

IDAHO CUSTODY DETERMINATIONS: LIMITS ON STANDING

TABLE OF CONTENTS

I. INTRODUCTION	141
II. STATUTORY INTERPRETATION FOLLOWING <i>TROXEL</i> <i>V. GRANVILLE</i>	144
III. DIVERGENT APPROACHES IN IDAHO AND FLORIDA	146
A. Idaho Supreme Court Decision of <i>Hernandez v.</i> <i>Hernandez</i>	146
1. Facts	146
2. Holding.....	148
3. Rationale.....	148
B. Florida Supreme Court Decision of <i>Richardson v.</i> <i>Richardson</i>	149
1. Facts	149
2. Holding.....	150
3. Rationale.....	150
C. Can Both Cases Be Consistent with <i>Troxel</i> ?	151
IV. PROBLEMS WITH THE CURRENT SYSTEM OF INFORMAL CAREGIVERS	155
A. Informal Caregivers of Children Have Limited Rights.....	156
B. Litigation is Often Harmful to Children and Families	158
V. IDAHO'S CUSTODY STATUTE § 32-717 SHOULD BE CLARIFIED AND EXPANDED.....	161
A. Idaho's Third Party Child Custody Laws Are Unnecessarily Complex.....	161
B. The Phrases "Actually Residing" and "Stable Relationship" Are Not Adequately Defined	164
C. Other States' Statutes Are More Inclusive of Third Parties	165
VI. SUGGESTED REVISIONS TO THE IDAHO GRANDPARENT CUSTODY STATUTE	169
VII. THE COMMON LAW IN IDAHO ALLOWS A COURT TO AWARD CUSTODY TO A NONPARENT THIRD PARTY	170
VIII. CONCLUSION	171

I. INTRODUCTION

Idaho's custody statutes are currently inadequate to deal with changing trends in our society. In particular, Idaho Code section 32-717(3), which grants certain grandparents standing in evaluating child custody arrangements¹ (and which was recently upheld by the Idaho

1. IDAHO CODE ANN. § 32-717 (3) (West 2013).

Supreme Court in *Hernandez v. Hernandez*)² should be clarified and expanded to allow additional interested parties to participate in child custody decisions because the current statute lacks necessary definitions and unfairly limits standing to grandparents.

Idaho Code section 32-717, like the child custody³ statutes of most other states, purports to promote the best interests of children involved in child custody litigation.⁴ Indeed, the statute is entitled “Custody of children – best interest.”⁵ In recent years, much has been written about the best interest standard with particular emphasis on a parent’s fundamental right to provide care and instruction to his or her children.⁶

2. *Hernandez v. Hernandez*, 265 P.3d 495, 501, 151 Idaho 882, 888 (2011).

3. Custody is but one of several legal rights of interaction that an adult may have with a child. For example, guardianship may give a person the right to supervise a child’s day-to-day activities and to oversee any money and property that the child owns. James W. Douglas, *The Grandkids & Your Rights*, 31-SUM. FAM. ADVOC. 22, 22 (2008). Visitation is a second example. With visitation, a court may allow an individual certain regular or scheduled visits with a child, as defined by agreement or court order. *Id.*; *Visitation Rights of Non-Custodial Parents*, LAW FIRMS.COM, <http://www.lawfirms.com/resources/child-custody/child-visitation/non-custodial-parent.htm> (last visited Nov. 14, 2013). Typically, visitation gives the individual only temporary physical control of the child; it does not empower the visitor to make important decisions for the child except in an emergency. Douglas, *supra* note 3. On the other hand, custody is “a judicial determination that affords the adult nearly all decision making, parenting functions, and caretaking responsibilities for a child.” *Id.* Courts base guardianship, visitation and custody determinations primarily on the best interest of the child, with preference being given to a fit parent’s decisions and the long-term residence of the child. *Id.*; see also *Troxel v. Granville*, 530 U.S. 57, 68 (2000). Section 32-717 authorizes the court to “give . . . direction for the custody, care and education of the children of the marriage.” IDAHO CODE ANN. § 32-717(1) (West 2013) (emphasis added). Accordingly, the court is not limited to making only “custody” decisions.

4. IDAHO CODE ANN. § 32-717 (1), (3) (West 2013). This section’s placement in Idaho’s divorce code (found in title 32, chapter 7) unquestionably indicates that its provisions apply to divorce suits. However, it is still unclear whether the provisions apply to non-divorce child custody decisions such as paternity suits. See *In re Doe I*, 179 P.3d 300, 302, 145 Idaho 337, 339 (2008) (declining to decide whether IDAHO CODE § 32-717 is only applicable to divorce actions due to mootness).

5. IDAHO CODE ANN. § 32-717 (West 2013).

6. See generally Tara Nielson & Robin Bucaria, Note, *Grandparent Custody Disputes and Visitation Rights: Balancing the Interests of the Child, Parents, and Grandparents*, 2009 UTAH L. REV. 569 (2009) (examining a grandparent’s visitation and custody rights in Utah); Kristina V. Foehrkolb, Comment, *When the Child’s Best Interest Calls for It: Post-Adoption Contact by Court Order in Maryland*, 71 MD. L. REV. 490 (2012) (examining the legal framework behind post-termination visitation rights of parents in Maryland); Daniel R. Victor & Keri L. Middleditch, *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*, 22 J. AM. ACAD. MATRIM. LAW 391 (2009) (surveying grandparent visitation throughout the United States); Natalie Amato, *Black v. Simms: A Lost Opportunity to Benefit Children by Preserving Sibling Relationships When Same-Sex Families Dissolve*, 45 FAM. L.Q. 377 (2011) (arguing that maintaining sibling relationships should be considered in best interest determinations); Peter P. Gelzinis, *Constitutional Law -- Constitutional Rights of Parents Do Not Require Showing of Unfitness in Third Party Cases -- Kulstad v. Maniacia*, 220 P.3d 595 (Mont. 2009), 44 SUFFOLK U. L. REV. 785 (2011) (examining a Montana case that deals with the constitutionality of a Montana “child’s best interest” statute); Anne Milligan, Note, *The Arkansas Court of Appeals Affirms a Trial Court’s Order Awarding Grandparent Visitation*, 32 U. ARK. LITTLE ROCK L. REV. 405 (2010) (examining an Arkansas case dealing with grandparent

In 2000, the U.S. Supreme Court addressed the rights of third parties to visit another's children in *Troxel v. Granville*.⁷ The decision has been extremely influential in the adoption and amendment of statutes addressing a non-parent's rights to custody and visitation with a child.⁸ There, the Court held that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."⁹ *Troxel* dealt with paternal grandparents who wished to see their grandchildren more than the children's biological mother would allow.¹⁰ The grandparents obtained court-ordered visitation under a Washington statute that permitted the court to grant any person visitation with any child whenever it might "serve the best interest of the child."¹¹ In reversing the trial court's grant of visitation to the grandparents, the Court held that the Washington statute¹²—as applied¹³—violated the mother's constitutional right to raise her child without undue government interference.¹⁴ Specifically, the court held that "there is a presumption that fit parents act in the best interest of their children"¹⁵ and that the trial court impermissibly failed to give any special weight to a fit parent's decision.¹⁶

As trends in society have started to change, more and more children are being raised or cared for by people other than their parents.¹⁷

visitation and the best interest of a child); Mekisha F. Smith, Note, *Mama Didn't Raise No Fool: A Fit Mother's Right to Manage Grandparent Visitation*, 37 S.U. L. REV. 213 (2010) (noting that forcing grandparent visitation on a family is not good for a family and that fit parents should be presumed to act in the best interest of their children).

7. See *Troxel v. Granville*, 530 U.S. 57 (2000).

8. Susan Adcox, *Troxel v. Granville Impacts Grandparents Visitation Rights*, ABOUT.COM, http://grandparents.about.com/od/grandparentsrights/a/Troxel_v_Granville.htm (last visited Nov. 14, 2013).

9. *Troxel*, 530 U.S. at 66.

10. *Id.* at 60–62.

11. *Id.* at 57.

12. WASH. REV. CODE ANN. § 26.10.160(3) (West 2012). The statute provided that "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." *Id.*

13. The plurality realized that custody determinations are typically made on a case-by-case basis and the Court was concerned with the possibility of invalidating all nonparent visitation statutes. *Troxel*, 530 U.S. at 73. The Court wisely refrained from making this decision and left the discretion with state courts, which can more adequately adapt and provide for the changing needs of society. *Id.*

14. *Id.* at 60–61, 67.

15. *Id.* at 68.

16. *Id.* at 69.

17. Ken Bryson & Lynn M. Casper, *Coresident Grandparents and Grandchildren*, U.S. DEPT. OF COM. ECON. & STAT. ADMIN. (1999), <http://www.census.gov/prod/99pubs/p23-198.pdf>. (Because "these relationships usually arise informally . . . [and] the caregivers often lack the legal authority to parent the children," they are commonly referred to as informal caregiver.); Elizabeth B. Brandt, *De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?*, 38 FAM. L.Q. 291, 291 (2004).

While the focus of this article is on child custody and not visitation, court decisions and literature regarding visitation are relevant to the child custody discussion. Grandparents, who form the bulk of third parties who take custody of children, are the most prominent nonparent in third party custody disputes.¹⁸ As a result, the majority of research in this article focuses on this important relationship; however, this research largely applies to other third parties as well.

Very few cases since 2000 report granting custody to grandparents in adversarial custody proceedings not involving a statute or agreement between the parties, and in these cases the grandparents' wishes have received no deference.¹⁹ Regrettably, while these results conform to the standard laid down in *Troxel*, they do not always promote the best interests of the children because grandparents or other third parties may be better situated to provide for the needs of any children involved.

II. STATUTORY INTERPRETATION FOLLOWING *TROXEL V. GRANVILLE*

The issue of third-party visitation splintered the *Troxel* court²⁰ and left ample room for future interpretation.²¹ As a result, state courts have reached different conclusions in applying *Troxel's* constitutional analysis. Even so, *Troxel's* guidelines are extremely important and have provided diverse legal opinions that adversarial parties can use in litigation.

Although previous opinions had established a parent's fundamental right to parent their children, *Troxel* made clear that the "Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."²² In addition, the Court recognized that there is a traditional presumption that fit parents act in the best interests of their children.²³ However, contrary to popular belief, this proposition does not require a court to find that a parent is unfit before awarding custody to an adverse party.²⁴ Instead, it only requires that the court give "special weight" to a fit parent's decision.²⁵ In fact, the court specifically stated

18. Bryson & Casper, *supra* note 17.

19. Douglas, *supra* note 3, at 22–23.

20. Justice O'Connor wrote the plurality decision, in which Justices Rehnquist, Ginsburg, and Breyer joined. *Troxel*, 530 U.S. at 60. Justices Souter and Thomas wrote separate concurring opinions. *Id.* at 75, 80. Justices Stevens, Scalia, and Kennedy wrote separate dissenting opinions. *Id.* at 80, 91, 93.

