

INAPPROPRIATE APPLICATION OF THE BEST INTERESTS OF THE CHILD STANDARD LEADS TO WORST CASE SCENARIO: *IN RE C.C.R.S.*

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I. INTRODUCTION

Most of us have seen the heart-wrenching custody battles between young children's natural and adoptive parents played out on our television sets like some sort of perverse play. These sad dramas usually climax in a tearful scene as the child is forcibly removed from the arms of the adoptive parents and then whisked away into a future life with the biological parents that he never knew, leaving the national audience stunned into reflection over whether the outcome was really in the child's best interests.¹

1. The most prominent case was that of "Baby Jessica," whose saga began shortly after her birth on February 8, 1991, when her natural mother, Cara Clausen, gave Jessica up for adoption to Jan and Roberta DeBoer. See *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich.), *stay denied sub nom. DeBoer v. DeBoer*, 509 U.S. 1301 (1993). However, at the time of termination of parental rights, Clausen purposely named the wrong man as Jessica's father. See *id.* at 652. When the real father, Dan Schmidt, learned of his paternity in March 1991, he immediately sought to intervene in the adoption proceedings in Iowa. See *id.* After the district court found for the natural parents, the DeBoers appealed in Iowa, and when these efforts were unsuccessful, they brought the case to Michigan. See *id.* at 653. Finally, on July 2, 1993, the Michigan Supreme Court ordered that the then two-year-old Jessica be returned to her natural parents, who had married in 1992. See *id.* at 668.

The case attracted widespread media attention, ranking as one of Iowa's most newsworthy stories of 1993, second only to the historic Midwest flooding. See *Nebraska, Iowa: Top 10 by AP*, OMAHA WORLD-HERALD, Dec. 31, 1993, at 28. In fact, the public interest in the story was so great that it only took 10 days after Jessica was returned to the Schmidts for a made-for-television motion picture on the ordeal to begin filming. See Jenny Deam, *Reality Has Become a Hot Seller on TV*, ST. PETERSBURG TIMES, Sept. 26, 1993, at 1A. The film was shown on the ABC television network 55 days after Jessica left the DeBoers. See *id.* For a more in-depth look at the Baby Jessica case, see Bernadette Weaver-Catalana, *The Battle for Baby Jessica: A Conflict of Best Interests*, 43 BUFF. L. REV. 583 (1995).

Another case that attracted media attention involved Baby Richard. See *In Re Kirchner*, 649 N.E.2d 324 (Ill.), *cert. denied*, 115 S.Ct. 2599 (1995). More recently, the Rost twins were ordered returned to their biological parents under the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (1983), after 20 months with their adoptive parents. See *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996); Susan Estrich, *Indian Rights Win, Two Children Lose*, USA TODAY, July 13, 1995, at 9A.

When this drama plays out in Colorado, however, the grand finale takes a different turn. Instead of the child being plucked from the arms of the only parents the child has ever known, his psychological parents,² the child quietly remains in their custody. Although this may seem like the preferred outcome, a problem arises when the psychological parents never properly obtained legal custody of the child in the first place. This difficulty recently arose in *In re C.C.R.S.*³

In *C.C.R.S.*, a couple trying to adopt a baby boy discovered, after months with custody of the boy, that the child was not legally available for adoption under the state's adoption statute, the Children's Code.⁴ In an effort to bypass this legal obstacle, the couple immediately petitioned for custody under the more relaxed standards in Colorado's Uniform Dissolution of Marriage Act (UDMA).⁵ The Colorado Supreme Court upheld the couple's legal maneuvering.⁶ The court reasoned that regardless of whether the couple would have been able to lawfully adopt the boy and regardless of the natural mother's fitness as a parent, the child's best interests required placement with the couple because they had retained physical possession of the boy throughout his life.⁷

Because this case "create[s] an avenue by which prospective adoptive parents may circumvent the stringent statutory requirements for relinquishment and adoption,"⁸ it undermines

2. The term "psychological parent" gained recognition after publication of the seminal book by Joseph Goldstein, Anna Freud, and Albert Solnit, *Beyond the Best Interests of the Child*, in 1973. See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 19 (1973). The authors defined a psychological parent as any caring adult who has day-to-day interaction with the child. See *id.* According to the authors, it is the psychological bond between a child and an adult that forms the parent-child relationship, not a biological tie. See *id.* Thus, an absent parent cannot be a psychological parent. See *id.*

3. 892 P.2d 246 (Colo. 1995).

4. The Children's Code is Colorado's statute that governs matters such as relinquishment of parental rights, both voluntary and involuntary, and adoption. See COLO. REV. STAT. §§ 19-1-101 to 19-6-106 (Supp. 1996).

5. The Uniform Dissolution of Marriage Act of Colorado governs the break-up of families due to divorce and child custody in divorce proceedings. See COLO. REV. STAT. §§ 14-10-101 to -133 (1987 & Supp. 1996).

6. See *C.C.R.S.*, 892 P.2d at 258.

7. See *id.* The press viewed the case as unique because, unlike the Baby Jessica and Baby Richard cases, the court awarded custody to the nonparents even though the natural mother was found to be fit. See Howard Pankratz, *Birth Mom Denied Custody; Colorado Court Bucks U.S. Trend*, DENV. POST, Jan. 31, 1995, at A1.

8. *C.C.R.S.*, 892 P.2d at 259 (Lohr, J., dissenting).

the purposes of the Children's Code. Thus, it sets the dangerous precedent that if a prospective adoptive couple gains physical possession of a child by any manner, regardless of how unscrupulous, the couple can then keep permanent custody of the child even if the natural parents are perfectly fit.

This casenote first reviews the national debate over the use of the child's best interests standard in custody disputes between natural parents and nonparents in Part II. Part III then examines the procedural safeguards in Colorado's Children's Code's provisions on relinquishment of parental rights, followed by a review of the UDMA's custody provisions in Part IV. Against this backdrop, Parts V and VI analyze *C.C.R.S.* and argue that applying the UDMA to custody disputes between a biological parent and a prospective adoptive parent undermines the procedural safeguards in the Children's Code.

II. THE DEBATE OVER THE BEST INTERESTS OF THE CHILD STANDARD

A. *Standards Applied in Custody Disputes Involving Nonparents*

In custody disputes⁹ between natural parents and nonparents,¹⁰ jurisdictions apply standards that are either parent-focused or child-focused. Because each standard has different hurdles to overcome, the standard applied by the court may determine which party gets custody. On one end of the spectrum, the parental rights standard requires a showing of unfitness of the natural parents before the child's best interests can be considered.¹¹ On the other end of the spectrum, the child's

9. Throughout this casenote, child "custody" will refer to the physical possession of a child, and the legal obligation to care for and raise a child. See 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 20.6, at 527 (2nd ed. 1987) (practitioner's ed.). Custody can be shared between two natural parents or between natural and nonparents. In contrast, adoption involves the termination of the legal rights of the natural parents and the replacement of those rights to new parents. See *id.* at 565. Thus, the key difference between custody and adoption is that custody does not involve the termination of a natural parent's legal rights to his or her child.

