 2d 903 (Miss. 1976) (child returned to mother after living with grandparents for six years); Frederick v. Frederick, 617 S.W.2d 629 (Mo. Ct. App. 1981) (court refused to abandon parental rights doctrine on basis of sociological and psychological data); In re Fish, 174 Mont. 201, 569 P.2d 924, 928 (1977) (child cannot be "adversely possessed").

33. See, e.g., Lloyd v. Lloyd, 92 Ill. App. 3d 124, 415 N.E.2d 1105 (1980) (rights of parents must yield to best interests of child; not necessary that parent be found unfit or have legally forfeited right to custody if it is in child’s best interest to be placed in custody of nonparent); In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45 (1978) (natural parent may be fit to care for child, but all other circumstances may dictate that the best interests of the child would be served by nonparent custody award); In re Perales, 52 Ohio St. 2d 89, 369 N.E.2d 1047 (1977) (welfare of the child is the interest given priority).

34. J. Goldstein, A. Freud & A.J. Solnit, Beyond the Best Interests of the Child (new ed. 1979). The authors define "parent" from the child’s perspective:

[F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his "psychological parent" in whose care the child can feel valued and "wanted."

An absent biological parent will remain, or tend to become, a stranger.

Id. at 17.

35. Id. at 19.

36. See generally id. at 31-52 (discussing importance of continuity in child-parent relationships).
significant risk.\textsuperscript{37} Courts in jurisdictions that have adopted the best interests of the child standard recognize and emphasize both the psychological parent\textsuperscript{38} and the continuity concepts.\textsuperscript{39}

Some jurisdictions fall in between these two poles. Those closer to the parental rights end of the continuum state that there is a rebuttable presumption that a child’s best interests will be served by being in the custody of a natural parent. These jurisdictions give the nonparent the burden of rebutting this presumption.\textsuperscript{40} Although the courts differ over the weight of this burden, they agree that parental rights are not absolute. Therefore, they hold that a parent need not be proven "unfit" before a nonparent is awarded custody, and that the paramount concern of the court is the best interests of the child. Nevertheless, procedural devices, such as a presumption in favor of the natural parent, increase the probability that the parent will be awarded custody.\textsuperscript{41} Jurisdictions that employ these devices are therefore closer to the parental rights end of the continuum.

Other intermediate jurisdictions are closer to the "best interests" end of the continuum. Courts in these jurisdictions require a showing of "extraordinary" or "exceptional" circumstances before they will award custody to a nonparent. These circumstances include the duration of the parent-child separation and the adverse effect that a change in custody may have on the child.\textsuperscript{42} These courts’ recognition of the importance of conti-
nuity for a child and their overall focus on the child's welfare place their jurisdictions close to the "best interests" classification.

2. In Washington

Washington courts have vacillated between the two ends of the parental rights-best interests continuum, but there has been a definite movement toward the best interests of the child standard in parent-nonparent custody disputes. In early cases, the Washington courts adhered to the traditional parental rights doctrine, ignoring evidence of a well-established psychological parent relationship or of an extended separation of parent and child.\(^43\) There is no discussion of the needs and welfare of the children involved in these cases; the courts focused exclusively on the fitness of the parents.

An early sign of a shift away from the parental rights doctrine came in 1926, when the Washington Supreme Court upheld an award of custody to a child's aunt, with whom the child had lived for eight years.\(^44\) The court stated that, "notwithstanding the original and primary right of a parent, the great and leading object to be obtained is the welfare of the child."\(^45\)

The supreme court similarly upheld a custody award to a stepmother in a 1953 case, Eickerman v. Eickerman.\(^46\) Although the trial court held that