21. Eight of the nine Justices in *Troxel* agreed that the Fourteenth Amendment protects a parent's fundamental right to raise children without undue government interference. *See id.* at 66, 77, 80, 87, 91. The four Justices joining in the plurality opinion held the Washington statute unconstitutional as applied, while the two concurring justices held the statute unconstitutional on its face. *Id.* at 69, 75, 80.

22. *Troxel*, 530 U.S. at 66.

23. *Id.* at 68.

24. *See id.*

25. *Id.* at 69.

that it did not consider whether “nonparental visitation statutes [must] include a showing of harm or potential harm to the child as a condition precedent to granting visitation.”²⁶ Although the Court does not specifically identify what constitutes “special weight,” it appears that “special weight” means that the courts should apply the traditional presumption that fit parents act in the best interest of their children and require adverse parties to bear the burden of rebutting this presumption.²⁷

When a case deals with fundamental rights, courts typically apply strict scrutiny in examining the constitutional issues.²⁸ To infringe on such fundamental rights, a statute must ordinarily be “supported by sufficiently important state interests” and be “closely tailored to effectuate only those interests.”²⁹ The *Troxel* plurality, however, did not apply strict scrutiny.³⁰ Instead, the Court applied what it called “heightened protection against government interference.”³¹ A state has a legitimate interest in protecting the best interests of children, which includes protecting a child’s emotional wellbeing by preventing parents from eliminating an important relationship with a grandparent or other relative without cause or reason. Accordingly, most state statutes should survive constitutional scrutiny under a *Troxel* analysis if state courts are willing to construe them to require deference to a parent’s decision regarding visitation, a presumption of parental fitness, or a finding of actual or potential harm to the child.³² Further, it is likely that more state stat-

26. *Id.* at 73.

27. *See id.*

28. *See Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

29. *Id.* at 388.

30. *See Troxel*, 530 U.S. at 65. Only Justice Thomas made the connection. In his concurring opinion, he agreed that “parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them.” *Id.* at 80. He opined that government interference with that right is subject to “strict scrutiny.” *Id.* Further, he believed that “the State of Washington lacked even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent’s decision regarding visitation with third parties.” *Id.*

31. *Id.* at 65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). The Court did not explain what it meant by “heightened protection,” leaving some to wonder whether a new form of intermediate scrutiny applies to fundamental rights cases dealing with child rearing. *See id.*

32. The Idaho Supreme Court effectively did so in connection with a grandparent visitation statute. *See Leavitt v. Leavitt*, 132 P.3d 421, 142 Idaho 664 (2006). Many courts have made similar findings. *See, e.g., In re L.B.S. v. L.M.S.*, 826 So. 2d 178 (Ala. Civ. App. 2002) (grandparent must prove by clear and convincing evidence that prohibiting visitation would cause substantial harm to the child); *McGovern v. McGovern*, 33 P.3d 506 (Ariz. Ct. App. 2001) (trial court must apply a rebuttable presumption that a fit parent acts in the child’s best interest, must give “some special weight” to a fit parent’s decision regarding visitation, and must give “significant weight” to a parent’s voluntary agreement to some visitation though it is less than the grandparent desires); *In re Custody of C.M.*, 74 P.3d 342 (Colo. App. 2003) (“best interest” standard mandates that the court consider and accord deference to a parent’s preferences); *Roth v. Weston*, 789 A.2d 431 (Conn. 2002) (clear and convincing evidence must show that the grandparent has a parent-like relationship with the child and that denial of visitation would cause real and significant harm to the child); *Skov v. Wicker*,

utes will pass constitutional muster under heightened scrutiny than would under traditional strict scrutiny.

While the justices in *Troxel* disagreed as much as they agreed, the decision still provides significant guidance for the application of non-parent visitation statutes. Because most custody statutes are based on best interest determinations and invoke parents' constitutional rights³³, the decision also provides essential guidance for child custody legislation. The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to raise their children without undue government influence.³⁴ States may infringe on this right only when a legitimate state interest survives a court's heightened scrutiny.³⁵

III. DIVERGENT APPROACHES IN IDAHO AND FLORIDA

State courts do not always interpret child custody statutes in the same way. Differences among jurisdictions due to precedent, dissimilar state constitutions, and varied approaches to statutory interpretation can often yield conflicting results between the states. In particular, concern over a parent's fundamental right to care for and control his or her child has caused some states to overzealously defend this right. Idaho and Florida contain a good example of how this concern can lead to conflicting opinions generated from almost identically worded child custody statutes.³⁶ The results are exemplified by the Idaho Supreme Court case of *Hernandez v. Hernandez*³⁷ and the Florida Supreme Court case of *Richardson v. Richardson*.³⁸

A. Idaho Supreme Court Decision of *Hernandez v. Hernandez*

1. Facts

Charles and Kerri Hernandez divorced in September 2000.³⁹ Prior to the divorce, the couple and their two children briefly lived with Kerri's mother, Janice, in Houston, Texas.⁴⁰ Later, Janice moved to Mountain Home and lived with Charles and Kerri before finding her own

32 P.3d 1122 (Kan. 2001) (grandparent visitation statute may be applied constitutionally if the grandparents bear the burden of proving that they have a substantial relationship with the child and if the trial court accorded special weight to the presumption that a fit parent will act in the child's best interests).

33. See 67A C.J.S. *Parent and Child* § 55 (2013).

34. *Troxel*, 530 U.S. at 66.

35. *Id.* at 65.

36. IDAHO CODE ANN. § 32-717(3) (West 2013); FLA. STAT. ANN. § 61.13(7) (West 2013), *invalidated by* *Richardson v. Richardson*, 766 So. 2d 1036, 1036 (Fla. 2000) (repealed 2005).

37. *Hernandez v. Hernandez*, 265 P.3d 495, 151 Idaho 882 (2011).

38. *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000).

39. *Hernandez*, 265 P.3d at 496, 151 Idaho at 883.

40. *Id.*

place in Mountain Home.⁴¹ The divorce decree gave Kerri primary physical custody of the two children with Charles having reasonable visitation.⁴² Following the divorce, however, Charles moved to Texas and had very little contact with the children.⁴³ In fact, Charles had no physical contact with the children between November 2002 and early 2008.⁴⁴

In March 2001, Kerri—suffering from a drug addiction—left the children with Janice.⁴⁵ Thereafter, Janice raised the children without physical help from Charles or Kerri until 2008.⁴⁶ In March of that year, Charles and Kerri stipulated a new custody arrangement giving Charles sole physical custody and Kerri visitation.⁴⁷ Janice was unaware of the stipulation and had never petitioned a court for guardianship.⁴⁸ The court, unaware that the children were actually living with Janice, entered an order consistent with the stipulation.⁴⁹

Charles and Kerri planned for Kerri to take the children from school in Mountain Home, without telling Janice, and to take the children to meet Charles in Salt Lake City, Utah.⁵⁰ Janice found out about the plan, however, and kept the children home from school.⁵¹ Janice then filed a separate action for custody⁵² pursuant to Idaho Code section 32-717(3) which states, “[i]n any case where the child is actually residing with a grandparent in a stable relationship, the court may recognize the grandparent as having the same standing as a parent for evaluating what custody arrangements are in the best interests of the child.”⁵³ In that action, the magistrate judge awarded Charles and Janice shared physical custody with Charles having primary custody and Janice having custody for six weeks during the summer.⁵⁴ The judge also gave Charles sole legal custody.⁵⁵

Charles appealed, arguing that the award of limited custodial rights to Janice violated 14th Amendment due process.⁵⁶ The district court affirmed, and Charles again appealed.⁵⁷

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Hernandez*, 265 P.3d at 496, 151 Idaho at 883.

46. *Id.* One child did live with a maternal aunt for about a year and a half while Janice recovered from a shoulder surgery. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Hernandez*, 265 P.3d at 496, 151 Idaho at 883.

52. *Id.*

53. IDAHO CODE ANN. § 32-717(3) (West 2013).

54. *Hernandez*, 265 P.3d at 496, 151 Idaho at 883.

55. *Id.*

56. *Id.* at 496–97, 151 Idaho at 883–884.

57. *Id.* at 497, 151 Idaho at 884.

2. Holding

The Idaho Supreme Court affirmed the award of partial custody rights to Janice, upholding the constitutionality of Idaho Code section 32-717(3) both facially and as it applied to the case.⁵⁸ In the process, the court confirmed the post-*Troxel* constitutionality of its opinion in *Stockwell v. Stockwell*, which held that a court may award custody to third parties who care for another's children for an appreciable period of time if doing so would serve the best interest of the children.⁵⁹

The holding in *Hernandez* gives grandparents who have grandchildren residing with them in a stable relationship the ability to be recognized by the court as having the same standing as a parent when custody arrangements are evaluated.⁶⁰ The court explained, however, that a grandparent's standing to participate in custody determinations is "not equal to a parent's fundamental right to raise his or her children" and that in applying section 32-717(3), courts must afford special weight to a fit parent's decision regarding the care, custody, and control of his children.⁶¹

3. Rationale

The Idaho Supreme Court scrutinized section 32-717(3) in light of *Troxel v. Granville* and determined that the U.S. Supreme Court issued only a limited holding that "stands for the narrow proposition that [the Washington statute] is constitutionally infirm as [it was] applied in that case."⁶² As a result, the court believed it had no reason to declare the Idaho statute facially unconstitutional.⁶³ Additionally, because the court interpreted the Idaho statute as giving a grandparent only standing—not a right equal to a parent's right to raise his children—Idaho courts may constitutionally apply the statute as long as they give special weight to the parent's preferences and decisions.⁶⁴ Since the magistrate

58. *Id.* at 497–98, 501, 151 Idaho at 884–85, 888.

59. *Id.* at 500, 151 Idaho at 887.

60. *See id.*

61. *Id.* at 499–500, 151 Idaho at 886, 887.

62. *Id.* at 498, 151 Idaho at 885.

63. The Court in *Troxel* did not reach a majority opinion that found that the Washington statute was facially unconstitutional. *See Troxel v. Granville*, 530 U.S. 57, 60. Instead, a plurality opinion found that the Washington statute was "breathtakingly broad." *Id.* at 67. Since the Idaho statute is much narrower than the statute challenged in *Troxel*, it logically flows that the Idaho statute is not facially unconstitutional. *See Hernandez v. Hernandez*, 265 P.3d 495, 498, 151 Idaho 882, 885.