10. Throughout this casenote, the term "nonparent" will refer to third parties interested in the custody of the child as against the natural parent. This will include prospective adoptive parents, relatives, and foster parents.

11. See, e.g., CLARK, *supra* note 9, at 481; James G. O'Keefe, *The Need to*

best interests standard considers only factors affecting the child's welfare with no consideration of the claims of the adults involved.¹²

Parent-focused standards reflect the historical approach to the parent-child relationship. As far back as the Roman Empire, children were viewed as belonging to their parents, and to their fathers in particular.¹³ Thus, the state gave parents total authority over their children and refused to interfere with the parent-child relationship until as recently as the nineteenth century.¹⁴ Societal views on children began to change in the twentieth century, however, when society began to view children as individuals requiring nurture and protection.¹⁵ Still, the state as *parens patriae*¹⁶ could not interfere with the parent-child relationship unless a parent's care jeopardized the child's well-being or fell below minimally acceptable standards.¹⁷ Due to this increasing awareness of children, society moved away from the view of children as the property of their parents. Still, the predominant view was that parents had a natural right to the custody of their children.¹⁸

The United States Supreme Court reinforced this concept by finding that natural parents have a constitutional right to the care and custody of their children.¹⁹ The Court has held that this

Consider Children's Rights in Biological Parent v. Third Party Custody Disputes, 67 CHI.-KENT L. REV. 1077, 1081 (1991) (describing the evolution of the legal rights of parents and children).

12. See, e.g., Joy McMillen, Note, *Begging the Wisdom of Solomon: Hiding Behind the Issue of Standing in Custody Disputes to Treat Children as Chattel Without Regard for Their Best Interests*, 39 ST. LOUIS U. L.J. 699 (1995).

13. See O'Keefe, *supra* note 11, at 1082; CLARK, *supra* note 9, at 527.

14. See O'Keefe, *supra* note 11, at 1082.

15. See *id.* at 1083.

16. *Parens patriae* means literally "parent of the country." See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). More generally, the term refers to the state's role as guardian of persons under legal disability. See *id.*

17. See, e.g., Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63 (1995).

18. See Suzette M. Haynie, *Biological Parent v. Third Parties: Whose Right to Custody Is Constitutionally Protected?*, 20 GA. L. REV. 705, 707 n.8 (1986) (citing *Roche v. Roche*, 152 P.2d 999, 1000 (Cal. 1944)). Professor Clark also cites *Roche* as an example of a case that applies the parental rights doctrine before the courts began to base the doctrine on the Constitution. See CLARK, *supra* note 9, at 527 n.15.

19. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (invalidating state statute requiring students to attend public rather than private schools because the statute "unreasonably [interfered] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*,

constitutional right cannot be terminated absent a showing that the natural parent is unfit.²⁰ In effect, this places the burden on nonparents to prove the natural parents' unfitness before the natural parents' rights to custody may be terminated. These hurdles to the removal of children from their natural parents exemplify how the parental rights doctrine attempts to protect the historically recognized parental interests while also safeguarding the welfare of children.²¹

The best interests standard, on the other hand, disregards the traditional deference to parental interests. As aforementioned, it was not until the twentieth century that society viewed children as individuals with needs of their own.²² This view of children was extended in the late 1960s when the Supreme Court held that children have constitutional rights.²³

Shortly thereafter, the revolutionary book *Beyond the Best Interests of the Child* hit the shelves.²⁴ This book argued that because children need continuity in their lives to have normal psychological development, children must be allowed to form attachments to a psychological parent who tends to the child's needs by giving the child love and affection.²⁵ When this theory is applied to custody disputes, whoever has had day-to-day contact with the child for an extended time receives custody,

262 U.S. 390 (1923) (invalidating state law prohibiting the teaching of any modern foreign language in any grammar school because the statute interfered with the right to raise children as parents see fit). The Court has extended constitutional protection to other various aspects of family autonomy, including the right to marry, *Zablocki v. Redhail*, 434 U.S. 374 (1978), and the right to choose whether to have children, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

20. In the context of adoption by nonparents, the Court has found that the rights of a natural parent cannot be involuntarily terminated absent a showing of unfitness. See *Stanley v. Illinois*, 405 U.S. 645 (1972). However, the Court has also held that this right is not absolute and is subject to a finding that the natural parent has made some effort to have a substantial relationship with the child. See *Lehr v. Robertson*, 463 U.S. 248 (1983). For a more in-depth look at the constitutional rights associated with the parent-child relationship, see Kirsten Korn, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1290-1306 (1994), and Appell & Boyer, *supra* note 17, at 67-74 (1995).

21. See Haynie, *supra* note 18, at 708.

22. See O'Keefe, *supra* note 11, at 1083.

23. See *id.* at 1087 (citing *In re Gault*, 387 U.S. 1 (1967) (holding that juvenile has the right to due process under the Fourteenth Amendment), and *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (holding that school cannot prohibit students from wearing armbands to protest the Vietnam War)).

24. See GOLDSTEIN ET AL., *supra* note 2.

25. See *id.* at 31-36.

regardless of whether that person has a biological tie to the child.²⁶ State courts have integrated this theory in proceedings to terminate parental rights, with the end result being less emphasis on maintaining the biological family and more emphasis on sustaining psychological ties.²⁷ After the Baby Jessica case and other highly publicized cases of the early 1990s,²⁸ the psychological parent theory provided fuel for children's advocates in the fiery debate over the best interests standard.²⁹

26. See *id.* at 38.

27. See Theresa A. Nitti, *Stepping Back from the Psychological Parenting Theory: A Comment on In re J.C.*, 46 RUTGERS L. REV. 1003, 1011-13 (1994) (citing New Jersey as an example of a state that follows this theory).

28. See sources cited *supra* note 1.

29. For an example of commentary criticizing these cases and advocating the best interests standard, see McMillen, *supra* note 12.

The reader should be aware that the parental rights standard and the best interests standard are not always applied strictly in child custody disputes between natural parents and nonparents. Although this casenote discusses the extremes of the parental rights and best interests standards for emphasis, brief mention of the other variations in the standards will be made here.

Between the extremes of the parental rights standard and the best interests standard lies a middle range of standards that one commentator has labeled the parental presumption standards, which fall into three categories. See Haynie, *supra* note 18, at 711. First, there are parental fitness presumptions, which apply a rebuttable presumption that the natural parent is the fit and proper person to have custody of the child. See *id.* at 711; see also Sandra R. Blair, *Recent Development*, 58 WASH. L. REV. 111, 117 (1982). A second category is the convincing presumption, whereby a nonparent must show by clear and convincing evidence that the child's best interests dictate nonparental custody. See *id.*; Haynie, *supra* note 18, at 714. A third category is the disappearing presumption standard, in which the presumption in favor of the natural parent will disappear once the nonparent shows by a preponderance of the evidence that the child's best interests will be served best through custody with the nonparent. See *id.* at 721.

