Third Party Custody Disputes in Minnesota: Overcoming the "Natural Rights" of Parents or Pursuing the "Best Interests" of Children?

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THIRD PARTY CUSTODY DISPUTES IN MINNESOTA: OVERCOMING THE "NATURAL RIGHTS" OF PARENTS OR PURSUING THE "BEST INTERESTS" OF CHILDREN?

Lawrence Schlam†

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† Professor of Law, Northern Illinois University College of Law. The author wishes to gratefully acknowledge the invaluable research assistance of Mark A. Gruenes (J.D., N.I.U. '00) in the preparation of this article. Certain portions of this article are adapted from, and are modified versions of an earlier, similar discussion of third party custody disputes in Illinois. See Lawrence Schlam, Children "Not in the Physical Custody of One of [Their] Parents": The Superior Rights Doctrine and Third Party Standing Under the Uniform Marriage and Dissolution of Marriage Act, 24 S. ILL. U. L. REV. 405 (2000).
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1. INTRODUCTION

In the United States, which has the western world’s leading divorce rate, children increasingly are being raised in non-traditional families. Many children will spend some time living in a stepfamily. Often a non-parent is the only father or mother a child has known—the “one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, [has fulfilled] the child’s psychological need for a parent.” That person is essential to a child’s development and well being, often more so than a biological or adoptive parent, and the emotional bonds children form with these “non-parents” can be as strong and meaningful as the bonds between parents and their children.

1. “In 1990, the U.S. had the highest divorce rate among advanced Western nations; 6 out of 10 of those divorces took place in families with children.” See Beth Bailey, Broken Bonds: The Effects of Divorce on Society, Family, and Children, CHI. TRIB., Feb. 9, 1997, at 6.

2. See MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 1-2 (1994). The nuclear family no longer is the dominant family model; it is now estimated that only 21% of households in America are traditional nuclear families. See id.

3. See Bryce Levine, Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding, 25 Hofstra L. Rev. 315, 316 (1996) (providing demographers’ prediction that one in three American children will spend some of their time growing up in a stepfamily); Jennifer Klein Mangnall, Stepparent Custody Rights After Divorce, 26 Sw. U. L. Rev. 399, 400 (1997) (stating that one out of every three children will spend some time living in a stepfamily); Virginia Rutter, Lessons from Stepfamilies, PSYCHOL. TODAY, May-June 1994, at 30.

4. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (1973); see also Mangnall, supra note 3, at 417-19 (discussing the need for courts to recognize the importance of psychological parenting). A child’s perception of a parent is shaped by his or her day-to-day needs. See James B. Boskey, The Swamps of Home: A Reconstruction of the Parent-Child Relationship, 26 U. Tol. L. Rev. 805, 808 (1995).

5. See GOLDSTEIN ET AL., supra note 4 (suggesting resolving custody disputes by recognizing the importance of this sort of psychological parent, rather than focusing on the biological aspects of parenting); see also LEGAL RIGHTS OF CHILDREN, § 2.08, at 52-53 (Donald T. Kramer ed., 2d ed. 1994) (discussing the psychological parent doctrine).

6. See Arlene B. Huber, Children at Risk in the Politics of Child Custody Suits: Acknowledging their Needs for Nurture, 32 U. LOUISVILLE J. FAM. L. 33, 34 (1993-94). “[T]erminating custodial relationships between stepparents and stepchildren simply because the marriage ends is unfair to stepparents who assumed a parental role during marriage and can be detrimental to children, especially if they view their stepparents as ‘psychological parents’.” Mangnall, supra note 3, at 403; see also Susan H. v. Jack S., 37 Cal. Rptr. 2d 120, 124 (Cal. Ct. App. 1994) (stating that
Unfortunately, however, third parties who have become "psychological parents" and seek custody are faced with an obstacle not faced by biological or adoptive parents: the "superior rights" doctrine, a presumption in most states that unless parents are at least in some broad sense unfit, they are the best persons to raise and nurture their children. For example, one of the model provisions in the Uniform Marriage and Divorce Act (UMDA), promulgated almost thirty years ago, contains a "standing" requirement calculated to give third parties a right to petition for custody only under the narrowest of circumstances. This

the relationship between a child and the man she knows as her father does not necessarily terminate upon divorce from the child's mother).


8. Stepparents are not afforded the same rights in child custody suits as parents, because in the eyes of the law, stepparents are seen as legal strangers to their former stepchildren. See Katherine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed, 70 VA. L. REV. 879, 894 (1984); see also Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family, 8 BYU J. PUB. L. 321, 335 (1994) (arguing that when two adults have raised a child together in the context of a nuclear family setting, there should be no significance attached to the nonexistence of a biological or legal connection between the child and one of the parents).


provision, with some subsequent modifications or repeals in several states, was incorporated into the law of several states. Typically, legislation to preserve the “superior rights” doctrine:

[was] devised to protect the “parental rights” of custodial parents and to insure that intrusions upon those rights will occur only when the care the parent is providing the child falls short of the minimum standard imposed by the community at large—the standard incorporated in the neglect or delinquency definitions of the state’s Juvenile Court Act.

13. See, e.g., WASH. REV. CODE ANN. §26.09.180 (West 1986) (repealed by 1987 Wash. Laws ch. 460, § 61). But see WASH. CODE ANN. § 26.10.030 (West 1997 & Supp. 2000), which augments the third party standing language found in the UMDA as follows: “[O]nly if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.” Id.


[Given the] intense emotionalism [of custody adjudication], how “unfit” litigating parents often appear or are made to appear to judges, and the invitation the “best interests” standard’s indeterminate qualities offers to judges to award custody to those litigants whose attributes and values most resemble their own, . . . an expansion of judicial discretion may well produce a much larger increase in the number of stepparents custody awards than is warranted by the number of [stepparents who truly deserve custody]. Denying “standing” to stepparents can be justified, then, because many of the “truly” meritorious stepparent claims will in any event be honored by decisions “outside doctrinal parameters,” while the “formal,” “no standing,” rule will serve to protect many biological parents from those trial judges tempted to use indeterminate custody standards to prefer stepparents inappropriately.

Robert J. Levy, Rights and Responsibilities for Extended Family Members?, 27 FAM. L.Q.
The problem, however, is that requiring parental "unfitness" as a condition precedent to placing children with third parties unnecessarily duplicates the work of the Adoption and Juvenile Court Acts, may interfere with the court's ability to focus on the best interests of children, and rarely is necessary for the protection of the legitimate interests of parents. Indeed, the "superior rights" presumption was directly called into question just a few years ago in a Pennsylvania case, Rowles v. Rowles. The concurring opinion questioned the legitimacy of recognizing "a prima facie presumption that parents have a right to custody of their children as against third parties."

[s]erious questions may be posed with respect to the soundness of the apriorism that mere biological

191, 197-98 (1993) (speculating on why participants in a family law conference were largely committed to "protecting the interests of the biological parents" and favoring the "traditional doctrine") (citations omitted).

16. See In re L.A.E., 554 N.W.2d 393, 397, 398 (Minn. 1996). See, e.g., In re Staat, 287 Minn. 501, 506, 178 N.W.2d 709, 713 (1970) (holding that the abandonment by a parent must be intentional and not due to circumstances beyond the control of the parent). For example, "abandonment" is any conduct that evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. See id. at 505-06, 178 N.W.2d at 713 (holding that abandonment requires both actual desertion of the child and "an intention to forsake the duty of parenthood"). Under Staat the abandonment must be intentional rather than due to misfortune or misconduct. See id. Consequently, the petitions of parents who fail to support their children or who relinquish custody or otherwise forfeit a claim to parenthood may be unable at a later date to regain custody. See generally Wilson v. Barnet, 275 Minn. 32, 36-37, 144 N.W.2d 700, 703-04 (1966) (holding that a parent who demonstrated unfit behavior did not have the right to withhold consent from an adoption proceeding); In re Hohmann, 225 Minn. 165, 168-69, 95 N.W.2d 643, 647 (1959) (holding that if the custodial parent passed away then the child would automatically return to the non-custodial parent, unless a third party could show a finding of abandonment or unfitness).