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\(^{43}\) See, e.g., In re Ward, 39 Wn. 2d 894, 239 P.2d 560 (1952) (natural parent entitled to custody unless proven to be unfit); Penney v. Penney, 151 Wash. 328, 275 P. 710 (1929) (father entitled to custody notwithstanding the child's ten-year relationship with another family); In re Smith, 118 Wash. 1, 202 P. 243 (1921) (father entitled to custody as against child's grandparents); In re Mead, 113 Wash. 304, 194 P. 807 (1920) (father awarded custody of his four-year-old daughter even though daughter had lived all but two months with another family); In re Neff, 20 Wash. 652, 45 P. 383 (1899) (father entitled to custody unless proven to be unfit); Lovell v. House of the Good Shepherd, 9 Wash. 419, 37 P. 660 (1894) (parents entitled to custody unless proven to be unfit).

\(^{44}\) Penney v. Penney, 151 Wash. 328, 275 P. 710 (1929), affords a typical example of these cases. In Penney the supreme court awarded custody to the child's father instead of the nonparents with whom his daughter had been living for ten years. The only significant factors, according to the court, were that the father was not unfit and that he had not abandoned the child. Neither the strong bond of love between the child and the nonparent family nor the child's wishes carried any weight. Of paramount importance to the court was that the child, even though thirteen years old at the time of the custody award, would "be a Penney, as she was born, with the memories and traditions of a Penney, and not a Mohr, whose traditions may be wholly foreign to those of the Penney family." Id. at 336, 275 P. at 713.

\(^{45}\) In re Allen, 139 Wash. 130, 245 P. 919 (1926).

\(^{46}\) Id. at 131, 245 P. at 920.
the father had neither waived nor abandoned his parental rights, it disre-
garded the parental rights precedents under which the father would have
regained custody of the children automatically. Instead, the trial judge
visited the father and the stepmother, evaluated their respective home en-
vironments, talked with the children, and heard extensive evidence. In
reaching its decision not to grant custody to the father, the trial court gave
considerable weight to the fact that the stepmother was the only mother
the children had ever known. It held that the children were entitled to the
security that only the stepmother could continue to give them. By up-
holding the trial court’s reasoning, methodology, and decision, the su-
preme court implicitly rejected the parental rights doctrine in favor of the
best interests of the child standard.

Finally, in 1972, the supreme court expressly rejected the parental
rights doctrine in In re Palmer. In Palmer, the court of appeals had held
that a child’s natural parents could not be deprived of custody in favor of
a grandmother with whom the child had lived for three years unless the
parents were unfit and would jeopardize the child’s welfare. In revers-
ing, the supreme court stated, “We hold that the welfare of the child is
the only operative standard at this stage of the proceedings and all other
considerations are secondary.” The court then proceeded to enumerate
the factors to be considered in determining the best interests of the child,
referring to the same standards used in a dissolution action involving a
child’s parents. The court remanded the case for a determination of the
child’s best interests.

The trend away from the parental rights doctrine was also manifested in
a new and original provision added to the 1973 Dissolution Act. This
 provision enables nonparents to institute a custody proceeding by show-
ing that the child is not in a parent’s custody or that neither parent is a
suitable custodian. One scholar has interpreted the “unsuitability” re-
quirement to be both less stringent than the old “unfitness” requirement
and a means of balancing the parents’ legitimate interests with the child’s

mother in a dissolution action between her and the children’s father. The dissolution decree incorpo-
rated the father’s agreement that custody of his children should be awarded to their stepmother. When
the father later sought a modification of the dissolution decree to regain custody of the children, the
trial court denied the father’s request and the supreme court upheld the decision.

47. Id. at 167, 223 P.2d at 963.
(1972).
50. 81 Wn. 2d at 605, 503 P.2d at 465.
51. Id. at 606, 503 P.2d at 466 (quoting Chatwood v. Chatwood, 44 Wn. 2d 233, 239, 266 P.2d
782, 785–86 (1954)).
needs. Furthermore, the provisions of the Dissolution Act indicate a significant movement toward favoring the child’s interests over the parents’ absolute rights.