Colorado appears to fall in this middle ground. For instance, in a child custody dispute between the natural father and the stepfather of a 12-year-old girl, the Colorado Supreme Court applied a rebuttable presumption that custody with the natural parent would best serve the child's interests. See *Root v. Allen*, 377 P.2d 117, 121 (Colo. 1962). The court in *Root* found that the presumption had been rebutted because, although the natural father was found to be a fit and proper parent to have custody, he was virtually a stranger to the girl, who the court felt could not handle another traumatic event as her mother had just died. See *id.*; see also *Devlin v. Huffman*, 339 P.2d 1008, 1010 (Colo. 1959) (finding that the presumption that natural parents are the fit and proper persons to have custody of their children can only be overcome by plain and certain proof).

B. *Criticisms of the Standards*

Critics of the parental rights standard argue that it does not place enough emphasis on the child's welfare in custody disputes, resulting in the treatment of children as chattel.³⁰ Relying heavily on the psychological parent model in the Goldstein, Freud, and Solnit work,³¹ these critics of parental rights argue that because psychological, not biological, ties are essential to a child's well-being, there is no reason for the law to prefer natural parents to nonparents who have a superior psychological relationship with the child.³² Thus, nonparents and natural parents should be treated as asserting comparable claims instead of giving an advantage to the natural parents.³³

In contrast, critics of the best interests standard claim that it does not provide enough protection for the rights of natural parents. First, these critics question the accuracy of the effect of the psychological parent on the child and point to studies that propose different theories.³⁴ For instance, some studies show that adopted children face greater risk of behavioral, emotional, and learning problems, and that they experience a deep sense of loss over their natural parents.³⁵

Second, critics of the best interests standard claim that by basing custody decisions on psychological ties between the child and nonparents, the best interests standard creates an incentive for nonparents to wrongfully gain custody of a child.³⁶ This is

30. See McMillen, *supra* note 12.

31. GOLDSTEIN ET AL., *supra* note 2.

32. See Weaver-Catalana, *supra* note 1, at 597-601.

33. See CLARK, *supra* note 9, at 620.

34. One avenue of attack on the psychological parent theory is that the studies behind the theory were based on research methodologies that were inaccurate in two ways. See Nitti, *supra* note 27, at 1023; John Batt, *Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's Painter v. Bannister Jurisprudence*, 16 NOVA L. REV. 621, 624-26 (1992). For one, the research subjects were drawn from orphanages, foster homes, and hospitals, making the sample group unrepresentative of the population as a whole. See Nitti, *supra* note 27, at 1023; Batt, *supra*, at 624-26. Also, the methodology emphasized the bond to the psychological parent while ignoring other factors, such as the circumstances surrounding the child's move to a new home, that may have had a role in the child's emotional development. See Nitti, *supra* note 27, at 1025.

35. See Appell & Boyer, *supra* note 17, at 78 (citing DAVID M. BRODZINSKY ET AL., BEING ADOPTED — THE LIFELONG SEARCH FOR SELF (1992)).

36. See *id.*

because the standard does not take into account the nonparent's actions; it is concerned only with the impact on the child. Hence, under a strict application of the best interests standard, a child should remain with his or her psychological parent even if the psychological parent obtained the child through behavior as appalling as kidnapping or wrongfully retaining the child.³⁷

Third, critics allege that the best interests standard has the potential for misuse because the standard is based on vague or nonexistent criteria, opening the custody decision to social biases.³⁸ One often-cited example is *Painter v. Bannister*,³⁹ in which the Iowa Supreme Court found that it was in a four-year-old boy's best interests to remain with his grandparents instead of being returned to his natural father. When applying the best

37. While many people would find the idea of granting custody to a kidnapper ludicrous, many situations can be imagined in which this result is perfectly plausible. For instance, imagine that a mother has legal custody of an infant boy and that the child's natural father one day absconds with the baby. Over time, the kidnapping father fosters a nurturing, positive relationship with the boy. Meanwhile, as the boy grows into a toddler, he has virtually no memory of his mother, and a move back to his mother would be a move away from everything he has ever known. In this scenario, it is easy to imagine a court allowing the child to remain with his father under the psychological parent model. That is, looking only at the child's best interests and not at the parent's conduct, a court may find that the child would be better off with his father. See Batt, *supra* note 34, at 656 (referring to Professor Goldstein's testimony on cross-examination during a custody case in which he said that if a psychological bond had formed between a child and a noncustodial parent who kidnapped the child, he would leave the child in the kidnapping parent's custody).

This logic also holds true in situations involving nonparents. For instance, in *In re B.B.R.*, 566 A.2d 1032 (D.C. Cir. 1989), a potential adoptive couple wrongfully retained custody of a baby boy from his birth mother, who sought return of the child within days of his birth. The couple refused to comply with the mother's lawful request for the return of her child. See *id.* at 1035. Instead, the couple held the child across the country from his birth mother during a lengthy court battle for custody. See *id.* at 1035-36. In *B.B.R.*, the court faced only a jurisdictional issue and did not decide which party should get custody of the child. See *id.* at 1034, 1044. A concurring judge, however, indicated that if the case were to reach a custody proceeding, the couple should prevail. See *id.* at 1045 (Farrell, J., concurring). Judge Farrell wrote:

I believe that on the issue of permanent custody, the best interests of *this* child should be the exclusive focus; it is unnecessary to jeopardize the child's future in order to teach the Platts (and others similarly tempted) a further lesson. For me, the dominant fact is no longer the behavior of the Platts, inexcusable as that may have been, but the evidence credited by Judge Hess that removing this child from the only parents it has known may have a devastating effect on its emotional development.

Id. See also *In re C.C.R.S.*, 892 P.2d 246, 260 (Colo. 1995) (Lohr, J., dissenting).

38. See Appell & Boyer, *supra* note 17, at 78.

39. 140 N.W.2d 152 (Iowa 1966).

interests test, the court compared the lifestyle of the natural father, whom the court viewed as having a "Bohemian" lifestyle, with the "conventional" lifestyle of the grandparents.⁴⁰ The court found that although the father was fit and had not abandoned his son, the child's best interests required that he be placed with the grandparents.⁴¹

Critics of the best interests standard cite *Painter* as illustrative of the standard's potential to become a form of social engineering.⁴² As two commentators observed, "Strict obeisance to psychological attachments . . . can mask economic and cultural biases and lead to outcomes which favor the more resourceful or powerful person who retains custody of the child long enough for significant attachments to form."⁴³ To counter these risks, legislatures draft exacting procedural requirements for relinquishment and adoption.

III. PROCEDURAL SAFEGUARDS IN COLORADO'S CHILDREN'S CODE

When construing the Children's Code⁴⁴ in relinquishment and adoption proceedings, courts strictly adhere to the procedural requirements in the Code. This is partly because adoption did not exist at common law, and thus, the only law on the subject is statutory.⁴⁵ A more important reason, however, is that strict adherence to the procedural requirements helps protect the child's best interests.

For instance, the Children's Code explicitly says that "[n]o parent shall relinquish the parent-child legal relationship with a child other than in accordance with the provisions of this article."⁴⁶ The Children's Code then sets out the procedural steps in relinquishment and adoption. The procedure for relinquish-

40. See *Painter*, 140 N.W.2d at 154.

41. See *id.* at 158.

42. See, e.g., Appell & Boyer, *supra* note 17, at 66.

43. *Id.* at 81.