17. See infra Part II.

18. See Note, Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties, 73 YALE L.J. 151, 154 (1963-64) ("Whether as a result of [feeling inadequate to determine the best interests of children] or because of a sympathy for parental emotions, most courts applying the best interest test to third party situations utilize a variety of procedural devices [such as the parental rights presumption] which increase the probability of the natural parent winning the suit."). See generally JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 185-86 (1947) (discussing generally the operation of a presumption).


20. Id. at 127 (quoting Ellerbe v. Hooks, 416 A.2d 512, 516 (Pa. 1980) (Flaherty, J., concurring)).
relationship assures solicitude, care, devotion, and love for one's offspring... [W]here a third party better fulfills these needs, or where other circumstances indicate third party custody to be preferable, the courts, when exercising judgment as to a child's welfare, should not be restrained solely by a presumption.

Thus, the "superior rights" presumption at least is questionable and may be problematic in that it compels court's to focus on parental "quasi-property" rights instead of the overall welfare of children, which often may involve maintaining relationships with one or more non-parents.

This article first discusses the evolution of the parental "superior rights" doctrine in Minnesota, then attempts to illuminate the current burden of proof on third parties seeking custody. The question is whether third parties must meet a "one-part" balancing test (proof that the child's "best interests" lie with custody in a third party as compared to a parent) or a "two-part" test (proof of parental "unfitness," then proof of the child's "best interests"). Finally, an effort is made to reach certain discrete conclusions about whether interpretation of the "superior rights" doctrine in Minnesota has furthered or somehow inhibited the rendering of custody decisions in the "best interests" of children.

21. *Id.* at 128.

22. "Superior rights" doctrines are sometimes justified today through the assumption that a natural parent will most adequately fulfill his child's needs. *See In re Clausen*, 289 N.W.2d 153, 155-56 (Minn. 1980) (holding that a party may rebut this presumption by clear and convincing evidence); *In re Klugman*, 56 Minn. 113, 118, 97 N.W.2d 425, 429 (1959). There is, however, little scientific basis for the presumption that a child's best interests are best served by being in the custody of natural parents. *See Richard J. Gelles, Family Reunification/Family Preservation: Are Children Really Being Protected?, 8 J. INTERPERSONAL VIOLENCE 557, 560 (1993).*

23. After all, critics of Goldstein et al., *supra* note 4, say the real best interests of a child may be in retaining relationships, if they exist, with more than one psychological parent. *See generally Peggy C. Davis, Use and Abuse of the Power to Sever Family Bonds, 12 N.Y.U. REV. L. & SOC. CHANGE 557, 559 (1983-84). For other criticisms of the conclusions of Goldstein et al., *see Nanette Dembitz, Beyond Any Discipline's Competence, 83 YALE L.J. 1304 (1973-74); Peter L. Strauss & Joanna B. Strauss, Book Review, 74 COLUM. L. REV. 996 (1974).*
II. THE “SUPERIOR RIGHTS” PRESUMPTION: HAS PARENTAL UNFITNESS SUFFICIENT FOR TERMINATION OF RIGHTS OR A FINDING OF NEGLECT BEEN A NECESSARY PRECURSOR TO THIRD PARTY CUSTODY IN MINNESOTA?

Most likely, the “superior rights” doctrine evolved from very early judicial decisions that looked only to parents’ proprietary or possessory interests in children. To some extent, the growing obsolescence of the concept of children as property led to changes in judicial attitudes and approaches. Nevertheless, “[e]ven into the early twentieth century, courts in the United States almost uniformly held that a father had the right to custody of his children as a matter of property law or title.” Even those state courts that purport to act in the best interests of children require “extraordinary circumstances”—such as forfeiture or relinquishment of parental rights—to place custody in non-parents. Some states still refuse to do so unless surviving parents can demonstrate sufficient unfitness to terminate parental rights.

Minnesota long has been a state in which “the controlling question” in custody determinations has been the best interests of the child, even though at the same time the state’s courts have enforced a parental “superior rights” presumption. Even before

26. See Kaas, supra note 14, at 1063 (stating that children historically have been viewed as the property of their parents); see also Paul Sayre, Awarding Custody of Children, 9 U. Chi. L. Rev. 672, 674-75 (1942) (explaining the historic interpretation of custody as a property interest).
27. Prior to 1964, even those states that employed the best interests test in custody disputes between parents replaced it with the “fitness test” where the contest was between a parent and a nonparent. See Henry H. Foster, Jr. & Doris Jonas Freed, Child Custody (Part I), 39 N.Y.U. L. Rev. 423, 425 (1964); see also Sayre, supra note 26, at 674-75.
28. See, e.g., In re A.R.A., 919 P.2d 388, 391 (Mont. 1996) (stating that a third party may have standing, but can be awarded custody only after there has been a finding of abuse, neglect or dependency).
29. See, e.g., Anderson v. Anderson, 89 Minn. 198, 94 N.W. 681, 682 (1903) (“[T]he essential thing [is] the welfare of the children.”); Greenwood v. Greenwood, 84 Minn. 203, 204, 87 N.W. 489, 489 (1901) (“[T]he welfare of the children will be given controlling consideration by the court.”); Flint v. Flint, 63 Minn. 187, 189, 65 N.W. 272, 273 (Minn. 1895) (“[T]he primary object of all courts, at least in America, is to secure the welfare of the child, and not the special claims of one or the other parent.”).
passage of the current Minnesota Statutes section 518.156, a non-parent in Minnesota could obtain custody of a child under the Probate Act, the Juvenile Court Act, or Minnesota Statute Chapter 259. Obtaining custody under the Probate Act, however, generally was limited to situations where both parents had died or lost the capacity to care for the child. Moreover, under the Juvenile Court Act and the Adoption Act, custody or adoption of the child could be ordered only upon a showing of parental unfitness, even if custody in the petitioner was in the child’s best interests. Natural parents, however, have occasionally been deprived of the custody of their children “under a variety of circumstances,” usually as a result of habeas corpus proceedings.

31. Id. § 525.591 (1998).
32. Id. § 260.111, subd. 2(d) (1980). “The juvenile court in those counties in which the judge of the probate juvenile court has been admitted to the practice of law in this state shall proceed under the laws relating to adoptions in all adoption matters.” Id.
33. Id. § 259.22 (1998). “Any person who has resided in the state for one year or more may petition to adopt a child or an adult.” Id.
34. See generally Burris v. Hiller, 258 Minn. 491, 104 N.W.2d 851 (1960) (discussing that if a child who had one parent dies in an automobile accident, then the other parent should have custody over the child; however, if both parents die in the accident, then a third party would have custody rights over the child).
35. It has long been the case that parents who have neglected, deserted, or abandoned their family also may forfeit their rights to custody. See Foster & Freed, supra note 27, at 432. Family and juvenile court acts in several states have long had authority to terminate and fix custody in cases of dependent or neglected children. See Walker A. Jensen, The Child Without a Family: Problems in the Custody and Adoption of Children, 1962 U. ILL. L. REV. 633, 634.
36. Only occasionally did courts circumvent this “fitness” rule. See In re N.M.O., 399 N.W.2d 700, 704 (Minn. Ct. App. 1987) (concluding that third party was entitled to an evidentiary hearing, even where the parent is fit); Tubwon v. Weisberg, 394 N.W.2d 601, 604 (Minn. Ct. App. 1986) (holding that the fitness of a natural parent will not necessarily compel custody for the parent).
37. See, e.g., Anderson v. Anderson, 89 Minn. 198, 200, 94 N.W. 681, 682 (1903) (stating that the right of parents to have custody of their children is important but not absolute). See also Clifford v. Woodford, 320 P.2d 452 (Ariz. 1957) (holding that a father did not automatically have custody of a child); Hermann v. Jenkins, 180 N.E.2d 359 (Ill. App. Ct. 1962) (“The parents’ natural right must give way to the welfare and best interest of the child.”); Clark v. Chrietztberg, 348 S.W.2d 476, 480 (Tex. Civ. App. 1961) (holding that the best interests of the child was more important than the superior rights of the parent).
III. THE "SUPERIOR RIGHTS" PRESUMPTION: THE CONSTITUTIONAL BASIS FOR THE PROTECTED FUNDAMENTAL RIGHT TO CHILD CUSTODY AND CONTROL

It should be noted at the outset, that even though the "superior rights" doctrine occasionally may seem to dictate custody decisions contrary to the emotional and relational interests of stepparents and children, the natural parent-child relationship is a protected fundamental right under the Constitution. A natural parent's right to raise his or her own child also is protected by the constitutions of some states. Indeed, in a variety of cases, the U.S. Supreme Court has even undertaken to develop a constitutional definition of the family itself.