64. *See Hernandez*, 265 P.3d at 499, 151 Idaho at 886; *see also Troxel*, 530 U.S. at 69.

had given great deference to the parent's wishes,⁶⁵ the statute was constitutionally applied.⁶⁶

B. Florida Supreme Court Decision of *Richardson v. Richardson*

1. Facts

Adrienne and Raymond Richardson divorced in 1994, and the court awarded custody of their daughter, Ashleigh, to Adrienne.⁶⁷ Their marital separation agreement stated that "neither parent was permitted to move the child's residence beyond a one-hundred mile radius of Pensacola, Florida."⁶⁸ While in Adrienne's custody, "Ashleigh lived with her [paternal] grandparents for four to five days a week and visited her mother on weekends."⁶⁹ Later, Adrienne moved Ashleigh outside the one-hundred mile radius to North Carolina, and Raymond filed a motion to modify the custody agreement due to the change in circumstances.⁷⁰ Ashleigh's paternal grandparents intervened in the modification proceedings and petitioned for custody under Florida Code section 61.13(7),⁷¹ which stated:

In any case where the child is actually residing with a grandparent in a stable relationship, whether the court has awarded custody to the grandparent or not, the court may recognize the grandparents as having the same standing as parents for evaluating what custody arrangements are in the best interest of the child.⁷²

Raymond then withdrew his motion for custody, arguing instead that his parents should be awarded custody.⁷³

The trial court granted custody to the grandparents and Adrienne appealed.⁷⁴ The district court reversed the decision, finding that "it invoked a best interest standard without requiring proof of a substantial threat of significant and demonstrable harm to the child."⁷⁵ The grandparents appealed.⁷⁶

65. This is a difficult proposition to make. One may wonder what deference courts really give to parent's wishes. It appears that in some sense, this is exactly the type of judicial overruling of parent's wishes that the court was concerned with in *Troxel v. Granville*.

66. *Hernandez*, 265 P.3d at 500, 151 Idaho at 887.

67. *Richardson v. Richardson*, 766 So. 2d 1036, 1037 (Fla. 2000).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1037–38.

72. FLA. STAT. ANN. § 61.13(7) (West 2013), *invalidated by* *Richardson v. Richardson*, 766 So.2d 1036, 1036 (Fla. 2000) (repealed 2005).

73. *Richardson*, 766 So. 2d at 1037.

74. *Id.* at 1037–38.

75. *Id.* at 1038.

76. *See id.*

2. Holding

The Florida Supreme Court affirmed the district court and denied custody rights to the grandparents.⁷⁷ The court held that “section 61.13(7) unconstitutionally violate[d] a natural parent’s fundamental right to raise his or her child absent a compelling state justification.”⁷⁸ It further held that the statute is “unconstitutional on its face because it equates grandparents with natural parents and permits courts to determine custody disputes utilizing solely the ‘best interest of the child’ standard without first finding detriment to the child.”⁷⁹

The court rejected the argument that the statute could be narrowly construed or severed to “merely give[] grandparents standing to seek custody of a minor child.”⁸⁰ Under this interpretation, the court believed the statute would be worthless because it would permit a court to grant standing to a grandparent, but would not allow a grandparent to intervene unless “it [was] established that the parent abandoned the child, that the parent is unfit or that harm would result to the child if the parent were to be awarded custody.”⁸¹ Nonetheless, the court believed that the statute unambiguously elevated a grandparent to the same status of a parent and provided the court discretion to award custody based solely on the best interest of a child.⁸² The court found that such interpretation violated a parent’s constitutional rights and could not be narrowly construed or severed to mean otherwise.⁸³

3. Rationale

The court interpreted the statute as giving grandparents “the same legal custody rights as the natural parents.”⁸⁴ It believed that Florida Code section 61.13(7) treated “grandparents and natural parents alike by giving grandparents custody rights equal to those of a parent, and allow[ed] courts to make . . . custody determination[s] . . . based solely on the best interest . . . standard.”⁸⁵ In addition, the court believed that the statute was unambiguous and was not susceptible to an alternate interpretation that would not infringe on parents’ constitutional right to care for their children.⁸⁶ Thus, the court believed that the statute did not

77. *Id.* at 1043.

78. *Id.* at 1038.

79. *Richardson*, 766 So. 2d at 1043.

80. *Id.* at 1040.

81. *Id.*

82. *Id.* at 1041.

83. *Id.* at 1040. Although this case was decided shortly after *Troxel v. Granville* and made no mention of the case, the court still recognized a parent’s “fundamental right . . . to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

84. *Richardson*, 766 So. 2d at 1038.

85. *Id.* at 1039.

86. *Id.* at 1040–43.

merely provide standing to grandparents, but instead provided grandparents with unconstitutional custody rights.⁸⁷

The court indicated that precedent from prior Florida Supreme Court decisions dealing with grandparent visitation rights were important in its determination.⁸⁸ In two previous opinions the court had held that a parent's fundamental right to raise his or her children without government influence could only be violated where a compelling state interest was shown.⁸⁹ Further, in order to show a compelling state interest, the court had held that a state must show that it was acting to "prevent demonstrable harm to a child."⁹⁰ Because the Florida statute contained no such requirement of harm to a child before allowing for state infringement on a parent's fundamental right to care for a child, the statute was deemed unconstitutional.⁹¹

C. Can Both Cases Be Consistent with *Troxel*?

With such divergent approaches to the interpretation of almost identically worded statutes,⁹² the question is raised, "Can both these cases be consistent with the rules announced in *Troxel v. Granville*?" The simple answer to this question is yes; however, one must carefully consider the approaches used and the courts' intent in order to do so. The main difference in these two cases comes from the interpretation of the phrase "having the same standing as a parent."⁹³ While one court believed that the statute simply provided standing to grandparents, the other found that the statute unconstitutionally elevated a grandparent's rights to those of a parent.⁹⁴

In *Hernandez v. Hernandez*, the court found that the Idaho statute, which gave certain grandparents the "same standing as a parent for evaluating . . . custody arrangements"⁹⁵ did not elevate a grandparent's custody right to that of a parent's.⁹⁶ Elizabeth Brandt contemplates the use of the phrase "same standing that is given to each parent under this

87. *Id.* at 1040–41.

88. *Id.* at 1038–39.

89. *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998); *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996).

90. *Beagle*, 678 So. 2d at 1276. *See also Von Eiff*, 720 So. 2d at 514; *Richardson*, 766 So. 2d at 1039.

91. *Richardson*, 766 So. 2d at 1039–40.

92. Kentucky and the Virgin Islands also have similarly worded statutes. However, neither the Supreme Court of Kentucky nor the Supreme Court of the Virgin Islands has addressed the constitutionality of their statutes. *See* V.I. CODE ANN. tit. 16, § 17-606 (West 2013); KY. REV. STAT. ANN. § 620.027 (West 2013).

93. IDAHO CODE ANN. § 32-717(3) (West 2013); *See* FLA. STAT. ANN. § 61.13(7) (West 2000) (repealed 2005), *invalidated by* *Richardson v. Richardson*, 766 So.2d 1036 (2000).

94. *Hernandez v. Hernandez*, 265 P.3d 495, 499, 151 Idaho 882, 886 (2011); *Richardson v. Richardson*, 766 So. 2d 1036, 1038 (Fla. 2000).

95. IDAHO CODE ANN. § 32-717(3) (West 2013).

96. *Hernandez*, 265 P.3d at 499, 151 Idaho at 886.

act” in a similar Idaho statute that involves de facto custodians.⁹⁷ In her article, she points out that this provision “does not makes sense since the de facto custodian legislation does not give standing to parents.”⁹⁸ Further, unlike other de facto custodian statutes,⁹⁹ the Idaho statute provides a de facto custodian only with *standing* and does not give a de facto custodian the same consideration a parent would receive in best interest determinations.¹⁰⁰ One could also argue that Idaho Code section 32-717(3) does not make sense because the use of the word “same” in the statute indicates that it applies to more than just standing.¹⁰¹ Citing Black’s Law Dictionary, the court in *Hernandez* noted, “[s]tanding is [a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.”¹⁰² Thus, standing simply provides an individual with the opportunity to participate in a legal proceeding; it does not confer identical legal rights on the parties. However, this is not what is implied by the wording of the Idaho statute. The use of the word “same” in Idaho Code section 32-717(3) indicates that it was intended to apply to more than just giving grandparents an opportunity to participate in legal proceedings. Instead, it is likely that the statute was intended to give certain grandparents the same legal custody rights as a parent—something that both *Hernandez* and *Troxel* explicitly condemn.¹⁰³

Although issues of statutory construction were not raised by either party in *Hernandez*, an examination of a statute’s construction is important in determining its constitutionality. “[T]he starting point in every case involving construction of a statute is the language itself.”¹⁰⁴ If a statute is unambiguous, then the plain language of the statute is to be followed.¹⁰⁵ In making this determination, courts look to “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”¹⁰⁶ Further, “[w]hen a word is not defined by statute, [the court] normally construe[s] it in accord with its ordinary or natural meaning.”¹⁰⁷

The word “same” in these statutes suggests that the legislature intended to elevate a grandparent’s rights to those of a parent. Otherwise, the legislature could have simply stated that grandparents have stand-

97. Brandt, *supra* note 17, at 310–12.

98. Brandt, *supra* note 17, at 311.

99. See KY. REV. STAT. ANN. § 403.270(2) (West 2013).

100. Compare IDAHO CODE ANN. § 15-5-213(2) (West 2013) (listing two factors to be considered for de facto guardians), with IDAHO CODE ANN. § 32-717(1) (West 2013) (listing seven factors to be considered for parents).

101. See IDAHO CODE ANN. § 32-717(3) (West 2013).

102. *Hernandez*, 265 P.3d at 499, 151 Idaho at 886.

103. See *id.*; see also *Troxel v. Granville*, 530 U.S. 57 (2000).

104. *Watt v. Alaska*, 451 U.S. 259, 265 (1981) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)).

105. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

106. *Id.* at 341.

107. *Smith v. United States*, 508 U.S. 223, 228 (1993).

ing to participate in custody proceedings. Such interpretation, however, is inconsistent with the plain meaning and context of the statutes.