44. COLO. REV. STAT. §§ 19-1-101 to 19-6-106 (Supp. 1996).

45. See *Stjernholm v. Mazaheri*, 506 P.2d 155, 157 (Colo. 1973) ("Historically there was no adoption at common law. The states, under the doctrine of *parens patriae*, legislatively formulated adoption procedures intended, in the interest and welfare of the child, to fill the void caused by the failure of a parent to perform his basic parental duties.").

46. § 19-5-101(2).

ment begins with the parent obtaining counseling and submitting a petition to the juvenile court, along with affidavits indicating the nature and extent of counseling the parent received and any counseling recommendations.⁴⁷ Then, the court sets a hearing, and if satisfied that the parent has been counseled and that the relinquishment is in the child's best interests, issues an order of relinquishment.⁴⁸

Once this order has been issued and the court has taken into consideration "the racial, cultural, and religious background of the child," the court can place the child with the county department of social services, a licensed adoption agency, a relative, or with a person who has lived with the child for a year or more, unless the biological parents have designated an adoptive family to take the child.⁴⁹ At this point, the relinquishment order is subject to revocation for only a ninety-day period, and even within those ninety days, a revocation will not be granted unless there is clear and convincing evidence that the relinquishment was obtained through fraud or duress.⁵⁰

Only after the biological parents' parental rights are terminated or relinquished under the Children's Code is a child available for adoption.⁵¹ The next step in the adoption process requires a person seeking to adopt to file a petition and obtain court approval.⁵² After a hearing on the petition, the adoption can be completed.⁵³ A completed adoption, similar to a relinquishment order, can only be attacked on jurisdictional or procedural grounds within ninety days of the entry of the order.⁵⁴ When such an attack occurs, the court must consider the child's best interests when deciding whether to uphold the decree.⁵⁵

When courts enforce these procedures, they fulfill the statutory purposes, which are to promote the finality of adoptions⁵⁶ and to protect the best interests of the child.⁵⁷ Since

47. See § 19-5-103(1).

48. See § 19-5-103(2), (4), (6).

49. § 19-5-104(1), (2).

50. See § 19-5-104(4.5)(a).

51. See § 19-5-203; see also Pamela A. Gordon, *Difficult Issues in Adoption—Part I*, 23 COLO. LAW. 851 (1994).

52. See §§ 19-5-104(2), -206 to -209.

53. See § 19-5-210.

54. See § 19-5-214.

55. See *id.*

56. The legislative declaration for the provisions on relinquishment of parental rights states:

fully advised natural parents are more likely than unadvised natural parents to realize the finality of their actions, the statutory relinquishment and adoption process helps to ensure that fewer painful custody battles will be waged over adopted children.⁵⁸

Furthermore, by rigidly sticking to the statutory procedures for relinquishment and adoption, and by voiding an adoption decree that was wrongfully obtained, courts provide an incentive to follow the legal procedures. An early and somewhat extreme example of this is *Foley v. Carnesi*.⁵⁹ In *Foley*, a natural mother signed relinquishment of rights and consent to adoption forms in the home of the adoptive parents.⁶⁰ Although the court found that no fraud or duress was involved, the natural mother failed to swear to the consent form in the presence of a notary public, as was required by statute.⁶¹ When the natural mother sought to invalidate the adoption eight months later, she claimed that this consent was not legally valid because it did not meet statutory requirements.⁶²

The court agreed that the mother's "requisite consent" was never obtained, resulting in the nullification of the adoption decree.⁶³ The court reasoned that the notarization requirement could not be waived because the legislature had intended it to

It is the purpose of this article to promote the integrity and finality of adoptions to ensure that children placed in adoptive placements will be raised in stable, loving, and permanent families. The general assembly intends that by enacting this legislation, it will be protecting children from being uprooted from adoptive placements and from the life-long emotional and psychological trauma that often accompanies being indiscriminately moved.

§ 19-5-100.2(2).

57. The legislative declaration for the provisions on adoption states that "it is the intent of the general assembly that the court shall protect and promote the best interests of the children who are the subjects of [adoption] proceedings . . . while giving due regard to the interests of any other individuals affected." § 19-5-200.2.

58. Of these requirements, Professor Clark says:

The cases have naturally and properly insisted that there be compliance with the statutory formalities . . . as a condition upon recognizing the validity of the consents, the purposes of these requirements being to emphasize the seriousness and finality of the consent to adoption, and to avoid, so far as possible, later disputes over the validity and effect of the consent.

CLARK, *supra* note 9, at 609-10 (citations omitted).

59. 232 P.2d 186 (Colo. 1951).

60. *See id.* at 187.

61. *See id.*

62. *See id.* at 187-88.

63. *See id.* at 188.

convey the gravity of the action to the parties involved.⁶⁴ By invalidating the adoption decree, *Foley* sent a strong message that statutory safeguards of the parent-child relationship will be strictly enforced.

The Colorado Supreme Court elaborated on the importance of the procedural safeguards in *Storey v. Shumaker*,⁶⁵ where the court held that the failure to adhere to the statutory requirements results in a court's lack of jurisdiction to enter an adoption decree.⁶⁶ In *Storey*, an adoptive couple petitioned for the adoption of a child without first obtaining the natural mother's consent and before a valid dependency and neglect proceeding.⁶⁷ The Colorado Supreme Court vacated the adoption decree, finding that the failure of the couple to obtain consent resulted in the trial court's lack of jurisdiction.⁶⁸ The court said, "If a parent is to be forever divested of all rights to his child, there must be a compliance with the statutory requirements, and before acting on a petition in adoption the trial court should ascertain that the consents and notices necessary to confer jurisdiction were filed."⁶⁹

Although courts employ an unyielding approach to enforcement of the requirements in relinquishment and adoption proceedings, once these requirements are met, courts will not void an adoption decree absent the exceptional circumstances of fraud or duress.⁷⁰ This approach is evident in *In re S.O.*⁷¹ In that case,

64. *See id.*

65. 279 P.2d 1057 (Colo. 1955).

66. *See id.* at 1059.

67. Without notice to the natural mother, the child involved was determined to be dependent and neglected, and was then placed in the care of the prospective adoptive parents, who petitioned for adoption the day after the dependency and neglect proceeding. *See id.* at 1058. The natural mother sought to vacate the order of dependency and neglect, however, because she had not received notice. *See id.* Thus, a second proceeding was held, and the court again declared the child dependent and neglected. *See id.* The court then entered a final decree on the couple's initial petition for adoption. *See id.* at 1059. The problem, however, was that the couple's petition for adoption had been filed before a valid dependency and neglect proceeding had occurred because the initial proceeding was invalid. Without such a valid order already in existence, the natural mother's consent was required at the time the petition was filed. *See id.* Thus, the petition was filed without the requisite consent. *See id.*

68. *See id.*

69. *Id.*

70. *See, e.g.,* *Batton v. Massar*, 369 P.2d 434 (Colo. 1962). In *Batton*, the court refused to vacate a subsequent adoption decree once the natural mother gave her consent without fraud or duress. *See id.* at 437. The court said, "It is not the law that one may avoid the consequences of his voluntary acts, acts not induced by fraud,

a stepfather adopted his wife's son with the natural father's signed consent.⁷² The natural father later attempted to invalidate the adoption by claiming that his consent had been invalidly obtained. In particular, he argued that he had mistakenly believed that he would retain his right to visit the child, and had given his consent on the basis of that belief.⁷³ The court rejected this claim and said that, because the natural father knew of the risk of losing his visitation rights and signed the form anyway, the consent was validly obtained.⁷⁴ Once a valid consent is shown, "[a] parent's change of heart or subsequent regret at having consented to the adoption of his child is not by itself a sufficient reason for setting aside the adoption."⁷⁵

The above examples illustrate that the relinquishment and adoption processes protect the interests of natural parents while also safeguarding the welfare of their children. The natural parents are protected from making rash or coerced decisions early in the process by rigid adherence to the most detailed aspects of the procedural statutory requirements. Once a court finds that the parent has had the benefit of these safeguards, however, the court will not likely vacate an adoption decree. Instead, it will allow the decree to stand in order to promote finality for the child's benefit.