The Court established constitutional protection for the parent-child relationship as early as 1923, in Meyer v. Nebraska. Meyer involved a Nebraska statute that forbade teaching any foreign

38. See Matter of Appeal in Cochise Cty. Juvenile Action No. 5666-J, 650 P.2d 459, 460 (Ariz. 1982) (stating that a parent has a fundamental right to the custody and control of his or her minor child); In re Newsome, 527 N.E.2d 524, 525 (Ill. 1988) ("The natural parents have the superior right to care, custody and control of their children."); see also Boatwright v. Walker, 715 S.W.2d 237, 244 (Ky. Ct. App. 1986) ("The natural parents of a child have a superior right to its care and custody.").


40. See, e.g., In re Santoro, 578 N.W.2d 369, 375 (Minn. Ct. App. 1998) (examining the fundamental right of child rearing with regard to a grandparent visitation statute), rev'd, 594 N.W.2d 174, 177 (Minn. 1999) (reversing the court of appeals decision because the trial court had abused its discretion in granting grandparents visitation rights and the appellate court had upheld the award).

41. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 504-06 (1977) (holding that the state could not apply a single family zoning statute to a family consisting of a grandparent and two of her grandchildren who were cousins; the protection accorded the traditional parent-child relationship was based upon a flexible definition of family). In holding that the definition of family is to be interpreted flexibly, the Moore court stated that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." Id. at 504. But see Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 843 (1977) (reaffirming a flexible definition of family based not necessarily on blood, marriage or adoption, yet refusing to extend constitutional protection to a foster family protesting New York's laws allowing removal of foster children from foster families).

language to a child prior to eighth grade. The Court held the statute unconstitutional, finding that the statute infringed on the liberties guaranteed by the Due Process Clause of the Fourteenth Amendment: "without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . it is the natural duty of the parent to give his children education suitable to their situation in life."

Subsequently, in Pierce v. Society of Sisters the Court was confronted with a state statute that prohibited children from attending non-public schools. The Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." Meyer and Pierce established that parents' authority to rear their children as they see fit is constitutionally protected. In West Virginia Board of Education v. Barnette, the Court reaffirmed this principle by holding that a statute requiring children to recite the Pledge of Allegiance over parental objection violated rights of free expression and religious freedom under the

43. See Meyer, 262 U.S. at 397. The court noted that the statute stated in part:

No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language. . . . Languages, other than the English language, may be taught . . . only after . . . eighth grade . . . any person who violates any of the provisions of this act . . . shall be subject to a fine of not less than twenty-five ($25) dollars.

Id.
44. Id. at 399-400.
45. 268 U.S. 510 (1925).
46. See id. at 530 (stating that the Compulsory Education Act required every parent or guardian having custody of a child between eight and 16 to send the child "to a public school for the period of time a public school shall be held during the current year").
47. Id. at 534-35. The Court went on to say: "The child is not the mere creature of the state" and parents who nurture the child can "direct his destiny . . . coupled with the high duty, to recognize and prepare him for additional obligations." Id. at 535.
48. See Linda L. Lane, The Parental Rights Movement, 69 U. COLO. L. REV. 825, 838 (1998). The author mentions that Meyer and Pierce recognize a parent's right to control his child's upbringing as a "fundamental substantive right protected by the Fourteenth Amendment." See id. The author goes on to say that critics caution that the cases can promote the "view of the child as the parent's private property" to the detriment of the child and legitimate state authority. See id.
49. 319 U.S. 624 (1943).
First and Fourteenth Amendments. 50

Notwithstanding the fundamental right articulated in Meyer, Pierce and Barnette, in Prince v. Massachusetts51 the Court declared that although a parent had a constitutionally protected right to direct the upbringing of her child, this right could be outweighed by a state’s compelling interest in the child’s health and well being. 52 The Massachusetts statute in Prince, indirectly prohibiting children proselytizing on public streets by restricting the times and circumstances under which children could remain on those streets, was upheld because, as part of its parens patriae power, the state had a compelling interest in enacting child labor laws to protect children. 53

In Stanley v. Illinois,54 the Court for the first time addressed the rights of unwed fathers in a case where an Illinois statute presumed those fathers unfit. The Court declared that unwed fathers have a fundamental right to a parent-child relationship and that under the Due Process Clause of the Fourteenth Amendment, unwed fathers cannot be deprived of parental rights without a hearing to

50. Id. at 642. The Court further stated that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Id. More recently, in Wisconsin v. Yoder, 406 U.S. 205, 207 (1972), Amish parents argued that a law, which mandated attendance at school until the age of 16, was contrary to the Amish religion and way of life. The Supreme Court held this statute unconstitutional because it would contravene parents’ child-rearing authority and free exercise of religion, both protected under the Due Process Clause of the Fourteenth Amendment. See id. at 233-34.


52. See Prince, 321 U.S. at 166-170 (“[N]either rights of religion nor rights of parenthood are beyond limitation.”). A state as parens patriae “may restrict the parent’s control by requiring school attendance” or regulating, indeed, prohibiting the child’s labor. Id. at 166. Parental authority may be balanced against a state’s police power when necessary to protect children and promote their welfare. See generally Douglas R. Rendleman, Parens Patriae: From Chancery to Juvenile Court, 23 S.C. L. REV. 205, 218-23 (1972).

53. See Prince, 321 U.S. at 169. Massachusetts’s Child Labor Law prohibited a boy under 12 and a girl under 18 from selling, exposing, or offering for sale “any newspapers, magazines, periodicals or any other articles of merchandise . . . in any street or public place.” Id. at 160-61.

54. 405 U.S. 645 (1972).

55. See id. at 647. The statute in Stanley failed to include unwed fathers as “parents” the statute only included “the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent.” Id. at 649-50. Accordingly, when the natural mother died, Stanley had no parental rights, he was presumed unfit, and his children became wards of the state and were placed with a public guardian. See id. at 646-47.
determine their parental fitness. More than a biological connection is required, however; the father must "step forward" and assume some parental responsibility or otherwise manifest some effort to establish an actual parent-child relationship. Moreover, even if a biological father makes such an effort, he still may not have a fundamental right to maintain that relationship.

In Michael H. v. Gerald D., for example, the Court dealt with a biological father's parental rights in a child born to a married woman, but conceived with him in an adulterous relationship. The biological father at some point lived with the child and financially supported her. The California statute at issue, however, created a presumption that a child born to a married woman living with her husband is the husband's child. The Court rejected the unmarried father's claims under both procedural and substantive due process because the state was furthering legitimate public policies and because an adulterous father's relationship

56. See id. at 657; see also Santosky v. Kramer, 455 U.S. 745, 768 (1982) (holding that a "preponderance of the evidence" standard failed to comport with Due Process and that a "clear and convincing evidence" standard was required to terminate parental rights).