As previously noted, the ordinary meaning of standing is a “right to make a legal claim or seek judicial enforcement of a duty.”¹⁰⁸ Since the meaning of statutory language is to be determined in the context of surrounding language, the use of the word “same” shines additional light on legislative purpose.¹⁰⁹ The plain meaning of the word “same” is “identical; not different.”¹¹⁰ Therefore, the plain and unambiguous language of the statute allows a court to give certain grandparents an identical right to make a legal claim. This should be the end of the inquiry, and courts should not construe the statute as giving a grandparent the same legal custody rights as a parent.¹¹¹

Likewise, additional canons of construction support the proposition that the statute *only* confers standing to grandparents. For example, the canon of constitutional avoidance dictates that “ambiguous statutory language be construed to avoid serious constitutional doubts.”¹¹² Thus, an interpretation of Idaho Code section 32-717(3) that would give grandparents the same legal custody rights as a parent should be avoided in order to avoid constitutional difficulties. Additionally, reading the statute in this way is not contrary to the canon against superfluity because without Idaho Code section 32-717(3), grandparents who have a grandchild residing with them would have no standing to participate in a grandchild’s custody determination.¹¹³

Instead of making *Hernandez* a case of statutory interpretation, it appears that the Idaho Supreme Court examined only the constitutionality of the statute in light of *Troxel v. Granville*.¹¹⁴ Even without examining the statutory structure, the court in *Hernandez* correctly upheld the statute by finding that it did not put grandparents on the same footing as parents, but instead only granted them standing.¹¹⁵ This interpretation is appropriate given the goal of the statute in providing for the best interests of children in custody determinations.¹¹⁶

By making the statute about standing, the court in *Hernandez* was able to give special weight to a fit parent’s decisions concerning the “care, custody, and control” of a child.¹¹⁷ Recall that *Troxel* did not invalidate the Washington state statute; instead, the Court simply found it

108. *Hernandez v. Hernandez*, 265 P.3d 495, 499, 151 Idaho 882, 886 (2011).

109. *See Robinson*, 519 U.S. at 341.

110. *Definition of same in English*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/same> (last visited Nov. 14, 2013).

111. *See Robinson*, 519 U.S. at 340.

112. *Fed. Comm’n. Comm’n. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

113. *See Hernandez*, 265 P.3d at 499, 151 Idaho at 886.

114. *Id.*

115. *Id.*

116. *See IDAHO CODE ANN. § 32-717(3)* (West 2013).

117. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

unconstitutional as applied to the specific facts of that case.¹¹⁸ It noted, “[t]he problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother’s] determination of her daughters’ best interests.”¹¹⁹

The Court in *Troxel* was hesitant to invalidate state statutes.¹²⁰ The Court said, “[b]ecause much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.”¹²¹ Thus, the Idaho Supreme Court’s careful consideration of the statute was appropriate because it allowed courts to make case-by-case determinations while still giving parents special weight in making decisions for their children.

Curiously, neither the court nor the parties in *Hernandez* cited the *Richardson* opinion or raised the arguments that were made there.¹²² While the court in *Hernandez* focused on the precedent established in *Troxel*, the court in *Richardson* chose to forego this analysis and focused on rules of statutory construction.¹²³ In fact, *Richardson*, which was decided some eleven years before *Hernandez* and just two months after *Troxel*, does not even mention *Troxel* in its opinion while the Idaho case closely analyzes the statute to conform with the U.S. Supreme Court authority.¹²⁴

In *Richardson v. Richardson*, the Florida Supreme Court approached the statute as a violation of a parent’s fundamental right to care for his or her children because it gave grandparents “the same legal custody rights as the natural parents.”¹²⁵ Thus, the court equated the phrase “same standing” with equal rights.¹²⁶ In light of recent state precedents declaring a grandparent visitation statute unconstitutional, the court believed that the child custody statute violated a state constitutional right for parents to raise children without government interference.¹²⁷

This state precedent contains perhaps the greatest distinction between the Idaho and Florida cases. Due to two previous Florida Supreme Court cases, the common law in Florida established a rule that state interference with a parent’s fundamental parenting right could

118. *Id.* at 73.

119. *Id.* at 69.

120. *Id.* at 73.

121. *Id.*

122. See Appellant’s Brief, *Hernandez v. Hernandez*, 265 P.3d 495, 151 Idaho 882 (2010) (No. 37779-2010), 2010 WL 4091387; Respondent’s Brief, *Hernandez v. Hernandez*, 265 P.3d 495, 151 Idaho 882 (2010) (No. 37780-2010), 2010 WL 4874239.

123. See *Richardson v. Richardson*, 766 So. 2d 1036, 1041–43 (Fla. 2000).

124. See generally *Hernandez v. Hernandez*, 265 P.3d 495, 151 Idaho 882 (2011) (decided Nov. 2, 2011), *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000) (decided Aug. 17, 2000), and *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (decided June 5, 2000).

125. *Richardson*, 766 So. 2d at 1038.

126. See *id.*

127. *Id.* at 1038–39.

occur only where there had been a showing of demonstrable harm to a child.¹²⁸ Idaho law contains no such requirement.¹²⁹ In fact, the court in *Hernandez* specifically noted that neither the U.S. Supreme Court nor Idaho law supported the argument that there must be a threshold finding of unfitness for a parent's fundamental parenting right to be violated.¹³⁰ This difference is likely the controlling factor that led to the distinct holdings in these cases.

Although argued, the court in *Richardson* refused to construe the statute as giving certain grandparents mere standing to seek custody of their grandchildren.¹³¹ The court questioned the utility of giving a grandparent standing where the court would be powerless to grant any relief absent parental unfitness.¹³² Further, it believed that the statute was unambiguous and could not reasonably be interpreted so narrowly as to apply only to standing.¹³³ The court, however, did not explain why it found the statute unambiguous.¹³⁴

Given the Florida court's interpretation of the statute, the court in *Richardson* had little choice but to find the statute unconstitutional. If the phrase "same standing" confers on grandparents the same legal custody rights that parents enjoy, then it would unconstitutionally violate a parent's right to raise children without government influence.¹³⁵ However, given the Supreme Court's reluctance to invalidate a much broader statute in *Troxel*,¹³⁶ it appears that the court in *Richardson* was a little too eager to strike down the Florida statute.

Both *Richardson* and *Hernandez* are in accord with the holding in *Troxel*. The divergent approaches in these cases result from different interpretations of statutory language in addition to different precedents. Even so, it appears that the unambiguous language in the statute would confer only standing and not the legal rights that the *Richardson* court believed made the statute unconstitutional.

IV. PROBLEMS WITH THE CURRENT SYSTEM OF INFORMAL CAREGIVERS

Even though *Hernandez* made a step in the right direction by ensuring that some grandparents have standing to participate in child custody determinations, the current state of the law in Idaho is still inadequate. Because the realities of child care have evolved to the point

128. Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998); Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996).

129. See *Hernandez*, 265 P.3d at 499–500, 151 Idaho at 886–887 (2011).

130. *Id.*

131. *Richardson*, 766 So. 2d at 1040.

132. *Id.*

133. *Id.* at 1040–41.

134. See *id.*

135. See *Troxel v. Granville*, 530 U.S. 57, 66–69 (2000).

136. See *id.* at 73.

that parents are not always the predominant caregivers for their children, more needs to be done to protect a third party's interests in caring for a child. By examining the shortcomings of the current legal framework, one can better understand the changes that must be made in order to ensure that Idaho's statute is truly serving the best interests of its children.

A. Informal Caregivers of Children Have Limited Rights

Changing societal norms have led to third parties playing increasingly important roles in raising and parenting children. Absent parents, death, multiple marriages, harsh immigration regulations, changing family values, and a highly mobile workforce have all contributed to the increased involvement of grandparents and other nonparents in raising children.¹³⁷ Nonparent caregivers frequently develop parent-like relationships with other parents' children. Accordingly, custody disputes between caregivers and biological parents are increasing.¹³⁸ While there are many ways that a nonparent can become responsible for childcare—placement by child protective services, divorce, difficult work situations, drug abuse, mental illness, physical illness, and the death of a parent—there are few ways for caregivers to obtain actual legal authority over their charges without consent of the parents.¹³⁹

When children reside with third parties as a result of child protection claims, or where custody or guardianship is voluntarily given, grandparent or third-party custody is not usually an issue.¹⁴⁰ The problems occur when children are left with grandparents or third parties indefinitely without the parents giving the third party any legal authority.¹⁴¹

Informal caregivers in Idaho and many other states have very few rights with respect to others' children in the absence of legal relationships such as guardianships or custodianships. For example, grandparents who care for their grandchildren without some type of legal authority often have difficulties enrolling the grandchildren in school or authorizing medical care for them.¹⁴² Additionally, grandparents may be denied public assistance benefits for their grandchildren or have difficulties obtaining coverage for them under employment-related benefit plans.¹⁴³ While these problems can be resolved by adopting the child or receiving guardianship or custody rights, these processes often involve litigation that is sometimes financially and nearly always emotionally taxing on the family's relationship.

137. See Douglas, *supra* note 3, at 22.

138. See *id.*

139. See Brandt, *supra* note 17, at 292.

140. See *id.*

141. *Id.*

142. *Id.*

143. *Id.*

The initiation of guardianship or custody proceedings is not always costly.¹⁴⁴ However, if a parent contests a third party's claim, the cost of the proceedings can quickly rise to many thousands of dollars.¹⁴⁵ This often creates difficulties and hardships because the expensive litigation is difficult for many informal caregivers to afford.¹⁴⁶ This is not always the case, however, because, as one scholar points out, grandparents frequently have more time, money, power, and influence than their absent or irresponsible children.¹⁴⁷ Nonetheless, cost is only one of several barriers that affect a third party attempting to obtain custody rights.

An additional barrier for third parties seeking custody rights are the limits found in statutes that provide alternative means for obtaining these rights. For example, the guardianship provisions in Idaho and many other states require that "all parental rights of custody [be] terminated," that "the child [be] neglected, abused, abandoned," or that the "parents [be] unable to provide a stable home environment" before the court can appoint a guardian.¹⁴⁸ This essentially requires a third party seeking guardianship to allege facts that would be sufficient for state intervention from child protective services.¹⁴⁹

Since 2004, Idaho has implemented a de facto custodian statute,¹⁵⁰ which allows relatives or persons interested in the welfare of minors to initiate guardianship proceedings.¹⁵¹ However, as Elizabeth Brandt points out, this statute is "part of the guardianship provisions of the Idaho Code" and only "authorizes de facto custodians to participate in guardianship proceedings, not in custody proceedings."¹⁵² Thus, the de facto custodian statute also provides only limited additional protection to informal caregivers.¹⁵³

If parents are complicit in assigning legal rights to a third party, some states provide alternative options with varying limitations.¹⁵⁴ For example, a parent in Idaho can delegate custody and visitation rights to another person through a properly executed power of attorney.¹⁵⁵ The Idaho statute governing powers of attorney allows the provision to remain in effect for up to six months for most individuals and up to twelve

144. This is especially true where both parents consent to giving the third party custody or guardianship rights or the parties are able to settle out of court. *Child Custody Attorney Cost*, COSTHELPER.COM, <http://personalfinance.costhelper.com/child-custody-attorney.html> (last visited Nov. 14, 2013).