II. THE ALLEN COURT’S REASONING

The first issue before the Allen court was whether the superior court had jurisdiction under RCW § 26.09.180 to determine Joshua’s custody. Jeannie’s petition had not alleged that Joshua was not in the custody of one of his parents or that neither of Joshua’s parents was a suitable custodian. The trial court, however, had found both parents unsuitable, based on evidence admitted during the trial. The Allen court held that the jurisdictional issue was negated because Jeannie’s pleadings had been amended by the proof produced at the trial, pursuant to CR 15(b).

The court then went on to state, “More importantly, we hold that in a dissolution action the custody of all children is before the court.” The court reasoned that the statute dealing with petitions for dissolution gives the court jurisdiction over all children because it requires a statement of the “names, ages, and addresses of any child dependent upon either or both spouses.”

The second issue before the Allen court was whether Jeannie had standing to seek custody of Joshua. The court held that a stepparent may commence a proceeding for custody of a stepchild in a dissolution action in the same manner as a parent if the stepparent stands in loco parentis to the child. The court of appeals reasoned that because the rights and liabilities of the in loco parentis relationship are substantially the same as those

54 The provisions of the Dissolution Act “suggest a purposeful movement away from the philosophy that parents ‘own’ children and can be ‘deprived’ of their rights only by a showing of unfitness. The trend is toward a premise that the child’s welfare is more significant than the claim of parental rights.” Id. at 407.
56 Id.
57 Id. at 643, 626 P.2d at 20. Civil Rule 15(b) states in relevant part:
   When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.
WASH. SUPER. CT. CIV. R. 15(b).
60 Allen, 28 Wn. App. at 644, 626 P.2d at 21.
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in a parent-child relationship, a stepparent who stands in loco parentis to a child should have the same rights as a parent. Because Jeannie obviously met this requirement, the court held that she had the same right as a parent to seek custody of Joshua.

In considering the third issue, the standard to be applied, the court found that the trial court had erred in applying the best interests of the child standard of RCW § 26.09.190. This is the standard applied in a custody determination between parents, but the court required "a more stringent balancing test . . . to justify awarding custody to [a] nonparent." The court settled on an "actual detriment" standard: "[W]here circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent," custody may be awarded to a nonparent rather than to the parent. Because the court found that Joshua's development would be detrimentally affected if he were placed in Joe's custody, it affirmed the judgment.

III. ANALYSIS

The Allen court's holdings on all three issues are unsound and could lead to unfortunate results. Its holding that the superior court has jurisdiction over all dependent children is based on misconstruction of the dissolution statutes. Its holding that an in loco parentis relationship between a nonparent and a child gives the nonparent the same standing as a parent to seek custody is reasonably derived from the common law, but it is not grounded in the Washington statute. Finally, the court's holding that the best interests of the child standard does not apply in a parent-nonparent custody dispute contradicts both case law and a careful reading of the statutes.

A. Jurisdiction and Standing

The Allen court properly found that the superior court had jurisdiction over Joshua's custody under RCW § 26.09.180 because it had found both Joshua's parents to be unsuitable. The court should have ended its discussion of jurisdiction at this point, having disposed of the issue in the case under the appropriate statute. The court, however, went on to hold, alternatively, that the superior court has jurisdiction in a dissolution action

63. Id. at 645-46, 626 P.2d at 21.
64. Id.
65. Id. at 647, 626 P.2d at 22.
over all children who are dependent on either or both spouses. In doing so, it first misapplied one statutory provision and then misread another.

The court relied on RCW § 26.09.020, the "petition provision," to support its alternative jurisdictional holding. This provision requires information about all children dependent on either or both of the spouses, but says nothing about child custody. Rather, it relates directly to the provision governing the court's final decree, which must include a just and equitable disposition of the parties' property and liabilities.66

The petition provision's requirement of information about all dependent children is intended to supply the court with information regarding the parties' future economic circumstances for use in making the property distribution.67 Because a parent is often obligated to contribute to the support of a child of a prior marriage who is in the custody of a prior spouse, the court needs information about all dependent children to evaluate and project the duration of the parents' financial commitment. It does not logically follow, however, that the custody of all dependent children is within the court's jurisdiction. The petition provision is not jurisdictional and the court should not have used it to determine jurisdiction.