IV. CUSTODY PROVISIONS IN THE UNIFORM DISSOLUTION OF MARRIAGE ACT

The Uniform Dissolution of Marriage Act (UDMA) is Colorado's statute dealing with child custody in divorce proceedings.⁷⁶

duress, coercion, etc., by proof that he or she: 'did not realize the seriousness and finality of the papers she [or he] was signing.'" *Id.* See also COLO. REV. STAT. § 19-5-214 (Supp. 1996) (disallowing attacks on adoption decrees due to jurisdictional or procedural defects more than 90 days after the entry of the decree).

71. 795 P.2d 254 (Colo. 1990).

72. See *id.* at 255-56.

73. See *id.* at 257.

74. See *id.* at 259-60.

75. *Id.* at 260.

76. The provision of the UDMA that dictates who has standing to seek custody is section 14-10-123. Colorado modeled this provision after section 401(d) of the Uniform Marriage and Divorce Act (the "Uniform Act"). See UNIF. MARRIAGE AND DIVORCE ACT § 401(d), 9A U.L.A. 550 (1973). The UDMA and the Uniform Act differ in that the Uniform Act does not have a provision that corresponds to section 14-10-123(1)(c). The relevant portion of section 14-10-123 of the UDMA reads:

(1) A child custody proceeding is commenced in the district court or as

Although the title of the UDMA and the purposes of the act seem to indicate that the UDMA would only apply to divorce actions,⁷⁷ at least one court has found that the UDMA does not require that a petition for custody under section 14-10-123 be incidental to a dissolution of marriage proceeding.⁷⁸ Because the parties involved in custody disputes under the UDMA are presumably both natural parents and because the UDMA deals with custody and not with termination of parental rights,⁷⁹ the only factor to consider in such disputes is the child's best interests. Thus, the UDMA provides, "The court shall determine custody in accordance with the best interests of the child."⁸⁰

The UDMA, however, also allows nonparents to seek custody under its provisions.⁸¹ The UDMA applies the best interests

otherwise provided by law:

(a) By a parent:

(I) By filing a petition for dissolution or legal separation; or

(II) By filing a petition seeking custody of a 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 his parents; or

(c) By a person other than a parent who has had physical custody of a child for a period of six months or more, if such action is commenced within six months of the termination of such custody.

COLO. REV. STAT. § 14-10-123 (1987).

77. The purposes of the UDMA are: (1) "to promote the amicable settlement of disputes that have arisen between parties to a marriage"; (2) "to mitigate the potential harm to spouses and their children caused by the process of legal dissolution of marriage"; and (3) "to make the law of legal dissolution of marriage more effective for dealing with the realities of matrimonial experience by making an irretrievable breakdown of marriage the sole basis for its dissolution." COLO. REV. STAT. § 14-10-102 (1987).

78. See *In re Davis*, 656 P.2d 42, 44 (Colo. Ct. App. 1982) (allowing grandparents to petition for and obtain custody of children after the mother of the children died, even though the petition was not incidental to a divorce proceeding). Although a divorce is not necessary to institute a custody proceeding under section 14-10-123, most cases arising under the section concern divorce proceedings. See, e.g., *Abrams v. Connolly*, 781 P.2d 651 (Colo. 1989); *In re Marriage of Truth*, 631 P.2d 1183 (Colo. Ct. App. 1981); *In re Marriage of Tricamo*, 599 P.2d 273 (Colo. Ct. App. 1979).

79. See *supra* note 9.

80. COLO. REV. STAT. § 14-10-124(1.5) (1987). Section 14-10-124(1.5) dictates that custody be determined in accordance with the best interests of the child. This means that the court must take into consideration factors such as the wishes of a child's parents as to his custody, the child's wishes, the relationship between the child and the parties involved, the child's adjustment to his home, school, and community, and the past pattern of involvement between the parties and the child. § 14-10-124(1.5)(a)-(d), (i).

81. See § 14-10-123(1)(b), (c).

standard to custody disputes between parents and nonparents who have standing to seek custody under the Act.⁸² Thus, unlike the Children's Code,⁸³ a nonparent seeking custody under the UDMA does not have the burden of proving the natural parent's unfitness and instead must only meet the more relaxed standard of showing that the custody award will serve the child's best interests.⁸⁴

Although nonparents under the UDMA enjoy a lower burden of proof than under the Children's Code, the UDMA imposes standing requirements on nonparents, whereas natural parents automatically have standing under the Act.⁸⁵ For example, natural parents can petition for custody under the UDMA simply by filing for divorce or by filing a petition for custody unrelated to a divorce action.⁸⁶ Nonparents, however, can only acquire standing if: (1) the natural parents do not have physical custody of the child; or (2) the child is in the physical custody of his or her natural parents, and the nonparents had physical custody for at least six months and filed a petition for custody within six months after the child left their custody.⁸⁷

The uniform law upon which the Colorado Act is based, the Uniform Marriage and Divorce Act,⁸⁸ also confers standing on nonparents if the natural parents do not have physical custody of the child.⁸⁹ Although not adopted by Colorado, the Comment to

82. See § 14-10-124(1.5).

83. COLO. REV. STAT. § 19-5-105(3.1) (Supp. 1996).

84. In actions not arising under the UDMA, the law presumes that the natural parent is the person with whom the child's best interests lie. See *Root v. Allen*, 377 P.2d 117, 121 (Colo. 1962) ("[T]he presumption that a child's welfare is best served through custody of the natural parent is a rebuttable one, and . . . where the evidence establishes that the welfare of the child will not be promoted by the parent's custody, such custody will not be granted."); see also sources cited *supra* note 29; Janet Leach Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733 (1992). By requiring nonparents to overcome this presumption with evidence of unfitness, the presumption protects the parent-child relationship. See *id.* at 734-36. As previously mentioned, however, the UDMA presumably applies to custody disputes between natural parents, and not to termination of parental rights. Thus, under the UDMA, nonparents do not bear this burden of proof.