57. In Lehr v. Robertson, 463 U.S. 248 (1983), an unwed father challenged New York's putative father registry as unconstitutional for failing to give him notice and an opportunity to be heard before the adoption of his child. See id. at 249. The Court upheld the statute and found that Lehr failed to develop a parent-child relationship because he failed to demonstrate a commitment to the responsibilities of parenthood "by coming forward to participate in the rearing of his child." See id. at 261. The Court held that Lehr had not stepped forward because he never supported, rarely saw, and never lived with his child. See id. at 267-68. Whereas, in Stanley the unwed father had made positive manifestations such as living with his child. See Stanley, 405 U.S. at 646. As the Court explained in Lehr, the difference between the "developed parent-child relationship that was implicated in Stanley and Caban, and the potential relationship involved in Quillon and [Lehr]" is that in the former cases the unwed fathers came forward to participate in the rearing of their children. See id. at 26; see also Holmes, supra note 42, at 367 (stating that the Supreme Court's unwed father jurisprudence demonstrates that "the liberty interest in family relationships is personal and is dependent not only upon a biological tie, but also upon the manifestation of an actual parent-child relationship").


59. See id. at 130.

60. See id. at 114 (Michael had said to others that Victoria was his child, lived with her, supported her, and sought to be her custodial parent).

61. See id. at 115 (the statute provided that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage").

62. See id. at 129-30 (such public policies include an aversion to declare children illegitimate and the promotion of peace and tranquility in the family).
with his issue is not a fundamental right; such a relationship is not "deeply rooted in this Nation's history and tradition." 63

Recently, several state supreme courts also have addressed issues involving the need to protect the parent-child relationship. 64 In In re B.G.C., 65 an unwed father sought to vacate a mother's consent form and intervene in the adoption proceeding to assert his parental rights. 66 The Iowa Supreme Court denied the unwed mother's request to vacate her consent, granted the unwed father's motion to intervene, 67 denied the adoption and ordered that the child be surrendered to the unwed father. 68 The unwed father was allowed to assert parental rights because he was the biological father, had not released his parental rights and had not abandoned the child. 69 When the adoptive parents sought to stay the order directing them to return the child to her biological parents, 70 the U.S. Supreme Court ultimately denied the stay, stating that unrelated persons can not retain custody of a child when the "natural parents have not been found to be unfit." 71

Some state courts have also addressed non-biological parental rights in non-traditional families. 72 For example, in Alison D. v. 

63. Id. at 124, 129-30.
64. See, e.g., In re Doe, 638 N.E.2d 181, 183 (Ill. 1994) (holding that biological father's consent was not unnecessary for adoption); In re B.G.C., 496 N.W.2d 239 (Iowa 1992); Robert O. v. Russell K., 604 N.E.2d 99, 104 (N.Y. 1992) (holding that father lacked due process liberty interest in adoption even though he did not know of the adoption until it was finalized).
65. 496 N.W.2d 239 (Iowa 1992).
66. See id. at 242.
67. See id.
68. See id.
69. See id. (the court reasoned that a paternity test had conclusively established that he was the biological father and his parental rights were never terminated prior to the filing of the adoption petition).
70. The adoptive parents engaged in a vigorous legal battle including petitioning the Michigan courts to modify the Iowa Supreme Court's order. See In re Clausen, 502 N.W.2d 649, 655 (Mich. 1993). The adoptive parents were successful in the Michigan trial court and were awarded custody but on appeal the custody decision of the Iowa Supreme Court was reinstated. See id. at 691. The adoptive parents then unsuccessfully petitioned the United States Supreme Court to stay the enforcement of the custody decision. See Deboer v. Schmidt, 509 U.S. 1301, 1302 (1993).
71. See Deboer, 509 U.S. at 1302.
72. See, e.g., Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991) (dealing with a lesbian's parental rights when one partner has a child via artificial insemination); In re Z.J.H., 471 N.W.2d 202, 204 (Wis. 1991) (dealing with a lesbian's parental rights when one partner has a child through adoption), overruled by In re H.S.H.-K 533 N.W.2d 419 (Wis. 1995).
Virginia M., the New York Court of Appeals had to decide whether a woman who was a member of a dissolved lesbian relationship had a right to maintain a relationship with a child born to her lesbian partner during their relationship. The woman claimed to be the child's "psychological" parent in that she had provided financial and emotional support to the child for two and a half years. The court rejected her claim, however, declining to expand the statutory definition of parent to include "psychological" parents.

Thus, as a matter of both state and federal constitutional decisions, a parent has a constitutionally protected right to the parent-child relationship. Therefore, those courts that have succeeded in protecting children's interests in the continuity of stepparent relationships in custody determinations have had to compromise; the courts maintained and afforded parental "preferences" in custody decisions, but occasionally used broad, arguably unnatural definitions of "unfitness" to overcome the preferences and pursue children's best interests.

74. See Alison D., 527 N.E.2d at 29. The lesbian couple lived together for three years and decided to have children through artificial insemination. See id. at 28.
75. See id. at 28-29. The court agreed that she had in fact treated the child in all respects as her child and helped rear the child. See id.
76. See id.; see also In re Z.J.H., 471 N.W.2d at 204 (holding that a lesbian partner had no standing to seek custody or acquire visitation rights).
77. With regard to UMDA states, see, for example, Clifford v. Woodford, 320 P.2d 452, 459 (Ariz. 1957) (stepfather awarded custody of two stepdaughters upon his wife's death following a period of ten years when they resided together as a step-family based only on evidence of the father's absence during this same period of time). The Minnesota Supreme Court has also stated that a natural parent is entitled, as a matter of law, to the custody of his or her minor child unless such custody is not in the child's best interests. See Durkin v. Hinich, 442 N.W.2d 148, 153 (Minn. 1989). The parental preference can always be defeated, however, if the natural parent is "unfit" or "voluntarily forfeits" custody. See, e.g., Abrams v. Connolly, 781 P.2d 651, 658 (Colo. 1989) (voluntarily forfeited custody); In re Gonzalez, 561 N.E.2d 1276, 1278 (Ill. App. 1990) (voluntarily forfeited custody); In re Stell, 783 P.2d 615, 621 (Wash. Ct. App. 1989) ( unfit parents). As a result, courts have taken the opportunity to liberally construe "voluntary forfeiture." See generally Levy, supra note 15; see also infra Part V.
IV. THE EARLY PRINCIPLES OF CUSTODY DETERMINATIONS IN MINNESOTA

A. Origins

The fundamental approach to child custody determinations in Minnesota, whether between custodial and non-custodial parents or parents and third parties, can be traced to at least 1895.88 Due deference was given a parent's "natural rights," but the ultimate objective was to serve the "welfare"—or what is now generally referred to as the "best interests"—of the child. In Flint v. Flint,79 for example, in an era when the Minnesota Statutes 80 provided that a father was entitled to custody and care of his minor children, a husband, separated from his wife, sued in habeas corpus to gain custody of "his" child.81 The Minnesota Supreme Court, in ruling for the mother, explained that:

[W]hile under our statutes, the father is given the right to the custody of his minor children, yet this right is not an absolute legal right, beyond the control of the courts. The cardinal principle in such matters is to regard the benefit of the infant paramount to the claims of either parent. While the courts will not lightly interfere with what may be termed the "natural rights" of parents, yet the primary object of all courts, at least in America, is to secure the welfare of the child . . . .82

In 1903 in Anderson v. Anderson,83 when confronted with a custody dispute between a natural parent and a third party (the children's paternal uncle),84 the court extended Flint to this case in which "natural rights" were being asserted, and denied custody to

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78. See Flint v. Flint, 63 Minn. 187, 65 N.W. 272 (1895).
79. 63 Minn. 187, 65 N.W. 272 (1895). Although in the Flint case the Minnesota Supreme Court was faced with a custody dispute between natural parents, see id. at 190, 65 N.W.2d at 272, the case is cited as early as 1903 for the law in custody disputes between a natural parent and a third party. See Anderson v. Anderson, 89 Minn. 198, 200, 94 N.W. 681, 682 (1903).
80. 1894 Gen. Laws § 4540.
81. See Flint, 63 Minn. at 187, 65 N.W. at 272.
82. Id. at 187, 65 N.W. at 273.
83. 89 Minn. 198, 94 N.W. 681 (1903).
84. See id. at 199, 94 N.W. at 681. The paternal uncle's wife also was a party to the suit. See id.
the father. As part of what apparently was an examination of the "welfare" interests of the children, the trial court found the father "unfit." "[The evidence of the father's poor behavior does] not indicate a mind of that grade and type which would naturally know and do what was for the best interests of young children ...." This finding of parental "unfitness" was not pre-requisite to third party standing, nor was it determinative of the custody issue; it merely was probative with regard to the broader issue of the children's' best interests. Indeed, even if the father had been found fit, he still could have lost custody to the non-parent. "The fact that the parent desires to recover possession of his children, and the fact that, within the meaning of the law, he may not have been shown to be an unsuitable person, is not necessarily decisive."