Furthermore, the court misconstrued the provision that does apply to custody determinations in dissolution actions. As the court noted, "RCW 26.09.050 requires that the court in entering its decree of dissolution 'consider, approve, or make provision for child custody and visitation, the support of any child of the marriage entitled to support....'"68 The court, however, seemed oblivious to the significant words "any child of the marriage," and persisted in reading the petition provisions into the custody provision.69

The jurisdiction of the court in a dissolution action is prescribed and limited by the applicable statute.70 In Palmer v. Palmer,71 the Washington Supreme Court held that similar language in the 1949 divorce act precluded the court from taking jurisdiction of any children who were not of

67. Id. § 26.09.080.
69. The court stated, "Thus, the legislature in amending the dissolution statute in 1973 provided the court with jurisdiction over all children 'dependent upon either or both spouses ....'" 28 Wn. App. at 644, 626 P.2d at 20 (quoting WASH. REV. CODE § 26.09.020(1)(d) (1981)).
71. 42 Wn. 2d 715, 258 P.2d 475 (1953).
the marriage.\textsuperscript{72} In \textit{In re Marriage of Little},\textsuperscript{73} the supreme court recently discussed the jurisdiction of the courts under the dissolution statute. It cited \textit{Palmer}, with apparent approval, for the proposition that custody of a child who is not a child of the marriage is beyond the jurisdiction of the court in a dissolution action.\textsuperscript{74}

Thus, contrary to the \textit{Allen} court’s position, a court has jurisdiction only over the children of the marriage in a dissolution action. Only parents can petition for custody by filing a dissolution action under RCW § 26.09.180, and the court provides for their children’s custody in the dissolution decree under RCW § 26.09.050. A stepparent must, therefore, invoke the court’s jurisdiction over other children through the relevant procedures under the new custody provision.\textsuperscript{75}

The court of appeals’ resolution of the standing issue has similar infirmities. It again could have resolved the issue by simply referring to RCW § 26.09.180. Because the court deemed that Jeannie’s pleadings were amended by the proof to include an allegation that neither of Joshua’s parents was a suitable custodian, the court could have held that Jeannie had standing under RCW § 26.09.180 to petition for Joshua’s custody. Instead of relying on the nonparent provisions of the statute, however, the court looked to the common-law in loco parentis doctrine to support Jeannie’s standing under the statute. The court held that the provision authorizing a parent to institute a custody proceeding by filing a petition for dissolution “is also applicable to cases involving stepparents where the stepparent can meet the requirements of standing in loco parentis.”\textsuperscript{76}

The court’s reasoning here is sound and is in accord with the psychological parent doctrine. It is just and proper that a stepparent who has accepted full parental responsibilities and has given the child love and security, like a natural parent, should thereby be accorded parental rights.