145. *Id.*

146. See Douglas, *supra* note 3, at 23, and Brandt, *supra* note 17, at 298.

147. Douglas, *supra* note 3, at 22.

148. IDAHO CODE ANN. § 15-5-204 (West 2013); Brandt, *supra* note 17, at 298.

149. Brandt, *supra* note 17, at 298.

150. IDAHO CODE ANN. § 15-5-213 (West 2013).

151. Brandt, *supra* note 17 at 310.

152. *Id.*

153. *Id.*

154. *Id.* at 292.

155. IDAHO CODE ANN. § 15-5-104 (West 2013).

months for military personnel serving outside the United States.¹⁵⁶ The statute also provides for extended time limits if the delegation is made to a grandparent, sibling, aunt, or uncle.¹⁵⁷ While the power of attorney may be revoked at any time by a parent upon written notice to the third party, it can remain in force for the term stated in the instrument or, in the absence of such a term, for up to three years.¹⁵⁸ Such provision provides an inexpensive alternative for informal caregivers in an uncontroversial custody arrangement.

Where informal caregivers are parenting another's children, all parties are likely to be confused about their varying rights and responsibilities. This dynamic is further exacerbated if the parent is a minor living with his or her parents.¹⁵⁹ In such a case, there are competing fundamental rights between a grandparent's right to the care, custody, and control of his or her grandchild and a teen mother's right to control her own child. Although these cases are unlikely to end up in court, most minors are unaware of their constitutional rights to parent.¹⁶⁰ Further, most minors are so financially and emotionally dependent on their parents that involving the courts to defy the grandparental wishes would likely not be in the young mother's best interest.¹⁶¹

Without parental consent, litigation is the primary means by which a third party can obtain custody of another's children. However, after the court's fractured holding in *Troxel v. Granville*,¹⁶² many third parties remain confused about their legal custody rights. In *Hernandez v. Hernandez*,¹⁶³ the Idaho Supreme Court attempted to bring more clarity to this issue and give informal caregivers a legal avenue to define and formalize their rights and role in a child's life. The prospect of litigation, however, brings its own complications and should be undertaken only after careful consideration.

B. Litigation is Often Harmful to Children and Families

When child custody is contested, such proceedings are not only expensive, but are also stressful for adults and often psychologically harmful to children. Reducing such harmful effects is problematic.¹⁶⁴ The law

156. *Id.* The statute, while giving almost identical rights as parents, specifically excludes a parent or guardian's "power to consent to marriage or adoption of a minor . . ." *Id.*

157. *Id.*

158. *Id.*

159. See Jami L. Crews, *When Mommy's a Minor: Balancing the Rights of Grandparents Raising Grandchildren Against Minors' Parental Rights*, 28 LAW & PSYCHOL. REV. 133, 136–37 (2004).

160. *Id.* at 141.

161. *Id.*

162. See *Troxel v. Granville*, 530 U.S. 57 (2000).

163. *Hernandez v. Hernandez*, 265 P.3d 495, 151 Idaho 882 (2011).

164. Nonetheless, given the personal nature of child custody disputes, it is important to keep conflict among the parties at a minimum in order to maintain relationships and facilitate cooperation.

in most states actually encourages conflict among parties by directing them into an adversarial system where attorneys define and sharpen differences between the parties, often leading to personal and emotional attacks.¹⁶⁵ These conflicts are exacerbated by the high costs and substantial psychological stress that accompany litigation.¹⁶⁶ In the words of Benjamin Cardozo, lawsuits are “catastrophic experiences” for ordinary citizens.¹⁶⁷

A study conducted in 1999 found that marital conflict has a tremendous negative impact on the emotional wellbeing of a child caught in an acrimonious custody battle.¹⁶⁸ Children caught in parent/grandparent or parent/third-party custody disputes are similarly likely to suffer negative consequences.¹⁶⁹ Indeed, children may suffer more in third-party versus parent custody cases than in parent versus parent custody cases because in the former case the child/parent relationship is often already under great pressure.¹⁷⁰ Psychiatrist Andre Derdeyn believes that:

A grandparent’s filing suit for visitation during times of children’s great losses and changes occasioned by death, divorce, or remarriage of parents or adoption by stepparents can only be experienced as yet another stress or threat by the child’s primary caretaker and, therefore, by the child. At times when the child’s need for stability and security and for being certain upon whom he can depend are very high, such legal initiatives by grandparents are likely only to add to the child’s already excessive emotional turmoil, if for no more reason than the initiation of such litigation being seen as a threat to the integrity and economy of the family by the parent or parents.¹⁷¹

Further, instead of improving the strained child/parent relationship, the court adds “significant new burdens to it.”¹⁷² As psychologist David A. Martindale points out:

When, in the name of preserving relationships between children and others whom we deem to be important, we expose children to overt disharmony between their parents and members of the

165. Stephen A. Newman, *Grandparent Visitation Claims: Assessing the Multiple Harms of Litigation to Families and Children*, 13 B.U. PUB. INT. L.J. 21, 27 (2003).

166. *Id.*

167. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 128 (1921).

168. Catherine C. Ayoub, Robin M. Deutsch & Andronicki Maraganore, *Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM. & CONCILIATION CTS. REV. 297, 308 (1999).

169. See Newman, *supra* note 165, at 27.

170. See Newman, *supra* note 165, at 27–28.

171. Andre P. Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissention More Pronounced?*, 55 AM. J. ORTHOPSYCHIATRY no. 2 at 277, 285 (1985).

172. Newman, *supra* note 165, at 29.

extended family, we run the risk of doing more harm than good . . . Every time that a child departs the parental home for visitation that has been ordered by the court, the anger felt by the parents who must relinquish the child and the anger felt by the grandparents who must take the child under such circumstances will exacerbate the emotional wounds inflicted on all participants during the initial battle.¹⁷³

The personal nature of child custody disputes often creates confusion for children who are caught in the middle of the legal conflict.¹⁷⁴ These children are “torn by conflicting loyalties” and may be used as pawns, spies, or prizes in the continued conflict between the parties.¹⁷⁵ Although the parties’ anger is directed against each other, children are the focal point of this anger, and the attacks they hear can be very personal and disturbing.¹⁷⁶ Because “[c]hildren are sensitive to their caretaker’s fears and anxieties,”¹⁷⁷ these factors culminate in increased anxiety that can cause both physical and emotional problems for children.¹⁷⁸

Not surprisingly, studies show that there is a strong correlation between continued fighting between parties and both behavioral disturbances and conduct disorders in children.¹⁷⁹ Additional research shows that domestic violence also causes disturbances in conduct and anxiety in children.¹⁸⁰ This is true even if the child has only indirect exposure to the domestic violence.¹⁸¹ Courts too have recognized this problem.¹⁸² Further, high conflict custody disputes are linked to damaging a child’s emotional health,¹⁸³ including increases in anxiety, aggression, depression, withdrawal, bedwetting, and phobias.¹⁸⁴ It is clear that antagonistic litigation is harmful to children because it does not provide a structured environment where children are able to “relate well to both sides.”¹⁸⁵

Even after litigation is over, the strains of litigation will likely leave lasting scars and familial discord among parties. This problem is not something that can be resolved by the courts. Indeed, the court in *Richardson* recognized it was powerless when it said, “We can only hope that . . . a healthy relationship will continue despite this litigation.”¹⁸⁶

173. David A. Martindale, *Troxel v. Granville: A Nonjusticiable Dispute*, 41 FAM. CT. REV. 88, 89 (2003).

174. Newman, *supra* note 165, at 27.

175. Newman, *supra* note 165, at 28.

176. Newman, *supra* note 165, at 28.

177. Newman, *supra* note 165, at 32.

178. Newman, *supra* note 165, at 32.

179. Newman, *supra* note 165, at 29.

180. Newman, *supra* note 165, at 29.

181. Newman, *supra* note 165, at 29.

182. *Trombley v. Trombley*, 301 A.D.2d 890, 891 (N.Y. App. Div. 2003).

183. *Id.*

184. Ayoub et al., *supra* note 168, at 302.

185. Newman, *supra* note 165, at 30.

186. *Richardson v. Richardson*, 766 So. 2d 1036, 1043 (Fla. 2000).

Therefore, it appears that if courts were truly acting in the best interest of children and families, they would encourage alternative solutions to litigation.

V. IDAHO'S CUSTODY STATUTE § 32-717 SHOULD BE CLARIFIED AND EXPANDED

A. Idaho's Third Party Child Custody Laws Are Unnecessarily Complex

Idaho's third-party child custody laws do not have a coherent structure that allows for uniform application or consistent outcomes. These problems are created by a statutory structure that limits standing to participate in custody determinations to certain grandparents in divorce actions,¹⁸⁷ while the common law provides means for any individual to obtain custody of a child.¹⁸⁸ Further, Idaho's de facto custodian statute does not do enough to fix this discrepancy.¹⁸⁹ The structure of these laws is confusing and leaves many parties questioning their legal rights and options when it comes to custody determinations.

At the heart of this problem is the Idaho Supreme Court's holding in *Stockwell v. Stockwell*. There, the court held that "where an adverse party has had custody of a child for an appreciable period of time . . . the custody of the child will be left with that party if the best interests of the child so dictate."¹⁹⁰ Further, in that case, the court "reject[ed] . . . the . . . argument that only a mandatory showing of abandonment or patent unfitness will suffice to overcome a natural parent's right."¹⁹¹ Thus, the case appears to contradict *Troxel* because in certain situations¹⁹² it appears to place "the best-interest determination solely in the hands of the judge."¹⁹³ Even so, this holding was upheld in *Hernandez* because the *Troxel* holding does not force a court to presume that a parent's decisions are in the best interests of a child.¹⁹⁴

Curiously, the Idaho Supreme Court, in the case *In re Doe*, found that Idaho Code section 32-717(3) applies only to divorce proceedings.¹⁹⁵

187. *In re Doe*, 224 P.3d 499, 507, 148 Idaho 432, 440 (2009).