B. The Evolution of the "Superior Rights" Doctrine (the Presumption of Parental Fitness) in Minnesota

Two years after Anderson, in Lehman v. Martin, the Minnesota Supreme Court granted a father custody of his daughter to the exclusion of the maternal grandmother, firmly establishing the "superior rights" doctrine in Minnesota. Natural parents now were presumed fit to raise their children and the burden to prove unfitness would be on the non-parent. This holding appeared to

85. See id. at 200, 94 N.W. at 682.
86. See id. (noting testimony regarding the father's intemperance, immorality and "erratic nature").
87. Id.
88. Id. Another interesting aspect of the Anderson decision was the court's willingness to allow the father's new wife to "supplement" the father's parental shortcomings, as opposed to requiring him to qualify on his own merits. See id. Although the court denied the father custody, the court gave the father a chance in the future to qualify vicariously through his new wife:

[W]e are unwilling to hold that his habits and temperament are so different from those of a large class of men that he should for that reason be picked out and branded as an unfit person to have charge of his own children, if he established a home, and the stepmother is a suitable person to assume the responsibility thereof. But, unless the wife is qualified to protect the children from such influences as the father seems naturally to impart, it may well be doubted whether, as matter of right, he is in a position to claim them.

Id. at 201, 94 N.W. at 682 (emphasis added).
89. 95 Minn. 121, 103 N.W. 888 (1905).
90. See id. at 122, 103 N.W. at 889.
91. See Wallin v. Wallin, 290 Minn. 261, 265, 187 N.W.2d 627, 630 (1971);
directly contradict Anderson, implying that in a contest between a natural parent and a third party, parental fitness was “the only question”:

The only question for our consideration is whether, from the evidence submitted, respondent is a fit and suitable person to have the custody and care of his child... [The father’s right] is paramount and superior to that of any other person, and prima facie entitles him to the judgment of the courts, unless the evidence shows that the child’s welfare demands and requires that [the child] remain with [the grandmother].... The question presented is whether the evidence adduced by [the grandmother] sustains the contention that [the father] is unfit to care for his child.92

C. The Age and Preferences of the Child

In Gauthier v. Gauthier,93 the same court seemed to dispel the notion that parental “unfitness” was prerequisite to third party custody. It concluded, just five years after Lehman, that a boy’s natural father was fit but that custody nonetheless should be awarded to a third party.94 The boy was fifteen years old at the time the court heard the case and had lived with the third party since he was two.95 When questioned about his custody preferences, the boy responded in favor of the third party.96 Nonetheless, even though

Nelson v. Whaley, 264 Minn. 535, 545, 75 N.W.2d 786, 792 (1956); Olson v. Sorenson, 208 Minn. 226, 228, 295 N.W. 241, 242 (1940); Platzter v. Beardsley, 149 Minn. 435, 438, 183 N.W. 956, 957 (1921).
92. Lehman, 95 Minn. at 122, 103 N.W. at 888. This seeming contradiction subsequently has not been reconciled.
93. 110 Minn. 103, 124 N.W. 634 (1910).
94. See id. at 106, 124 N.W. at 635. With respect to the father’s fitness, the Minnesota Supreme court stated:

The learned judge who presided at the hearing of this matter in the district court found that the evidence was insufficient to show that the [father] was an unfit person to have the custody of his son.... An examination of the evidence submitted in the district court convinces us that it was sufficient to justify the findings as to the character of the parties....

Id. at 105, 124 N.W. at 634.
95. See id. at 104, 124 N.W. at 634.
96. See id. at 105, 124 N.W. at 635.
the *Gauthier* holding seemed to return to the earlier principles of *Anderson*—that parental fitness is *not* the only issue in third party custody disputes—*Gauthier* appeared to be limited to a mature minor’s choice.\(^97\)

Thus, custody would be granted to a third party to the exclusion of a parent in only two narrow occasions: 1) when the child is old enough to give a mature opinion regarding custody and no reason arose to disregard that opinion; and 2) when the parent is unfit:

> When the child is so young that its own preferences cannot be considered, the character of him to whom the custody is awarded is generally controlling; and unless the person in whom the natural right rests is shown to be entirely unfit no court would be justified in arbitrarily depriving parents of the custody of their children. But when the minor has reached an age sufficient to have an intelligent and well-defined preference . . . it is apparent that his inclination must be taken into consideration . . . .\(^98\)

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\(^{97}\) In *Neib v. Krueger*, 143 Minn. 149, 173 N.W. 414, (1919), a boy’s mother died shortly after his birth, whereupon he was given into the care of a close relative (his grandmother). See id. at 149, 173 N.W. 414. Like *Gauthier*, the custody dispute arose when the child was relatively older, about 14 years of age, and as in *Gauthier*, the boy was questioned as to his preferences, to which he responded in favor of his grandmother. See id. at 150, 173 N.W. at 414. The Minnesota Supreme Court, citing *Gauthier*, granted custody to the grandmother. See id.

\(^{98}\) *Gauthier*, 110 Minn. at 106, 124 N.W. at 635. Interestingly, this statement from *Gauthier* closely anticipated present-day statutory standards regarding child custody. Minnesota Statute section 518.17, subdivision 1, entitled “Custody and Support of Children on Judgment,” reads in part: “The best interests of the child’ means all relevant factors to be considered and evaluated by the court including: . . . the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference; . . .” Minnesota Statute section 257.025(a), entitled “Custody Disputes,” reads in part:

> In any proceeding where two or more parties seek custody of a child the court shall consider and evaluate all relevant factors in determining the best interests of the child, including the following factors: . . . the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference; . . .

**MINN. STAT. § 257.025(a) (1998).**
In 1929, for example, in *Feeley v. Williams*, the decision appeared to rest largely upon the girl’s wishes. The court denied custody to the natural parent because the child was “of the age and capacity to form a rational judgment” and wished to stay in her present environment.

Soon after *Feeley*, however, it became apparent that even in a custody dispute over an older child, the child’s preferences would not be determinative. In the mid-1930s, for example, in *Herniman v. Markson* and *Vik v. Sivertson*, third party custody disputes arose over children that were of the same age as the child in *Feeley*. The Minnesota Supreme Court affirmed granting custody to the natural parents in those cases, but in both cases entirely failed to discuss the children’s wishes. Thus, by the 1930s, it no longer was clear that the *Feeley* decision turned (or that similar cases in the future would turn) solely on the age and wishes of the child.

**D. Extraordinary Circumstances?**

In 1914, in *Larson v. Halverson*, the Minnesota Supreme Court also appeared to look beyond the sole issue of parental fitness in affording granting to third parties. In *Larson*, a young girl suffered from tuberculosis and required an “outdoor life... among congenial surroundings.” “[T]he home life on [the grandparent’s] farm [was found to be] best suited” for her continued health.