\textsuperscript{72} \textit{Id.} at 716-17, 258 P.2d at 476.
\textsuperscript{73} 96 Wn. 2d 183, 634 P.2d 498 (1981).
\textsuperscript{74} \textit{Id.} at 197, 634 P.2d at 506. The court followed the citation to \textit{Palmer} with a “but see” cite to \textit{Eickerman v. Eickerman}, 42 Wn. 2d 165, 253 P.2d 962 (1953), which is discussed \textit{supra} at note 46. In \textit{Eickerman}, the court had approved and was enforcing a contract between the parties. It could do so even if it would not have had jurisdiction to make a custody order. The parties themselves can enter into a custody contract that a court could not impose on them.
\textsuperscript{75} A nonparent may institute a custody proceeding under the provision by filing a custody petition, but only if the child is not in a parent’s custody or if the petitioner alleges that neither parent is a suitable custodian. If the petitioner can prove one of these threshold requirements, the court has jurisdiction over the custody determination. \textit{WASH. REV. CODE} § 26.09.180(1)(b) (1981).
\textsuperscript{76} \textit{Allen}, 28 Wn. App. at 644, 626 P.2d at 21. Although the court treats this issue as one of standing, the implications are jurisdictional; i.e., if a stepparent who stands in loco parentis to a child had the same standing as a parent to commence a custody proceeding by filing for dissolution, the stepparent would stand in the same position as a parent and the stepchildren constructively would be “children of the marriage.” Thus, the court would have jurisdiction over the stepchildren’s custody as part of the dissolution action.
with regard to the child. As far as the child is concerned, the stepparent is his or her parent and the law should recognize this fact. Unfortunately, however, the court's interpretation is not based on the language of the statute, because the custody provision does not distinguish between nonparents who stand in loco parentis to a child and those who do not.

A child custody proceeding is governed by the custody provisions of the Dissolution Act and the court's jurisdiction is strictly limited by those provisions. The statute distinguishes parents from nonparents but makes no special provision for nonparents who stand in loco parentis to children. Thus, although the court's holding is consistent with the common-law in loco parentis doctrine, it is unsupported by the custody statute and, therefore, is not a proper foundation for standing.

The Allen court's jurisdiction and standing holdings may have unfortunate results. First, trial courts may begin to consider the custody, and not merely the support, of children whose custody is not properly an issue in a dissolution action. In an extreme case, a court could even consider the custody of children from a party's prior marriage who are in the custody of the prior spouse. Followed to its logical conclusion, the Allen decision could cast uncertainty and instability over the custody of a great many children. Second, trial courts following Allen are likely to consider the custody of stepchildren to be automatically at issue in a dissolution. This will complicate many dissolution actions because of the necessity of joining the children's other parent, who otherwise would not be a party. Third, the automatic inclusion of the custody of stepchildren as an issue in dissolution actions may increase the number of contested dissolutions.

B. Standard For Determining Custody

The Allen court held that a stepparent who has established an in loco parentis relationship with a stepchild is entitled to parental status for standing and jurisdiction, but not for determining custody. The court held

77. See supra note 75 and accompanying text.

78. Changing the custody of these children would involve a modification of the original custody decree under WASH. REV. CODE § 26.09.260 (1981).

79. In an unpublished comparison of available data on Washington dissolution actions, Professor Luvern V. Rieke found that dissolutions in which stepchildren but not children of the marriage were involved more closely resembled childless dissolutions than those involving children of the marriage. The latter group of dissolutions took longer to complete than the former, an arguable indication that dissolutions involving children are more complex and more likely to be contested. L. Rieke, Update on the Dissolution Act: Eight Years After (1981) (copy on file with the Washington Law Review). If the custody of stepchildren automatically becomes an issue in a dissolution, it is likely that dissolutions involving stepchildren will more closely resemble dissolutions involving children of the marriage.
that the best interests of the child standard, which is applied in parental
custody disputes, is inapplicable to all custody disputes between a parent
and a nonparent regardless of the nonparent’s relationship to the child.80

The court stated that the only alternative standard recognized in Wash-
ington for awarding custody to a nonparent is a finding of parental unfit-
ness under the neglect and termination statutes.81 The court recognized
that the unfitness standard is inapplicable to custody disputes under the
dissolution statutes because a custody award does not have the drastic
consequence of terminating all parental rights.82 Therefore, the court de-
vised an intermediate standard under which a nonparent must show that
“the child’s growth and development would be detrimentally affected by
placement with an otherwise fit parent.”83

Most of the Washington cases cited in the court’s opinion deal with
dependency and termination proceedings.84 This is because the court had
before it only a one-sided presentation of this issue.85 A fair examination
of the relevant case law might have led the court to conclude that the best
interests of the child standard is the proper standard to apply in parent-
nonparent custody cases under RCW § 26.09.180.