85. See § 14-10-123.

86. See § 14-10-123(1)(a) (1986); UNIF. MARRIAGE AND DIVORCE ACT § 401(d)(1), 9A U.L.A. 550 (1973).

87. See § 14-10-123(1)(b), (c).

88. UNIF. MARRIAGE AND DIVORCE ACT § 401, 9A U.L.A. 550 (1991) (the "Uniform Act").

89. On the matter of nonparents' standing, the Colorado provision differs from

section 401(d) of the Uniform Act suggests that nonparents were given standing to provide interested relatives with an opportunity to intervene during a pending custody dispute.⁹⁰ The Comment states that subsection (d) allows judges, once a custody proceeding is commenced, to hear views of all parties with an interest in the child, such as relatives who otherwise could not commence an action to intervene.⁹¹ Thus, the Comment indicates that subsection (d) was not meant to apply to nonparents who are not relatives of the child in the relinquishment and adoption arena.

Because section 401(d) of the Uniform Act allows nonparents to gain custody without a showing of parental unfitness, other jurisdictions have exercised caution when conferring standing on nonparents. This caution is evident in other jurisdictions' interpretation of the words "physical custody," as seen in the leading case of *In Re Peterson*.⁹²

In *Peterson*, maternal grandparents petitioned for custody of their grandchildren under Illinois' version of section 401(d) after the mother had died.⁹³ The grandparents claimed that since the children were living in their house during the mother's illness, they had physical custody of the children and thus had standing to petition for custody under Illinois' counterpart of section 401(d) of the Uniform Act.⁹⁴ The court rejected this argument, however, and found that the definition of "physical custody" is not merely actual possession of a child.⁹⁵ The court said, "To hold differently would be to encourage abductions of minors in order to satisfy the literal terms of the standing requirement and would, in reality, defeat the statutory intentment."⁹⁶

As *Peterson* shows, other courts require that a nonparent have some type of legal custody, which would exist if the natural parents relinquished their rights to custody of the child.⁹⁷ By

the Uniform Act. See *supra* note 76. Colorado has inserted subsection c, which allows nonparents who had custody of the child for six months or more to file a petition within six months of the last time such nonparent had physical custody.

90. See UNIF. MARRIAGE AND DIVORCE ACT § 401(d)(1) cmt., 9A U.L.A. 550 (1991).

91. See *id.*

92. 491 N.E.2d 1150 (Ill. 1986) (construing Illinois' Marriage and Dissolution of Marriage Act, ILL. REV. STAT. ch. 40, para. 601(b)(2) (1981)).

93. See *id.* at 1151.

94. See *id.* at 1151-52.

95. See *id.*

96. *Id.* at 1152-53.

97. See *In re C.C.R.S.*, 872 P.2d 1337, 1349 (Colo. App. 1993) (Taubman, J.,

equating physical custody with legal custody, courts have taken an approach that denies nonparents free reign over the UDMA's best interests standard. However, the Colorado Supreme Court rejected this approach in *In re C.C.R.S.*⁹⁸

V. *IN RE C.C.R.S.*

A. *The Battle Over Cody*

When Candace Redshirt, a single mother of one on public assistance, became pregnant with her second child, she decided she would place the baby for adoption following its birth.⁹⁹ After a friend suggested that she meet with a couple who could not have children of their own, Redshirt met with the couple and agreed to a private adoption.¹⁰⁰ When Redshirt gave birth to her son on March 5, 1990, the adoptive mother was present and named the boy Cody.¹⁰¹ The next day, Redshirt signed release-of-custody and petition-for-relinquishment documents, which gave custody of Cody to the couple and provided that Redshirt would relinquish her parental rights on Cody's first birthday.¹⁰² Redshirt received no counseling throughout this process, and these documents were never filed in court.¹⁰³

When Cody was four months old, Redshirt, who did not have a car of her own, got her brother to drive her to visit Cody.¹⁰⁴ This visit convinced her that she wanted custody of Cody,¹⁰⁵ and thus, Redshirt revoked her release of custody in September 1990.¹⁰⁶

dissenting) (citing *In re McCuan*, 531 N.E.2d 102, 106 (Ill. App. Ct. 1988) (holding that a nonparent who seeks legal standing must show that the "parent has relinquished 'legal custody' of the child, rather than merely physical possession"), and *Henderson v. Henderson*, 568 P.2d 177, 179 (Mont. 1977) (finding that aunt was without standing to commence custody proceeding where children were under legal control of parent)). Research failed to reveal any states that have taken a contrary view.

98. 892 P.2d 246 (Colo. 1995).

99. See Rebecca Jones, *What's Best for Cody? The Colorado Courts Say His Adoptive Parents Should Continue to Raise Him, but an Appeal Could Affect Custody Cases Nationwide*, ROCKY MTN. NEWS, Mar. 7, 1995, at D3.

100. See *C.C.R.S.*, 892 P.2d at 248.

101. See Jones, *supra* note 99.

102. See *C.C.R.S.*, 892 P.2d at 249.

103. See *id.* at 249 n.5.

104. See Jones, *supra* note 99.

105. See *id.*

106. See *C.C.R.S.*, 892 P.2d at 249.

Her revocation made Cody no longer legally available for adoption under the Children's Code because both the custody agreement and the petition for relinquishment were invalid as a matter of law.¹⁰⁷

Although the couple at this point had no legal rights to Cody, they refused to return Cody to Redshirt and initiated legal action by filing for a temporary restraining order against Redshirt.¹⁰⁸ In addition, the couple filed a petition for custody under section 14-10-123 of the UDMA, arguing that because they had formed a psychological bond with Cody, Cody's best interests would be served by awarding custody to the couple.¹⁰⁹ In October 1990, the couple was awarded temporary custody of Cody.¹¹⁰ After this, Redshirt spent several months attempting to regain custody of Cody under the Indian Child Welfare Act because Redshirt is one-half Native American.¹¹¹ When these efforts failed, however, Redshirt filed a renunciation of the custody agreement and petition-for-relinquishment on June 17, 1991.¹¹²

By the time the case went to trial in May 1992, Cody had been living with the couple for more than two years and had seen Redshirt only twice.¹¹³ Thus, the trial court, in applying the best interests test of the UDMA, found that a parent-child relationship had formed between Cody and the couple, and that "severance of that relationship would be psychologically traumatic for [Cody]."¹¹⁴ The court also found that, although Redshirt was a fit and proper parent, the couple could provide Cody with a more "secure and healthy home environment."¹¹⁵

On appeal, the Colorado Court of Appeals upheld the trial court.¹¹⁶ First, the court of appeals held that nonparents have standing to seek custody under section 14-10-123(1)(c) because that section provides that nonparents can petition for custody as

107. *See id.* at n. 5; *see also supra* Part III.

108. *See C.C.R.S.*, 892 P.2d at 249.

109. *See In re C.C.R.S.*, 872 P.2d 1337, 1339 (Colo. Ct. App. 1993), *aff'd*, 892 P.2d 246 (Colo. 1995).

110. *See C.C.R.S.*, 892 P.2d at 249.

111. *See id.* Redshirt's claims under the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (1983), failed because she is not eligible for enrollment in any tribe.

112. *See C.C.R.S.*, 892 P.2d at 249.