Accordingly, the court found the girl’s natural father fit, but awarded custody to her maternal grandparents. In
awarding custody to the grandparents, the court reiterated principles of *Flint* and *Anderson*, indicating that: "This situation differentiates the case from many of those where the natural right of the father has been given effect, for it centers around and aims at the welfare of the child, which is paramount to the natural paternal right."\(^{110}\) *Larson*, therefore, extended the earlier principle of *Anderson* ("unfitness" is only one issue to be considered) beyond the facts of *Gauthier* (if a child is old enough, for example, his decision will prevail notwithstanding parental fitness) to matters of medical exigencies or other extraordinary circumstances.

### E. Defeating the "Superior Rights" Doctrine: Are There "Grave and Weighty" Reasons to Do So?

*Gauthier* and *Larson* made clear that custody could be awarded to third parties for reasons other than parental unfitness. But would it be enough to show that the non-parent could give the child a better life or that the non-parent and the child had developed a strong and healthy bond? The Minnesota Supreme Court answered these questions in *Rennings v. Armstrong.*\(^{111}\) There, a girl’s mother died shortly after her birth,\(^{112}\) and the child’s father voluntarily gave her to the care of a maternal aunt.\(^{113}\) When the girl was about eight years old, her father remarried and demanded her return.\(^{114}\) In returning custody to the father, the court stated:

> While the best interests of the child is the controlling question in controversies of this kind, the natural right of the parent cannot be set aside on sentimental grounds, nor upon the theory that perhaps the child will receive more tender care at the hands of those having its actual custody and control. No doubt [the aunt] would give to this child the same kindly treatment and care as she would

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\(^{110}\) *Id.* at 389, 149 N.W. at 665.

\(^{111}\) *Id.* at 390, 149 N.W. at 665.

\(^{112}\) 141 Minn. 47, 169 N.W. 249 (1918).

\(^{113}\) See *id.* at 48, 169 N.W. at 249.

\(^{114}\) See *id.*
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bestow upon her own children. But that is not the test in such cases. In 1921, for example, in Platzer v. Beardsly, a third party alleged that a mother had no suitable home or place to keep her daughter and was without means to support her. The Minnesota Supreme Court, in granting custody to the mother, established the burden of proof of unfitness to be met by third parties:

The ties by which mother and child are bound together should not be severed except for grave and weighty reasons. The mere fact that a mother is so destitute or impoverished that she cannot adequately provide for the needs of her child, and that someone else is willing to take it and give it better educational and material advantages, does not justify the court in transferring its custody.

115. Id. In Machgan v. Pelowski, 145 Minn. 383, 386, 177 N.W. 627, 628 (1920), however, while granting a father custody of his daughter to the exclusion of her maternal grandparents, the court hinted that a third party's disposition of financial resources might play a role in their decision: "[W]e should not be unmindful of the pecuniary advantage that may inure to [the child] by the agreement that by will she should be assured of her share of the [third party's] inheritance." Id. Other cases provide that the possibility of inheritance is not a factor to be considered in deciding custody between a parent and a third party. See Fossen v. Hitman, 164 Minn. 373, 375, 205 N.W. 267, 267-68 (1925) ("Best interests... does not mean that the child may have... greater prospect of inheritance with others than with the natural parents;... ").

116. 149 Minn. 435, 183 N.W. 956 (1921). The Platzer case was the result of an unwed mother signing an agreement with a third party consenting to the child's adoption. See id. at 436, 183 N.W. 956-57. The third party filed in court for adoption, and the mother appeared at the hearing, stating her intent to withdraw and revoke her consent to the adoption. See id. at 436, 183 N.W. at 957. The child was still in the custody of the third party, who based its custody rights on the written agreement and the child's best interests. See id. at 437, 183 N.W. at 957. The mother, on the same day, applied for a writ of habeas corpus for the return of the child. See id. at 436, 183 N.W. at 957. The Minnesota Supreme Court resolved the adoption issue quickly (in one sentence) by merely stating that the third party could not adopt the child without the mother's consent. See id. at 437, 183 N.W. at 957. The court, having disposed of the "written agreement" issue, was then left solely with the issue of the best interests of the child. See id. Thus, even though Platzer began as an adoption case, it turned into a "garden variety" custody dispute.

117. See id.

118. See, e.g., In re H.G.B., 306 N.W.2d 821, 825 (Minn. 1981) (stating that grave and weighty reasons must exist to deprive natural parents of custody); Jaroszewski v. Prestidge, 249 Minn. 80, 89, 81 N.W. 2d 705, 710 (1957) (same); Nelson v. Whaley, 246 Minn. 535, 545, 75 N.W.2d 786, 792 (1956) (same); Vik v. Sivertson, 194 Minn. 380, 381, 260 N.W. 522, 523 (1935) (same).

119. Platzer, 149 Minn. at 438, 183 N.W. at 958 (emphasis added).
However, even if poverty is not a ground for depriving parents of custody, a parent still must be capable of providing some minimum level of "proper" benefits and guidance. In *Fossen v. Hitman*,[120] the court stated in no uncertain terms that:

>[T]he natural parents have the first right to the care and custody of the child, unless the best interests of the child require it to be given into the hands of some one else.... If in the parents there is such lack of moral stamina or ability to gain a livelihood that it is made to appear that the child must go without proper education and moral training or suffer want under their care and custody, then the best interests of the child is at stake. Mere poverty of the parents is seldom, if ever, a sufficient ground for depriving them of the natural right to the custody of their child....[121]

Parental unfitness, therefore, is not considered a prerequisite to third party custody; it simply is one factor affecting the best interests of the child. One part of the equation is the reasonable assumption that parents tend to care for their children more than third parties, and since parental custody is presumed in the best interests of children, parents should have a "natural right" to custody. On the other side are factors that militate in favor of third parties—parental unfitness, the age and preferences of the child and extraordinary circumstances such as unusual medical needs of the child. Parents could lose their preference in custody determinations for any of these "grave and weighty" reasons.

**F. Indefinite Voluntary Relinquishment: Abandonment as "Unfitness"?**

By the late 1920s, it was clear that in addition to parental "unfitness" or extraordinary circumstances in the child's life, such as unusual "medical needs,"[122] another basis for third party custody
claims are situations in which otherwise “fit” parents abandon their children. Indeed, indefinitely relinquishing parental custody, especially when it permits development of de facto parent-child relationships with others, may be tantamount to unfitness. In *Henning v. Gundvaldson*, for example, a custody dispute arose between a young girl’s mother and the mother’s maternal aunt (and the aunt’s husband). The girl was nearly four years old when the court heard the case and had been in the aunt’s custody nearly all of her life. The mother was unable to care for the girl during this time but had recently married a man with a substantial income and a comfortable home.

Despite the presumption of parental fitness ordinarily afforded natural parents and the mother’s changed circumstances, the court awarded custody to the aunt and uncle with whom the child had bonded. The mother’s voluntary abandonment and the emergence of the “psychological” bond with third party caretakers overcame the presumption that returning custody to the parent would be in the child’s best interests. Under such circumstances, the burden shifted to the parent to prove she was fit to regain custody:

The evidence does not assure us that the [mother and her new husband] will continue in their desire and ability to care for the child and give it the home which it should have. . . . The time may come when it will be apparent that the mother is secure in a suitable home which will

necessitated unusual care. See *id.* at 518-19, 221 N.W. at 868-69. The grandmother was a practicing nurse. See *id.* at 519, 221 N.W. at 868. The court concluded that the father had not been shown to be unfit, but continued custody in the grandmother, saying:

In this case the situation is unusual. The children need, and are getting, extraordinary attention and care, which [the father], for want of money and facilities, cannot give them. He is already burdened in meeting his obligations incident to the condition of his wife. We think it best for the children to remain where they are.
welcome her child permanently and that the natural right of a parent to custody should be given its full effect. 129

In Feeley, the dispute was between a girl’s father and her maternal aunt. 130 The girl had been voluntarily placed in the care of the aunt when the father was imprisoned. 131 When he was released a year later, he failed to make any contact with his daughter over a four-year period and contributed essentially nothing to his daughter’s support or education. 132 While under then current law the court could have considered the girl’s view in denying the father custody since she was “approaching the threshold of womanhood . . . ,” 133 the court’s primary motivation in denying him custody, may have been abandonment, since “[t]he record [was] quite barren of evidence manifesting a father’s affection for the child while she has been out of his custody.” 134