There are no prior appellate opinions of custody determinations under
this provision.86 Nevertheless, when Washington courts have considered

81. Id. at 648–49, 626 P.2d at 23.
82. Id. at 649, 626 P.2d at 23. This commendable distinction is not recognized by courts in some
other states. See, e.g., Sheppard v. Sheppard, 230 Kan. 146, 630 P.2d 1121 (1981), cert. denied,
102 S. Ct. 1274 (1982), in which the Kansas Supreme Court held unconstitutional a statute allowing
a legal custody award to a nonparent who had physical custody of a child after a dissolution if the best
interests of the child would be served and if the nonparent had formed a parental relationship with the
child. The court required a finding of parental unfitness for any award of custody to a nonparent. 630
P.2d at 1128.

The United States Supreme Court recently considered the burden of proof required in termination
of parental rights proceedings. The Court recognized that termination involves the loss of rights in
addition to custody. Santosky v. Kramer, 102 S. Ct. 1388 (1982). The Court noted that
“[t]ermination denies the natural parents physical custody, as well as the rights ever to visit, commu-
nicate with, or regain custody of the child.” Id. at 1392 (footnote omitted). It also noted that “[f]ew
forms of state action are both so severe and so irreversible.” Id. at 1397.
84. E.g., In re Aschauer, 93 Wn. 2d 689, 611 P.2d 1245 (1980) (permanent deprivation of
parental rights); In re Becker, 87 Wn. 2d 470, 533 P.2d 1339 (1976) (dependency); In re Luscier, 84
App. 126, 595 P.2d 552, review denied, 92 Wn. 2d 1022 (1979) (permanent deprivation of parental
rights).
85. Joe’s brief stressed the early cases that adhered to the parental rights doctrine, and cited a line
of parent-nonparent custody cases. Brief for Appellant at 26–36. Jeannie’s brief, on the other hand,
cited only one parent custody case, and did not discuss which standard should be applied in parent-
nonparent custody cases. Brief for Respondent at 9.
86. The cases cited supra at notes 43, 44, & 46 were all decided prior to 1973 when the new
custody provision was adopted.
parent-nonparent custody issues under other statutes, the parties' arguments were similar to those that would be considered under the current provision. The parents assert that their parental status entitles them to custody of their children, and the nonparents assert that they can better fulfill the children's needs and provide a better home.\footnote{87}

The similarity of procedures and proof required in dependency cases and in parent-nonparent custody cases supports the use of the best interests of the child standard in custody cases. A custody proceeding instituted by a nonparent is similar to a dependency proceeding in that both involve a two-step procedure: first, the court must find facts sufficient to give it jurisdiction, and second, the court must make a custody disposition. The court's jurisdiction in a dependency action depends on a finding that the child is "dependent" under the statutory definition.\footnote{88} In a nonparent custody proceeding, the court's jurisdiction depends on a finding that the child is not in the custody of one of its parents or that neither parent is a suitable custodian.\footnote{89} Thus, under both statutes, the most stringent test occurs at the threshold, jurisdictional level. It is at this first stage that the adequacy of the parents is an issue. Thereafter, the court can turn its attention to the child. And it is at this point that the courts have reiterated that the welfare or best interests of the child is the court's paramount concern.\footnote{90}

The best interests of the child standard is also supported by the relevant provisions of the Dissolution Act. The custody provision\footnote{91} states separate criteria for parents and for nonparents who institute custody proceedings. The immediately succeeding provision sets forth the standard for custody disposition: "The court shall determine custody in accordance with the best interests of the child."\footnote{92} No distinction is drawn between parents and nonparents in this second provision. There is only one standard—the best interests of the child. If the legislature had intended two separate stan-
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dards as well as two separate criteria for jurisdiction, it is reasonable to assume that it would have stated the distinction in both provisions.\textsuperscript{93}