188. *Stockwell v. Stockwell*, 775 P.2d 611, 614, 116 Idaho 297, 300 (1989).

189. *See Brandt*, *supra* note 17, at 310.

190. *Stockwell*, 775 P.2d at 614, 116 Idaho at 300.

191. *Id.*

192. The *Stockwell* holding requires that the courts apply a presumption in favor of a natural parent "unless the nonparent demonstrates either that the natural parent has abandoned the child, that the natural parent is unfit or that the child has been in the nonparent's custody for an appreciable period of time." *Stockwell*, 775 P.2d at 613, 116 Idaho at 299. Accordingly, situations such as those found in *Hernandez* and *Richardson* would not require any deference to a fit parent's decision under Idaho common law. *See id.*

193. *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

194. *Hernandez v. Hernandez*, 265 P.3d 495, 500-01, 151 Idaho 882, 887-88 (2011).

195. *In re Doe*, 224 P.3d 499, 507, 148 Idaho 432, 440 (2009).

The court, however, did not give much reasoning behind its decision.¹⁹⁶ The court's interpretation from that case is misleading because the plain language of section 32-717(3) indicates that it should apply to "any case."¹⁹⁷ Even though the grandparent custody provision is part of a statute that deals with divorce actions,¹⁹⁸ the context of the statute as a whole should not overrule the language and the specific context in which it was used.¹⁹⁹ Applying rules of statutory construction, one could easily find that the grandparent custody statute applies to a variety of different actions in addition to divorce cases.

The time period of divorce proceedings are not as limited as some people might think. In *Gifford v. Gifford*, the Idaho Supreme Court held that the child custody and support aspects of a divorce action are still pending until the children reach the age of majority.²⁰⁰ This means that, for many grandparents, a child custody case can be brought at almost any time following a divorce proceeding.²⁰¹ Even so, parties must prove the necessary grounds for bringing an action for custody including proper jurisdiction.

Nonetheless, given the interpretation of *In re Doe*,²⁰² Idaho Code section 32-717(3) grants standing only to a specific type of grandparent participating in a divorce action.²⁰³ Thus, a grandparent who takes care of a grandchild that is born out of wedlock is distinguished from a grandparent whose child got married. With changing societal norms and the departure from the traditional nuclear family, these provisions are no longer adequate or fair to many individuals who are currently caring for another's children. In addition, the de facto custodian statute applies only to guardianship proceedings and thus provides limited protection

196. Idaho Code section 32-717(1) clearly applies to divorce actions. The statute states that "[i]n an *action for divorce* the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interest of the children." IDAHO CODE ANN. § 32-717(1) (West Supp. 2013) (emphasis added). In contrast, the language in section 32-717(3) is much broader and includes "*any case* where the child is actually residing with a grandparent . . ." *Id.* § 32-717(3) (emphasis added). However, the court in *In re Doe* does not give any reasoning for limiting section 32-717(3) to divorce actions other than pointing out that section 32-717(1) begins with "[i]n an action for divorce." *In re Doe*, 224 P.3d at 507, 148 Idaho at 440.

197. IDAHO CODE ANN. § 32-717(3) (West 2013).

198. See generally IDAHO CODE ANN. § 32-717 (West 2013).

199. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997). The Idaho Supreme Court has stated that "where the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 976 P.2d 477, 483, 132 Idaho 551, 557 (1999).

200. *Gifford v. Gifford*, 297 P. 1100, 1101, 50 Idaho 517, 517 (1931).

201. *Id.* However, because the provision only applies to divorce actions, it is unfairly limited to parents who were actually married.

202. *In re Doe*, 224 P.3d at 507, 148 Idaho at 440.

203. Idaho Code section 32-719 (dealing with grandparent visitation) is also found in Idaho's divorce code. It could likely be argued that these visitation claims only apply when a child has divorced parents as well.

for informal caregivers who wish to obtain legal custody rights to children.²⁰⁴

The purpose of Idaho Code section 32-717(3) has been severely restricted by court opinions that limit standing to grandparents in divorce actions because Idaho common law provides that “where an adverse party has had custody of a child for an appreciable period of time . . . the custody of the child will be left with that party if the best interests of the child so dictate.”²⁰⁵ How can the court award custody to third parties if they have no standing to bring a claim or enforce a legal right? *Stockwell* gives a third party (any third party) the right to custody of a child in the best interest analysis, but if only grandparents have standing, the common law rule is essentially worthless.

In contrast to Idaho’s visitation statute, which provides grandparents with “reasonable visitation . . . upon a showing that the visitation would be in the best interest of the child,”²⁰⁶ Idaho’s custody statute only provides standing in custody disputes if a grandchild “actually resides with a grandparent in a stable relationship.”²⁰⁷ Although the Idaho visitation statute is much broader than the custody statute,²⁰⁸ the Idaho Supreme Court in *Leavitt v. Leavitt* declined an opportunity to address the constitutionality of the grandparent visitation statute.²⁰⁹

All of these different provisions indicate the inconsistencies found in the Idaho statutory and common law structure regarding child custody. The statute, while attempting to provide caregiving grandparents with an appropriate avenue to bring an action, unnecessarily discriminates against children born out of wedlock.²¹⁰ Further, the statute is drawn too narrowly because grandparents aren’t the only people who care for another’s kids. With the addition of the *Stockwell* holding,²¹¹ which permits third parties to obtain custody, the overall statutory scheme becomes utterly confusing because third parties typically do not

204. Brandt, *supra* note 17, at 310.

205. *Stockwell v. Stockwell*, 775 P.2d 611, 614, 116 Idaho 297, 300 (1989).

206. IDAHO CODE ANN. § 32-719 (West 2013).

207. IDAHO CODE ANN. § 32-717 (West Supp. 2013).

208. The Idaho visitation statute allows for reasonable visitation to be granted to any grandparent if doing so would be in the best interests of the child. IDAHO CODE ANN. § 32-719 (West 2013). By contrast, the Idaho custody statute only provides standing if a grandchild actually lives with a grandparent and has a stable relationship with him or her. IDAHO CODE ANN. § 32-717(3) (West Supp. 2013).

209. *Leavitt v. Leavitt*, 132 P.3d 421, 428, 142 Idaho 664, 671 (2006).

210. Additionally, the statute would discriminate against children in situations where the father has not been identified or where a parent has died. Because the statute only applies to divorce actions, grandparents of these children would be unable to bring a claim under section 32-717.

211. *Stockwell*, like *Hernandez*, arose out of a divorce action. *Stockwell v. Stockwell*, 775 P.2d 611, 612, 116 Idaho 297, 298 (1989). However, Idaho’s statute differed in 1989 when that case was decided, and as the *Stockwell* court pointed out, “[t]he paramount consideration in any dispute involving the custody and care of a minor child [was] the child’s best interests.” *Stockwell*, 755 P.2d at 613, 116 Idaho at 299.

have standing. Thus, the overall legal scheme behind child custody is in serious need of revision.

B. The Phrases “Actually Residing” and “Stable Relationship” Are Not Adequately Defined

Idaho Code section 32-717(3) does not attempt to define key terms in the statute.²¹² While this may allow courts to exercise more discretion over grandparent custody litigation, it is certain to increase the costs of litigation and to leave parties unsure about the likelihood of bringing a successful claim. In the interest of relieving an overburdened court system, it would be beneficial to have more clearly defined standards that would increase the chance of parties settling out of court.

Since several key terms are not defined in the statute, far too much is open to interpretation. The term “actually residing,” for instance, can have many different meanings. For example, would a child who lives with a parent in the grandparent’s home be actually residing with a grandparent? What if the grandparent were residing with the child in the parent’s home? How long does a child have to live with a grandparent before the child is actually residing with the grandparent? How do interrupted periods of time affect this analysis? These questions have not yet been answered in Idaho. In some other states, however, legislatures have answered these questions by either adequately defining the terms or providing sufficient guidance so that a definition is unnecessary.

In Pennsylvania, for instance, the court avoids the phrase “actually residing” and instead requires that the child reside with a grandparent for twelve consecutive months.²¹³ The statute also excludes brief temporary absences of the child from the home and requires that the action be filed within six months after the child has been removed from the home by the child’s parent.²¹⁴ Arkansas has a similar statute that gives a grandparent standing if certain conditions are met.²¹⁵

Colorado has a more expansive statute and allows any person who has physical care of the child for at least one hundred eighty-two days to bring an action for custody if it is brought within one hundred eighty-two days of the child being removed from that person’s care.²¹⁶ Until re-

212. See IDAHO CODE ANN. § 32-717 (West Supp. 2013).

213. 23 PA. CONS. STAT. ANN. § 5324(3)(iii)(C) (West 2013).

214. *Id.*

215. The Arkansas statute provides separate requirements for children who are younger than twelve months from those who are older than twelve months. For a grandchild younger than twelve, the child must live with the grandparent for six continuous months, the grandparent must be the primary caregiver, and the period of continuous care must occur within one year of the initiation of the child custody proceeding. For a grandchild older than twelve months, the child must reside with the grandparent for more than a year, the grandparent must be the primary caregiver, and the continuous custody must be within one year of the initiation of custody provisions. ARK. CODE ANN. § 9-13-101 (West 2013).

216. COLO. REV. STAT. ANN. § 14-10-123(c) (West 2013).

cently, Arizona skipped the residence requirement completely and instead allowed any person to file a petition for custody in the county where the child was permanently residing or found, “but only if the child [was] not in the physical custody of one of the child’s parents.”²¹⁷ These statutes provide more concrete definitions for actually residing and thus forego the necessary questions that courts must ask in Idaho.

The Idaho statute also does not provide much guidance as to what constitutes a stable relationship. Even though *Hernandez* held that special weight is given to a fit parent’s decision,²¹⁸ the antecedent inquiry is whether a grandparent has standing. Accordingly, the lack of definition here opens the courts to a host of unnecessary litigation. Further, the statute leaves too much discretion in the hands of a judge because, for the most part, a person’s concept of “stable” is subjective. Even so, a grandparent without a stable relationship is not likely to be able to override a fit parent’s wishes and obtain custody of a child.

C. Other States’ Statutes Are More Inclusive of Third Parties

Among the statutes of the fifty states, Idaho Code section 32-717 is an oddity in child custody determinations.²¹⁹ Many other states provide

217. ARIZ. REV. STAT. ANN. § 25-401(B)(2) (2012), *repealed by* ARIZ. REV. STAT. ANN. § 25-402 (2013). The statute was repealed by S.B. 1127, 50th Leg., 2nd Reg. Sess. (Ariz. 2012) to give standing to any person other than a parent without regard to whether the child resides with his parent effective January 1, 2013.