113. *See C.C.R.S.*, 872 P.2d at 1343.

114. *C.C.R.S.*, 892 P.2d at 250.

115. *Id.*

116. *See id.*

long as they have physical custody of the child.¹¹⁷ The court interpreted “physical custody” literally, and distinguished contrary interpretations from other jurisdictions, which have equated physical custody with legal custody.¹¹⁸ Second, the court of appeals held that the Children’s Code did not apply because the couple had never initiated proceedings under the Code.¹¹⁹ Third, the court held that due process did not require a showing of Redshirt’s unfitness because the trial court did not terminate Redshirt’s parental rights. Instead, she only lost her right to custody.¹²⁰

In a dissenting opinion, Judge Taubman concluded that the couple lacked standing under the UDMA.¹²¹ Even if the couple did have standing, Judge Taubman argued, the trial court had violated Redshirt’s constitutional right to due process by applying the best interests standard.

B. The Colorado Supreme Court’s Holding

On petition for certiorari to the Colorado Supreme Court, Redshirt first argued that the couple lacked standing to petition for custody under the UDMA.¹²² She argued that the couple lacked legal custody of Cody because Redshirt had revoked her consent to a relinquishment of her parental rights.¹²³ Redshirt pointed out that other jurisdictions have interpreted the words “physical custody” to mean that the nonparent has some sort of legal rights to the child, and not just actual physical possession of the child.¹²⁴

Redshirt’s second argument was that her revocation of the relinquishment of her parental rights gave her a statutory right to the return of Cody.¹²⁵ Relinquishment of parental rights is governed by the Children’s Code, she argued, and the Code mandates strict compliance for a relinquishment to be legally

117. See *C.C.R.S.*, 872 P.2d at 1341; see also *supra* Part IV.

118. See *C.C.R.S.*, 872 P.2d at 1341.

119. See *id.* at 1342.

120. See *id.*

121. See *id.* at 1346 (Taubman, J., dissenting).

122. See Petitioner’s Brief on the Merits at 6-12, *In re C.C.R.S.*, 892 P.2d 246 (Colo. 1995) (No. 94-SC-23).

123. See *id.* at 6.

124. See *id.* at 7-8.

125. See *id.* at 12-20.

effective.¹²⁶ Thus, under the Children's Code, the couple had no legal claim to Cody and were required to return him to Redshirt.¹²⁷

The Colorado Supreme Court rejected both arguments. The court found that the UDMA, not the Children's Code, controlled the case because the couple never filed their petition for custody under the provisions of the Children's Code.¹²⁸ Thus, when the couple filed a petition for custody under the UDMA, the UDMA became controlling as long as the couple had standing. The court held that the couple did have such standing because Cody had been in their actual, physical possession for at least a year.¹²⁹ In defining standing as actual possession, the court found the Colorado legislature's adoption of section 14-10-123(1)(c)¹³⁰ persuasive. Because this provision is unique to Colorado, the court distinguished other jurisdictions' interpretation of "physical custody."¹³¹

Another reason the court gave for applying the UDMA was that an adoption was not legally possible under the Children's Code because the initial agreement between the couple and Redshirt provided that the couple must wait one year to file a petition for relinquishment and adoption, and Redshirt had revoked her consent to the adoption within that year. The court said: "Accordingly, the parties did not have available to them the statutory procedures providing for adoption and relinquishment under . . . the Colorado Children's Code Therefore, the

126. *See id.* at 12-14.

127. *See id.* Redshirt also argued that denying her the right to custody of her child in the absence of a finding of parental unfitness violated her rights to due process. *See id.* at 21-25. However, this casenote will not explore this constitutional claim.

128. *See C.C.R.S.*, 892 P.2d at 254. The supreme court adopted the court of appeals literal interpretation of the words "physical custody." *See id.* at 253. The court pointed to Colorado's adoption of section 14-10-123(1)(c) as evidence of a legislative intent to give a literal meaning to "physical." *See id.* at 252. The court also looked to the Uniform Child Custody Jurisdiction Act, section 14-13-103(9), which defines physical custody as actual physical possession for purposes of jurisdictional disputes. *See id.* Based on the combination of these provisions, the court rejected Redshirt's argument and other jurisdictions' interpretations that physical custody also means some type of legal custody. *See id.* at 253.

129. *See id.* at 253.

130. According to section 14-10-123(1)(c), a nonparent may petition for custody if the nonparent "has had physical custody of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical custody."

131. *See C.C.R.S.*, 892 P.2d at 253.

prospective adoption proceeding turned into a custodial dispute under the UDMA, which did not involve a termination of parental rights."¹³²

Thus, since the couple had standing under the court's reading of the UDMA, the best interests of the child standard applied. Under this standard, the court found that because the couple had formed a psychological bond with Cody and because Redshirt had not, it was in Cody's best interests to grant permanent custody, although not an adoption, to the couple.¹³³

Three justices filed vigorous dissents. They argued that by allowing prospective adoptive parents to obtain standing under the UDMA, the majority had created an avenue to circumvent the requirements of the Children's Code.¹³⁴

C. *An Inappropriate Application of the UDMA's Best Interests Standard*

The Children's Code expressly states that the rigid procedures for relinquishment of parental rights and adoption cannot be waived or bypassed for an adoption decree to be valid.¹³⁵ The Code then goes on to require compliance with the relinquishment provisions for a child to be available for adoption.¹³⁶ If termination of parental rights is involuntary, the Code requires some showing of unfitness through a dependency and neglect proceeding. This showing safeguards the rights of natural parents to the care and custody of their children.¹³⁷ In addition, these requirements not only allow natural parents to realize the finality of their actions, but also provide a strong incentive to prospective adoptive parents to obtain an adoption in a legal and ethical manner. In this way, the requirements promote the purposes of

132. *Id.* at 254.

133. *See id.* at 258-59.

134. *See id.* at 259-64 (Lohr, J., dissenting with Scott, J., and Kirshbaum, J., joining in the dissent; Scott, J., dissenting with Lohr, J., and Kirshbaum, J., joining in the dissent).

135. *See* COLO. REV. STAT. § 19-5-101(2) (Supp. 1996).

136. *See* § 19-5-203.

137. Colorado follows the doctrine that natural parents have rights to the care and custody of their children. *See In re R.H.N.*, 710 P.2d 482, 487 (Colo. 1985) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)); *Allen v. Huffman*, 307 P.2d 802, 805 (Colo. 1957).

the Children's Code, which are to provide finality in adoptions while safeguarding the best interests of the child.¹³⁸

In *C.C.R.S.*, the parties involved did not comply with the statutory requirements of the Children's Code. Specifically, Redshirt did not receive any counseling throughout the process, there was no court involvement, and a valid relinquishment order was never issued. Thus, under the Children's Code, the failure to follow these procedures resulted in legal custody remaining with Redshirt. To avoid this difficulty and to find a result in the child's best interests, the Colorado Supreme Court turned to the custody provisions of the UDMA.¹³⁹

The UDMA appears intended to apply to divorce proceedings and the custody disputes associated with these proceedings. Because in a divorce proceeding both parties are presumably natural parents with equal rights to the child, the UDMA lacks the procedural safeguards of parental rights found in the Children's Code. Also, under the UDMA, custody, not termination of parental rights, is involved, arguably warranting a lower standard because the natural parent has more to lose with termination.¹⁴⁰ Thus, when the Colorado Supreme Court allowed prospective adoptive parents to seek custody under the UDMA's

138. See §§ 19-5-100.2, -200.2; see also *supra* Part III.

139. In support of its application of the UDMA's best interests standard, the court cited section 19-5-104(4.7) of the Children's Code. See *In re C.C.R.S.*, 892 P.2d 246, 257-58 n.25. (Colo. 1995). Section 19-5-104(4.7) provides that if a biological parent validly revokes a relinquishment of parental rights due to fraud or duress within 90 days, and there are no grounds for involuntary termination of parental rights because the biological parent is fit, then the court "shall dismiss any proceeding for adoption and shall provide for the care and custody of the child according to the child's best interests." COLO. REV. STAT. § 19-5-104(4.7) (Supp. 1996).