Then, in the 1930s, in the cases of Herniman v. Markson 135 and Vik v. Sivertson, 136 the Minnesota Supreme Court re-enforced the significance of voluntarily relinquished parental rights and the concurrent development of de facto parent-child relationships. In Herniman, the dispute was between a boy’s mother and his maternal grandparents. 137 In this case the mother visited her son reasonably often, contributing to his support to the extent she could. 138 The court largely was silent on how the boy came to live with his relatives, but noted that the mother did not completely or indefinitely abandon her son. 139 Similarly, in Vik, a dispute between a girl’s mother and her maternal aunt, 140 the court noted that the mother visited her daughter at times and had contributed toward her support and care. 141 Considering the factual distinctions

129. Id.
130. See Feeley v. Williams, 176 Minn. 193, 194 222 N.W. 927 (1929). The aunt was joined by her husband in the action. See id.
131. See id.
132. See id.
133. See id. at 195-96, 222 N.W. at 928.
134. Id. at 195, 222 N.W. at 928.
135. 187 Minn. 176, 244 N.W. 687 (1932).
136. 194 Minn. 380, 260 N.W. 522 (1935).
137. Herniman, 187 Minn. at 176, 244 N.W. at 687. The grandparents were joined by their daughter (the child’s aunt) in the custody action. See id.
138. See id. at 178, 244 N.W. at 688.
139. See id. (“She did not abandon her child.”).
140. See Vik, 194 Minn. at 381, 260 N.W. at 522.
141. See id.
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between Feeley, on one hand, and Herniman and Vik on the other, voluntary and indefinite child abandonment as a ground for custody in third parties emerged.

This proposition gained further support in the 1943 case of Ashcroft v. Jensen.\(^{142}\) In Ashcroft, the girl was six years old,\(^{143}\) placing her below the age at which the court might defer to her opinion. Thus, the court could not rely on Neib v. Krueger\(^{144}\) and Gauthier, presumably decided on the basis of the preferences of a mature minor, nor on Larson and Lund,\(^{145}\) because no evidence indicated that the child had any special health problems. Moreover, although the court had some misgivings about the parent's home,\(^{146}\) it found nothing to indicate that the parents were morally unfit.\(^{147}\) The mother placed her daughter in the exclusive custody of a third party when the girl was only a few months old,\(^{148}\) however, and provided little support over the years.\(^{149}\) Consequently, the court denied the parents custody in favor of the third party.\(^{150}\)

Similarly, in RYS v. Vorlicek,\(^ {151}\) a custody dispute between an eleven-year-old girl's father and maternal aunt,\(^ {152}\) the girl wanted to stay with her aunt and uncle.\(^ {153}\) In earlier times, this factor might have been an adequate reason to decide in favor of the third parties. In this instance, however, the court noted that during the girl's lifetime the father had seen her only a few times and never

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142. 214 Minn. 193, 7 N.W.2d 393 (1943).
143. See id. at 193, 7 N.W.2d at 394.
144. 143 Minn. 149, 173 N.W. 414 (1919).
146. See Ashcroft, 214 Minn. at 196, 7 N.W.2d at 395 (“Neither are we satisfied that we know the kind of home the child would have should it go to Oregon with the Ashcrofts.”).
147. See id. at 195, 7 N.W.2d at 394 (“Investigations ... indicate nothing to suggest that the Ashcrofts are morally unfit to have the custody of their child.”).
148. See id. at 194, 7 N.W.2d at 394. Although the mother claimed her child was forcibly taken from her, and then hidden from her, there was testimony that the child was given into the care of the third party with the consent of the mother. See id. The court stated that “[t]here are sufficient improbabilities in the story of [the mother] to raise the question of its credibility.” Id. at 196, 7 N.W.2d at 395.
149. See id. at 194, 7 N.W.2d at 394. The father also failed to visit or support his daughter. See id. at 196, 7 N.W.2d at 395.
150. See id. at 196-97, 7 N.W.2d at 395 (“We conceive that serious emotional and psychological maladjustment would result if the child were transferred from the Jensen to the Ashcroft home.”).
151. 229 Minn. 497, 40 N.W.2d 350 (1949).
152. See id. at 498, 40 N.W.2d at 350.
153. See id. at 501-02, 40 N.W.2d at 352.
assumed any support obligations.\textsuperscript{154} As in Ashcroft, the court couched its decision in terms of the ultimate psychological well being of the child: "[the father] has offered absolutely no excuse for completely ignoring his child. So far as the child is concerned, the father is a complete stranger to her. By his past conduct, [the father], for all intents and purposes, has completely abandoned his child."\textsuperscript{155}

Thus, although earlier courts seemed less concerned about such matters,\textsuperscript{156} by the time of Ashcroft and RYS, separating children from \textit{de facto} parents was considered contrary to the children's "best interests." When this bond with third parties resulted from parental abandonment, the harm in removing a child from the third party caregivers could outweigh the "superior rights" of parents. Indeed, by 1956, in \textit{Nelson v. Whaley},\textsuperscript{157} the court specifically included abandonment among the broad grounds that might outweigh parental preferences in pursing the children's best interests in custody determinations: "In order to justify depriving a parent of the custody of a child in favor of third persons there must be a \textit{grave reason} growing out of neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care."\textsuperscript{158} By the 1960s, therefore, it appeared that third parties were able to argue the children's best interests to the court directly, with parental circumstances serving as only one variable in the equation.

\textbf{V. \textit{Wallin v. Wallin}: Third Party Custody in the Modern Era}

In 1971, the Minnesota Supreme Court decided \textit{Wallin v. Wallin},\textsuperscript{159} in which an original divorce decree gave custody of a six-year-old girl to her paternal grandparents.\textsuperscript{160} The girl's mother appealed, arguing that she was entitled to custody as a matter of

\begin{itemize}
  \item \textsuperscript{154} See id. at 501, 40 N.W.2d at 352.
  \item \textsuperscript{155} Id. at 501-02, 40 N.W.2d at 352 ("We are convinced that it would cause serious emotional and psychological disturbances to force [the child] to change her place and mode of living at this time.").
  \item \textsuperscript{156} See Herniman v. Markson, 187 Minn. 176, 244 N.W. 687 (1932). The court dismissed the matter by opining that: "The boy will soon accommodate himself to his changed surroundings." Id. at 179, 244 N.W. at 688.
  \item \textsuperscript{157} 246 Minn. 535, 75 N.W.2d 786 (1956).
  \item \textsuperscript{158} Id. at 544-45, 75 N.W.2d at 792 (emphasis added).
  \item \textsuperscript{159} 290 Minn. 261, 187 N.W.2d 627 (1971).
  \item \textsuperscript{160} See id. at 262, 187 N.W.2d at 628.
\end{itemize}
presumptive right. In its decision, the court first attempted to summarize the law to date with respect to third party custody disputes:

In determining custody disputes between [a parent] of a minor child and [a third party], courts have based their decisions on two basic doctrines. The first of these doctrines stands for the proposition that [parents are] entitled to the custody of [their] children unless it clearly appears that [they are] unfit or [have] abandoned [their] right to custody, or unless there are some extraordinary circumstances which would require that [they] be deprived of custody. The second doctrine is the so-called best-interests-of-the-child concept, according to which the welfare and interest of the child is the primary test to be applied in awarding custody.

This so-called “first doctrine” reiterated the judicial approach affording preferences to parents in third party custody disputes that could be outweighed by a variety of factors including unfitness. The “second doctrine” also affirmed the established principle that regardless of whether a parent’s presumptive right to custody has been overcome, the ultimate goal in custody determinations is the best interests of the child. The question of whether parents are unfit or forfeited their natural right to custody continued to represent only one factor impacting the ultimate judicial evaluation of the “best interests” of children. Indeed, farther along in the Wallin opinion, the court supported this overriding principle:

[A]ll things being equal, as against a third person, a natural [parent is] entitled as a matter of law to custody of [their] minor child unless there has been established on the [parent’s] part neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care, or unless it has been established that such custody otherwise would not be in the best welfare and interest of the child.