218. *Hernandez v. Hernandez*, 265 P.3d 495, 500, 151 Idaho 882, 887 (2011).

219. *Compare* ARK. CODE ANN. § 9-13-101 (West 2013) (limited to grandparents); GA. CODE ANN. § 19-9-3 (West 2012) (rights of non-parent third parties limited); IOWA CODE ANN. § 598.41 (West 2013) (limited rights for third parties); KAN. STAT. ANN. § 23-3203 (West 2013) (rights of non-parent third parties limited); MD. CODE ANN., Fam. Law § 9-102 (West 2013) (providing grandparents with visitation only); MISS. CODE ANN. § 93-5-24(1)(e) (West 2013) (granting third party a right to custody only when parents have abandoned or deserted child or are mentally, morally, or otherwise unfit to raise the child); MONT. CODE ANN. § 40-4-212 (West 2013) (limited rights for third parties); NEB. REV. STAT. ANN. § 42-364 (West 2013); (limited rights for third parties) (amended 2013); N.M. STAT. ANN. § 40-4-9.1(K) (West 2013) (providing that a person other than a natural or adoptive parent shall not be awarded custody absent a parent’s unfitness) (A child’s interaction with a third person is, however, considered as a factor in the best interest determination if such relationship may significantly affect a child’s best interest.); N.M. STAT. ANN. § 40-4-9 (West 2013)); N.D. CENT. CODE ANN. § 14-09-06.2 (West 2012) (limited rights for third parties) (amended 2013); R.I. GEN. LAWS ANN. § 15-5-16 (West 2013) (limited rights for third parties); UTAH CODE ANN. § 30-3-10 (West 2013) (limited rights for non-parent third parties); VT. STAT. ANN. tit. 15, § 665 (West 2013) (limited rights for third parties); WIS. STAT. ANN. § 767.41 (West 2013) (providing limited rights to third parties, but also stating that nothing will foreclose a person other than a parent who has physical custody of a child from proceeding under another statute); *and* WYO. STAT. ANN. § 20-2-201 (West 2013) (limited rights for third parties); *with* CONN. GEN. STAT. ANN. § 46b-57 (West 2013) (permitting “any interested third party or parties to intervene upon motion”); DEL. CODE ANN. tit. 13, § 721 (West 2013) (permitting intervention of interested third parties upon a showing of good cause); D.C. CODE § 16-914 (2013) (permitting intervention by any interested party upon a showing of good cause); HAW. REV. STAT. § 571-46 (West 2012) (permitting an award of custody to persons other than parents when such award is in the best interest of the child and establishing prima facie award of custody

to any person with de facto custody of a child in a stable and wholesome home) (amended 2013); 750 ILL. COMP. STAT. ANN. 5 / 601(b)(2) (West 2013) (allowing any person other than a parent to bring an action for custody if the child is not in the physical custody of one of the parents) (The statute also provides a grandparent who is a parent or stepparent of a deceased parent to bring an action if the surviving parent has been absent for more than one month without the deceased spouse knowing where he or she is, the surviving spouse is in jail, or the surviving parent has been convicted of certain criminal acts. *Id.* at § 601(b)(4)) (In addition, the statute permits intervention of interested parties upon a showing of good cause. *Id.* at § 604(c)); IND. CODE ANN. § 31-17-2-8 (West 2013) (evidence of child being cared for by a de facto custodian considered in custody determination) (de facto custodians are made parties to custody proceedings and custody is awarded to de facto custodian if it is in the best interests of the child. IND. CODE ANN. § 31-17-2-8.5(c)–(d) (West 2012)); KY. REV. STAT. ANN. § 403.270(2) (West 2013) (giving de facto custodians the same consideration as parents in best interest determinations); LA. CIV. CODE ANN. art. 133 (2013) (allowing an award of custody to any person with whom a child has been living in a wholesome and stable environment or a person able to provide an adequate and stable environment if placing the child in the custody of both parents would result in substantial harm to the child); ME. REV. STAT. ANN. tit. 19-A, § 1653(2)(C) (West 2013) (giving courts the ability to award parental rights and responsibilities to a third person upon a finding that awarding parental rights and responsibilities to a parent will place the child in jeopardy); MASS. GEN. LAWS ANN. ch. 208, § 28 (West 2013) (permitting courts to award custody of a child to a third person if it seems expedient or would be for the benefit of the child); MICH. COMP. LAWS ANN. § 722.26c (West 2013) (allowing a third person to bring an action for custody if child's biological parents never married, the custodial parent is missing or dead, and the third person is related to the child within the fifth degree by marriage, blood, or adoption); MINN. STAT. ANN. § 518.156 (West 2013) (permits the intervention of interested parties upon a showing of good cause); MO. ANN. STAT. § 452.375 (West 2013) (allowing any person to petition the court and intervene as a party in interest at any time, but only awarding custody to a third party if the court finds that each parent is unfit, unsuitable, unable to be a custodian, or if the child's welfare requires placement with a third party and placement of custody with the third party is in the best interest of the child); NEV. REV. STAT. ANN. § 125.480 (West 2013) (providing that the sole consideration of a court's decision is the best interest of the child and establishing a preference for custody to be awarded first, to parents, second, to a person with whom the child has been residing in a wholesome and stable environment, third, to any person related to the child within the fifth degree of consanguinity, and fourth, to any other person that the court finds suitable); N.H. REV. STAT. ANN. § 461-A:6(1)(h) (2013) (providing that the relationship of a child with a third party who may significantly affect the child is a factor to be considered in the best interest determination); N.J. STAT. ANN. § 9:2-9 (West 2013) (allowing any person who is interested in the welfare of a child to bring an action for custody if the parents or custodian of the child are unfit); N.Y. DOM. REL. LAW § 240 (McKinney 2013) (requiring a court to enter custody orders as "justice requires," even if the award is to a person who did not petition for custody, as long as such disposition is in the child's best interests); N.C. GEN. STAT. ANN. § 50-13.2 (West 2013) (declaring that custody shall be awarded to "such person, agency, organization or institution as will best promote the interest and welfare of the child"); OHIO REV. CODE ANN. § 3109.04(D)(2) (West 2013) (permitting a court to award custody to a relative of a child if it is in the best interest of a child); OKLA. STAT. ANN. tit. 43, § 112.5 (West 2013) (custody may be awarded in order of preference to parents, grandparents, person indicated by deceased parent, relatives of parents, "person in whose home the child has been living in a wholesome and stable environment," or any other suitable person); 23 PA. CONS. STAT. ANN. § 5324 (West 2013) (giving standing to parents, a person in loco parentis, and a grandparent not in loco parentis where certain requirements are met); S.C. CODE ANN. § 63-3-530(20) (2013) (giving exclusive jurisdiction to the family court to award custody of children to either spouse or "to any other proper person or institution"); S.D. CODIFIED LAWS § 25-5-29 (2013) (giving the court discretion to allow any person to intervene in a custody determination or petition a court for custody if such person "has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a

for more expansive treatment of third parties in custody determinations. For example, Colorado's statute provides standing to any person "other than a parent who has had the physical care of a child for a period of one hundred eighty-two days or more."²²⁰ A prior version of Arizona's statute gave a person other than a parent standing if "the child is not in the physical custody of one of the child's parents."²²¹ California requires that a court "make a finding that granting custody to a parent would be detrimental to the child" before custody may be awarded to a non-parent.²²² The statute defines "detrimental to the child" to include removing a child from a person who has assumed the role of a parent.²²³ Thus, any person who has assumed a parental role may obtain custody in California. All of these statutes differ from Idaho's statute because they provide standing to any third party and don't limit standing to grandparents.

To protect children from domestic violence, Alaska implemented a statute that allows the court to award a third party sole legal and physical custody if both parents have a history of perpetrating domestic violence.²²⁴ Arkansas, in addition to many other states,²²⁵ considers domes-

significant and substantial relationship," but creating a rebuttable presumption that a child should be placed in the custody of a parent); TENN. CODE ANN. § 36-6-101 (West 2013) (permitting a court to award custody to parents or to "some suitable person, as the welfare and interest of the child or children may demand"); TEX. FAM. CODE ANN. § 102.003 (West 2013) (granting standing to many different individuals including a person who has had "actual care, control, and possession of [a] child for at least six months"); VA. CODE ANN. § 20-124.2(B) (West 2013) (providing that the court's primary consideration should be the best interests of a child, and giving due regard to a parent-child relationship, but providing that custody or visitation may be awarded to a person with a legitimate interest if it is shown by clear and convincing evidence that such award would be in the best interest of a child) ("person with a legitimate interest" is designed to be broadly construed and includes grandparents, stepparents, family members, and blood relatives VA. CODE ANN. § 20-124.1 (West 2013)); WASH. REV. CODE ANN. § 26.10.030 (West 2013) (allowing a person other than a parent to file a petition seeking custody if the child is not in the custody of one of his parents or if such person alleges that both parents are unsuitable custodians); and W. VA. CODE ANN. § 48-9-103(b) (West 2013) (giving the court discretion to grant intervention by a person whose participation is likely to be in a child's best interests, but limiting their ability to initiate an action for custody).

220. COLO. REV. STAT. ANN. § 14-10-123(c) (West 2013).

221. ARIZ. REV. STAT. ANN. § 25-401(B)(2) (2012), *repealed by* ARIZ. REV. STAT. ANN. § 25-402 (2013).

222. CAL. FAM. CODE § 3041(a) (West 2013).

223. *Id.* at § 3041(c).

224. ALASKA STAT. ANN. § 25.24.150 (West 2013).

225. *See generally* HAW. REV. STAT. § 571-46(a)(9) (West 2013) (family violence creates a rebuttable presumption that child should not be placed with perpetrator); N.C. GEN. STAT. ANN. § 50-13.2(a) (West 2013) (court shall consider domestic violence between parties in determining custody); N.D. CENT. CODE ANN. § 14-09-06.2 (West 2013) (court shall consider evidence of domestic violence in determining parental rights and responsibilities); N.J. STAT. ANN. § 9:2-4 (West 2013) (history of domestic violence considered in a best interest determination).

tic violence in child custody proceedings.²²⁶ Idaho has a similar statute dealing with domestic violence; it creates a rebuttable presumption that a parent perpetrating habitual domestic violence should not be awarded custody.²²⁷ However, unlike Alaska's statute, Idaho's statute does not provide for an alternative placement for a child if both parents are found to perpetuate domestic violence.