However, this provision still does not justify applying the raw best interests test of the UDMA. In the general provisions of the Children's Code, the purposes of the Code are listed as "to preserve and strengthen family ties whenever possible" and "to remove a child from the custody of his parents only when his welfare and safety or the protection of the public would otherwise be endangered and . . . for the courts to proceed with all possible speed to a legal determination that will serve the best interests of the child." § 19-1-102(1)(b), (c). In contrast the purpose overlying the UDMA is to promote the amicable settlements of marital disputes to reduce the risk of harm to children of the marriage. See § 14-10-102 (1987); see also *supra* note 77. Because the Children's Code's purposes include "preserving and strengthening family ties," the analysis of best interests under section 19-5-104(4.7) of the Children's Code should include some effort to protect the biological family relationship, whereas an analysis of best interests under the UDMA would not include any partiality toward one party or the other.

140. See *In re D.C.*, 851 P.2d 291, 293-94 (Colo. Ct. App. 1993).

more lenient standards to reach a result in the best interests of the child, it created at least two difficulties.

One such difficulty is that the case undercuts the history of strict compliance with the Children's Code.¹⁴¹ By doing so, *C.C.R.S.* encourages nonparents to avoid the procedural steps in the Children's Code and provides an incentive to obtain physical custody of a child by any means, solely to establish the psychological ties that warrant an award of custody under the best interests standard.

This outcome sharply contrasts with a Colorado Court of Appeals decision that refused to undermine the purpose of the Children's Code in a situation similar to *C.C.R.S.*¹⁴² In *In re D.C.*,¹⁴³ foster parents sought custody under the UDMA after a dependency and neglect proceeding was instituted under the Children's Code.¹⁴⁴ The court of appeals refused to apply the UDMA to the situation because "[t]o engraft the custody provisions of the UDMA onto proceedings under the Children's Code would only lead to confusion and conflict between countervailing policies and procedures under the two different acts."¹⁴⁵

C.C.R.S. involved a situation strikingly similar to *D.C.* in that nonparents were attempting to use the custody provisions of the UDMA to bypass the more complex procedural requirements in the Children's Code. The key difference between the two cases rests on a technicality. In *D.C.*, a dependency and neglect proceeding under the Children's Code had been commenced prior to the UDMA action, whereas in *C.C.R.S.*, the petition for custody under the UDMA was filed without any prior action under the Children's Code. Thus, if the couple in *C.C.R.S.* had filed a petition for custody under the Children's Code first, then the Children's Code would have applied and the couple may not have

141. See *C.C.R.S.*, 892 P.2d at 260 (Lohr, J., dissenting) ("[B]y allowing nonparents after a failed relinquishment and adoption easily to petition for custody under the UDMA eviscerates the stringent procedures and policies underlying the Colorado parental rights relinquishment statute delineated in Article 5, part 1, of the Colorado Children's Code."). In *C.C.R.S.*, the Colorado Court of Appeals argued that the risk of a court awarding custody to nonparents who obtained custody by kidnapping or other egregious means is unrealistic. See 872 P.2d at 1342. However, this result is plausible in light of a strict reading of the best interests standard. See *supra* note 37.

142. See *C.C.R.S.*, 872 P.2d at 1350-51 (Taubman, J., dissenting).

143. 851 P.2d 291 (Colo. Ct. App. 1993).

144. See *id.* at 294.

145. *Id.* at 294.

received custody of Cody.¹⁴⁶ This distinction, however, is illusory because even though the couple did not file a petition for adoption first under the Children's Code, in essence the couple was attempting to achieve the same result: adoption of Cody. By not following *D.C.*, the court overlooked the policy behind the Children's Code.

A second problem with *C.C.R.S.* is that it removes any presumption in favor of a natural parent by applying a raw best interests standard in relinquishment and adoption proceedings. As discussed in Part II, the application of the best interests standard without a presumption for the natural parent runs the risk of social engineering. As one journalist remarked:

Having abandoned the firm handhold of the old standard — the child belongs to the biological parent and that is that — we are heading down a slippery slope at the bottom of which lurks an issue we Americans are reluctant to face: The awful realities and inequalities of wealth and class.¹⁴⁷

A policy choice to dispose of the natural parent presumption is a task for the legislature, not the courts. Although a literal reading of the UDMA's custody provisions supports the Colorado Supreme Court's conclusion that the legislature intended the result reached in *C.C.R.S.*, this is true only to the extent that the UDMA is read in a vacuum. When the Children's Code is considered, however, it is not at all clear that the legislature intended an obscure provision in the UDMA to undercut the Code's extensive statutory scheme. This is especially true in light of the absence of language expressing an intent to override the Children's Code.

VI. CONCLUSION

When viewed strictly in terms of the child's best interests and the immediate impact on Cody, *C.C.R.S.* arguably reaches the right outcome. After all, by the time the case wound its way up to the Colorado Supreme Court, Cody had been living with the

146. Marvin Ventrell, Denver attorney for the National Association of Counsel for Children, said that if the couple in *C.C.R.S.* had tried to force the adoption, then they might not have retained custody of Cody. See Jones, *supra* note 99.

147. Richard Cohen, *Class Action*, WASH. POST, Sept. 12, 1993, (Magazine) at 9.

couple for nearly five years. By this stage in his development, removing Cody from the couple may very well have had a profound impact on the child's psychological welfare. Also, Redshirt, who was a virtual stranger to the boy, was trying to do what the cases under the Children's Code prohibit: allow a change of heart to disrupt the life of the child she previously chose to relinquish. Given these facts, it is difficult to say that the supreme court was wrong in finding a way to keep Cody with the couple.

Still, the precedent set in *C.C.R.S.* allows the best interests standard to be misused to favor adoptive parents. To prevent such outcomes in future cases, the legislature should amend the UDMA to exclude cases that rightfully belong under the Children's Code. Also, the legislature should seriously consider adoption reform laws that mandate speedy resolution of custody disputes to prevent rewarding the party who can retain physical possession of the child for the longest time. By taking these steps, the legislature will encourage adherence to the procedural safeguards in the Children's Code and will reinforce the idea that the child's best interests can be safeguarded adequately in a legal manner.