The court’s concern that a more stringent standard is necessary in cases involving a nonparent is adequately met under the statutory best interests of the child standard. The provision directs the court to “consider all relevant factors.”\textsuperscript{94} When a custody contest is between a parent and a nonparent, the additional factor of parental status is automatically included in the balancing process in favor of the parent.\textsuperscript{95} Furthermore, the language of the provision is taken from the Uniform Marriage and Divorce Act, which is “designed to codify existing law” and to preserve familiar presumptions—such as the presumption that “a parent is usually preferred to a nonparent.”\textsuperscript{96} Thus, adequate protection for a parent’s rights and interests is already included in the statutory standard.

The court’s adoption of the “actual detriment” standard may also create several problems. It may blur the distinction between a custody award and state intervention in the family to avert harm to a child due to parental abuse and neglect.\textsuperscript{97} The “actual detriment” standard could also lead to trial courts construing “detriment” to mean extreme harm. This would represent a return to the old standard under which a parent’s right to custody depended solely on his or her minimal fitness. Such a return would be inconsistent with the obvious trend in Washington law toward “a premise that the child’s welfare is more significant than the claim of parental rights.”\textsuperscript{98}

IV. CONCLUSION

\textit{In Re Marriage of Allen} provides a concrete illustration of the maxim

\textsuperscript{93} According to Sutherland, “‘where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.’” \textit{J. SUTHERLAND, STATUTORY CONSTRUCTION} § 51.02 (C.D. Sands 4th ed. 1973) (quoting Western States Newspaper, Inc. v. Gehringer, 203 Cal. App. 2d 793, 22 Cal. Rptr. 144, 148 (1962)).

\textsuperscript{94} \text{WASH. REV. CODE} § 26.09.190 (1981).

\textsuperscript{95} Thus, in the unusual situation in which all other factors balanced out between the parent and nonparent, the parent would be awarded custody because of the one additional factor in the parent’s favor. This would mean that the nonparent was not a “suitable custodian” either, given a child’s unique needs. As between two potentially minimally fit, but unsuitable, custodians, a parent would be preferred. In \textit{Allen}, for example, if Jeannie had not exerted herself on Joshua’s behalf and had not created a uniquely appropriate environment for him, but instead had shared Joe’s apathy and pessimism, she would not have been able to show any superior suitability as Joshua’s custodian. Joshua’s custody would, therefore, most likely have been awarded to Joe.

\textsuperscript{96} \text{UNIF. MARRIAGE AND DIVORCE ACT} § 402, Comm’n’s Note, 9A U.L.A. 198 (1979).

\textsuperscript{97} \textit{See supra} note 13 and accompanying text (discussing distinction between court’s child-protection and dispute-settlement functions).

\textsuperscript{98} \text{Rieke, supra} note 49, at 407.
that "hard cases make bad law." The Allen court reached the correct decision about Joshua's custody. It is doubtful that anyone who reads the facts of the case could deny that Joshua should continue to live with his stepmother, Jeannie. In reaching its decision, however, the Allen court went through needless analytic contortions, applied the wrong statutory provision, and misconstrued the appropriate provision. Consequently, the court's standing and jurisdictional holdings are unsupported by the statute and the case law. These holdings might well increase the number of contested dissolutions and create uncertainty about the custody of a great many children.

Furthermore, the court should have adopted the best interests of the child standard for cases arising under RCW § 26.09.180(1)(b). Parental rights are sufficiently protected by the provision's threshold requirements and by inclusion of parental status as a factor in the balancing process. These protections are adequate without the sort of judicial "tinkering" indulged in by the Allen court. The "actual detriment" standard created by the court at best confuses the issue. At worst, this new standard threatens a return to the old parental rights doctrine. Future courts should base their decisions in parent-nonparent custody disputes solely on the best interests of the child.

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