Another important provision found in many state child custody statutes is a separate rule that applies to stepparents. Delaware contains such a statute that affords stepparents a parent-like right to the custody of children if the child has resided with the stepparent.²²⁸ The statute essentially places a stepparent on equal footing with a parent in conducting the best interest determination.²²⁹ Illinois takes a more limited approach and provides a stepparent with the ability to bring an action only if:

- (A) the child is at least 12 years old;
- (B) the custodial parent and stepparent were married for at least 5 years during which the child resided with the parent and stepparent;
- (C) the custodial parent is deceased or is disabled and cannot perform the duties of a parent to the child;
- (D) the stepparent provided for the care, control, and welfare to the child prior to the initiation of custody proceedings;
- (E) the child wishes to live with the stepparent; and
- (F) it is alleged to be in the best interests and welfare of the child to live with the stepparent²³⁰

Considering the current dynamic of American families, Idaho would benefit from adopting a statute that provides stepparents with an avenue to secure custody rights if doing so would be in the best interests of a child.

Due to current struggles in modern families—including poverty, drug addiction, and mental illness—children commonly live with relatives other than grandparents. Indeed, even in *Hernandez*, one of the children lived with an aunt for almost a year.²³¹ Even though grandpar-

226. The Arkansas statute requires a court to consider domestic violence in the best interest determination. Domestic violence must be proven by a preponderance of evidence, which creates a rebuttable presumption that custody should not be awarded to the party perpetrating the domestic violence. ARK. CODE ANN. § 9-13-101(d)(1)–(2) (West 2013).

227. IDAHO CODE ANN. § 32-717B(5) (West 2013).

228. DEL. CODE ANN. tit. 13, § 733 (West 2013).

229. Although the constitutionality of this statute has yet to be challenged, it is likely that it would offend *Troxel's* holding requiring a “presumption that fit parents act in the best interests of their children.” *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

230. 750 ILL. COMP. STAT. ANN. 5 / 601(b)(3) (West 2013).

231. *Hernandez v. Hernandez*, 265 P.3d 495, 496, 151 Idaho 882, 883 (2011).

ents form the largest group of third parties that are caring for another's children (with an estimated 5.6 percent of children living with grandparents),²³² other third persons should not be left out because they are either a distant relative or unrelated to the child entirely by blood. Thus, the Idaho statute should be expanded to include additional third parties if the other requirements of the statute have been met.

In some states, statutes include third parties by requiring the parents to give them notice of a child custody proceeding.²³³ Delaware's statute requires notice of a child custody proceeding be given to parents, guardians, and custodians.²³⁴ The District of Columbia and other states have similar requirements.²³⁵ If such a requirement existed in Idaho, the situation in *Hernandez*, in which the parents collaborated to remove the child from the care of a custodial grandparent, could have been avoided.

VI. SUGGESTED REVISIONS TO THE IDAHO GRANDPARENT CUSTODY STATUTE

Idaho should clarify its grandparent custody statute and should broaden its application to include a wider variety of third parties. The statute should be amended to read: "In any case in which a child resides with any person other than a parent for a period of at least 180 days, the court may recognize that person as having the same standing as a parent for evaluating what custody arrangements are in the best interests of the child."

Further, the statute should define key terms to reflect the intent of the legislature. For example, "any case" should be defined to include "any judicial proceeding including but not limited to divorce actions." To ensure a constitutionally acceptable application, the legislature might also specify: "In making the best interests determination, the court must give special weight to a fit parent's decisions regarding the care, custody, and control of his or her children."

Thus, the statute would read as follows:

(3) In any case in which a child resides with any person other than a parent for a period of at least 180 days, the court may recognize that person as having the same standing as a parent

232. Crews, *supra* note 159, at 133.

233. See generally, DEL. CODE ANN. tit. 13, § 721(b) (West 2013) (notice for parents, guardians, and custodians); ARK. CODE ANN. § 9-13-101 (West 2013) (notice for grandparents); D.C. CODE § 16-914(b) (2013) (notice given to child's parents, guardian, or other custodian); 750 ILL. COMP. STAT. ANN. 5 / 601(c) (West 2013) (notice given to child's parents, guardian, and custodian); MINN. STAT. ANN. § 518.156 (West 2013) (notice given to parents, guardians, and custodians).

234. DEL. CODE ANN. tit. 13, § 721(b) (West 2013).

235. D.C. CODE § 16-914(b) (2013) (notice given to child's parents, guardian, or other custodian); 750 ILL. COMP. STAT. ANN. 5 / 601(c) (West 2013) (notice given to child's parents, guardian, and custodian); MINN. STAT. ANN. § 518.156 (West 2013) (notice given to parents, guardians, and custodians).

for evaluating what custody arrangements are in the best interests of the child. In making the best interests determination, the court must give special weight to a fit parent's decisions regarding the care, custody, and control of his or her children. Notice of any child custody proceedings must be given to a child's parents, guardians, and custodians.

(4) As used in this chapter:

(a) "Any case" means any judicial proceeding including but not limited to divorce actions.

(b) "Standing" means a party's right to make a legal claim or seek judicial enforcement of a duty or right.

(c) "Special weight" means a rebuttable presumption that a parent is acting in the best interests of his or her child. Such presumption is rebutted by providing clear and convincing evidence to the contrary.

(d) "Custodian" means any person who has resided with a child for a period of at least 180 days.

VII. THE COMMON LAW IN IDAHO ALLOWS A COURT TO AWARD CUSTODY TO A NONPARENT THIRD PARTY

In *Hernandez*, the court upheld its previous common law holding in *Stockwell v. Stockwell*.²³⁶ This holding provided that "where a child has been in the custody of a third party for an appreciable period of time . . . custody will be awarded to that party if the best interests of the child so dictate."²³⁷ As noted before, this provision is inconsistent with the current statutory scheme because these third parties usually will not have standing to bring a claim for custody.²³⁸

Although this issue was not addressed in *Hernandez*, other courts have held that: "where a parent has transferred (custody) to another (and the) other person (has assumed custody)' . . . the natural parent can regain custody only by showing a material change in circumstances sufficient that 'a change of custody will materially promote (the) child's welfare.'"²³⁹ Further, some courts have held that "a natural parent who voluntarily relinquishes custody of a minor child, through a court of competent jurisdiction, has forfeited the right to rely on the existing natural parent presumption."²⁴⁰

236. *Hernandez v. Hernandez*, 265 P.3d 495, 500–01, 151 Idaho 882, 887–88 (2011).

237. *Stockwell v. Stockwell*, 775 P.2d 611, 614, 116 Idaho 297, 300 (1989).

238. See *supra* Part IV.A.

239. Betty Campbell, Comment, *Constitutional Law--Blair v. Badenhope: Parent v. Parent or Parent v. Non-Parent--The Tennessee Supreme Court's New "One Size Fits All" Standard for Modification of Valid Custody Orders*, 34 U. MEM. L. REV. 199, 216–17 (2003) (quoting and altering *Ex parte McLendon* 455 So. 2d 863, 865 (Ala. 1984).

240. *Id.* at 218 (quoting *Grant v. Martin*, 757 So. 2d 264, 266 (Miss. 2000)).

Following the holding in *Stockwell*, the court in *Hernandez* would have been justified in awarding sole legal and physical custody to the grandmother Janice.²⁴¹ However, Janice did not appeal the trial court's decision while the father Charles did.²⁴² Thus, the Idaho Supreme Court did not need to decide whether the trial court erred in awarding Charles custody; it only needed to decide whether it erred in awarding Janice the limited custody rights it did.²⁴³

VIII. CONCLUSION

Idaho Code section 32-717(3) is currently an inadequate statute to meet the demands of a changing society. The statute limits standing to certain grandparents in divorce actions and excludes other parties who commonly care for another's children.²⁴⁴ Although there are methods that a third party can employ to obtain some type of legal rights over a child, the ability to obtain custody is severely limited.²⁴⁵ Further, the current statutory scheme is inconsistent with the Idaho Supreme Court's holdings in several important cases. This includes *Stockwell v. Stockwell* (where the court held that a third party will be awarded custody if the child has lived with that party for an appreciable period of time and the best interests of the child would be served by awarding that party custody)²⁴⁶ and *In re Doe* (where the court held that Idaho Code section 32-717(3) is limited to divorce actions).²⁴⁷ The plain language of the statute simply does not support these holdings.

As a result, Idaho Code section 32-717(3) should be amended to extend standing to a wider variety of third parties and to apply to more than just divorce suits. In doing so, Idaho would come more in line with other states that provide more consistent and appropriately defined statutes.²⁴⁸ *Hernandez v. Hernandez* was an appropriately decided case; however, the court's reasoning has done little to clarify a confusing statutory and common law scheme.

With the rising number of children who are being raised by third parties in an informal caregiver setting,²⁴⁹ Idaho would be wise to clarify this issue and provide more concrete guidance. Even so, the use of alternative methods should be encouraged, as the adversarial nature of liti-

241. See *Stockwell*, 775 P.2d at 614, 116 Idaho at 300.

242. *Hernandez v. Hernandez*, 265 P.3d 495, 496–97, 151 Idaho 882, 883–84 (2011).

243. See *Hernandez*, 265 P.3d at 497, 151 Idaho at 884.

244. See IDAHO CODE ANN. § 32-717(3) (West 2013).

245. See Brandt, *supra* note 17, at 310–11.

246. *Stockwell*, 775 P.2d at 614, 116 Idaho at 300.

247. *In re Doe*, 224 P.3d 499, 507, 148 Idaho 432, 440 (2009).

248. See ALASKA STAT. ANN. § 25.24.150 (West 2013); ARIZ. REV. STAT. ANN. § 25-401 (2013); COLO. REV. STAT. ANN. § 14-10-123(c) (West 2013).

249. Bryson & Casper, *supra* note 17.

gation is often harmful to both children and families.²⁵⁰ By amending Idaho Code section 32-717(3) as suggested above, the Idaho Legislature could help courts become more consistent and provide a statutory scheme that truly is in the best interest of children.

*Matthew G. Bennett, LMSW**

250. *See supra* Part III.B. By making these proposals I do not mean to suggest that contested litigation should be considered as an acceptable starting point by informed, thoughtful adults who are concerned with the best interest of a child.

* J.D. Candidate, University of Idaho College of Law, May 2014 and licensed psychotherapist at Alliance Family Services in Moscow, Idaho. I would like to thank my wife Ashley and my daughter Kiley for their patience and support throughout this writing process. I would also like to thank Professor Earl Blower for his feedback, guidance, and input in choosing this topic, conducting my research, and writing my paper. This paper, however, in no way represents any statements, assertions, or opinions of Professor Blower and is the sole product of the author.