Several cases interpreting Wallin, however, while supporting a

161. See id.
162. Id. at 264, 187 N.W.2d at 269 (emphasis added).
163. Id. at 266, 187 N.W.2d at 630 (emphasis added) (citations omitted).
single “best interests” criterion for child custody decisions, appeared to raise additional questions about the burden and standard of proof in third party custody disputes articulated in Wallin. For example, in *Tubwon v. Weisberg*, decided in 1986, the Minnesota Court of Appeals referred to *Wallin* as establishing a “two-part standard.” In *Tubwon*, the court noted that the trial court found parental “unfitness” and that it would be in the child’s best interests to remain with the third party, but added:

The best interests of the child is the second part of the *Wallin* standard and applies in determining custody between a biological parent and a third party. The trial court’s finding that [the child’s] best interests require granting custody to [the third party] is supported by the evidence. This is based on the same evidence that supports [the mother’s] parental unfitness and an evaluation of [the third party] as a parent.

Thus, although parental “unfitness” was important in evaluating the child’s best interests, it was not the only consideration, nor was it a prerequisite for third party custody. A balancing test would seem to exist where the parent or nonparent with more than a preponderance of the evidence in his or her favor would win. However, *In re P.L.C. & D.L.C.*, issued that same term, may have made the burden of proof for third parties more difficult. The court noted that the child’s best interests and the presumption of parental fitness were important considerations,

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164. 394 N.W.2d 601 (Minn. Ct. App. 1986). In *Tubwon*, the custody dispute was between a man and a woman who were never married. See id. at 602. The dispute was over two children; the younger child was the biological child of this couple, and the older child was the biological child of the woman and another man. See id. at 601-02. Consequently, with respect to the older child, the custody dispute was between a natural parent and a third party. The trial court awarded custody of both children to the man. See id. at 601.
165. See id. at 603.
166. See id. at 604.
167. Id. (emphasis added).
169. See id. at 225 (“[The] standard involves a combined consideration of the 'best interests of the child' and the presumption of parental fitness.”). The *P.L.C.* court also stated that “there is no conflict between the two [Wallin] standards.” Id. at 225. However, in *In re N.M.O*, 399 N.W.2d 700 (Minn. Ct. App. 1987), after again citing *Wallin* for the proposition that the resolution of third party custody disputes had always “employed two basic principles,” id. at 702, that court stated the *Wallin*
and that third parties "had to show 'grave reasons' for preferring them to a natural parent for custody," but then went further. It stated that "[t]hese ['grave'] reasons [must] approach those required for the termination of parental rights." Even though similar language was not in Wallin, this P.L.C. language may imply a stricter standard of proof for third party custody—the constitutionally-required "clear and convincing evidence" required for termination of parental rights.

VI. RECONCILING WALLIN WITH SUBSEQUENT STATUTORY CUSTODY PROVISIONS

In 1978, seven years after Wallin, the Minnesota Legislature enacted a statutory provision that provided that "a person other than a parent" may commence child custody proceedings. This broad statutory language essentially precludes most standing challenges brought against third parties. Thus the best interests of the child became the focus in custody determinations made under this provision.

In 1990, for example, the Minnesota Court of Appeals decided Westpahl v. Westpahl, in which a young girl's paternal grandparents claimed that the girl should be removed from her mother's custody and placed with them. The grandparents' request arose as a result of problematic behavior by or between the girl's parents. Minnesota Statute section 518.18(d), which standards were "sometimes conflicting." Id. at 703.


171. Id. (emphasis added). In 1988, in an unpublished opinion, the Minnesota Court of Appeals also stated: "To overcome the presumption of fitness, the parties seeking custody must show 'grave reasons' approaching those required for the termination of parental rights." In re T.R.M.G., No. CX-88-489, 1988 WL 88552, at *2 (Minn. Ct. App. Aug. 30, 1988) (emphasis added).


173. See In re L.A.F., 554 N.W.2d 393, 397 (Minn. 1996); In re M.H., 595 N.W.2d 223, 227 (Minn. Ct. App. 1999) (affirming the standard of proof as clear and convincing for an involuntary termination of parental rights).

174. See 1978 Minn. Laws ch. 772, § 33 (codified as MINN. STAT. § 518.156 (1998)).


177. See id. at 228.

178. The child's parents were divorced in 1983, and the court had placed physical custody in the girl's mother. See id. at 227. In 1985, custody was
governed the case, provided that a custody order may not be changed unless (1) the parties agree to modification; (2) the child has been integrated into the petitioner's home with the consent of the other party; or (3) the child's current environment endangers the child, physically or emotionally, and the harm caused by a changed environment would be outweighed by the benefits of changing custody.\footnote{179}

The parties in \textit{Westpahl} did not agree to a custody change, nor had the girl been integrated into the grandparent's home.\footnote{180} Consequently, the only ground to sustain the requested modification was that maternal custody had "endangered" the child. The grandparents made no prima facie showing of endangerment and the trial court dismissed their claim.\footnote{181} In doing so, however, the court attempted to harmonize the required findings of section 518.18 with the seminal \textit{Wallin} decision,\footnote{182}

\begin{quote}
transferred to the girl's father after it was alleged that the mother's new spouse had sexually abused the girl and, as a corollary allegation, which the mother had failed to protect the girl. \textit{See id.} In 1987, custody was transferred back to the mother after it was alleged that the father was sexually abusing the girl. \textit{See id.} The 1987 custody order was only temporary and when the mother moved for permanent custody, the paternal grandparents stepped in, asking for a modification of the custody order in their favor. \textit{See id.} at 227-28.
\end{quote}

\footnote{179} See \textit{Minn. Stat.} § 518.18(d) (1998). Section 518.18(d) provides that:

\begin{quote}
If the court has jurisdiction to determine child custody matters, the court shall not modify a prior custody order unless it finds, upon the basis of facts . . . that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custody arrangement established by the prior order unless:

(i) both parties agree to the modification;

(ii) the child has been integrated into the family of the petitioner with the consent of the other party; or

(iii) the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.
\end{quote}

\textit{Id.}

\footnote{180} See \textit{Westpahl}, 457 N.W.2d at 227-28.

\footnote{181} See \textit{id.} at 228.

\footnote{182} The \textit{Westpahl} decision was not the first time Minnesota courts had attempted to "harmonize" the \textit{Wallin} decision with Minnesota Statute section 518.18. In 1988, the Minnesota Court of Appeals decided \textit{Durkin v. Hinich}, 431 N.W.2d 553 (Minn. Ct. App. 1988), which, like \textit{Westpahl}, was a third party custody dispute in the context of a prior custody order. \textit{See id.} at 554. In \textit{Durkin}, the trial
THIRD PARTY CUSTODY DISPUTES

stating that:

First, the non-parent may show the natural parent is unfit to have custody. [citations omitted] Such a showing corresponds to the requirement in section 518.18(d)(iii) that the court find the current custody endangers the child. Second, the Wallin court recognized that the "overriding consideration" in deciding custody is the best interests of the child. This analysis recognizes that certain extra-ordinary situations may exist in which the child's best interests require placement with a non-parent.... [Finally, s]ection 518.18(d)(ii), which allows modification in favor of a noncustodian where the child has been integrated into the movant's family with the consent of the custodian, reflects these situations.183

Westpahl, in attempting to reaffirm principles of earlier Minnesota law, now presumably codified in section 518.18, may also have added some confusion as well as clarity. Since Westpahl did not mention "abandonment"—presumably because it had long been thought of as tantamount to unfitness—the practicing bar reasonably might have continued to assume that abandonment was subsumed under the broad definition of unfitness. Yet the court's further assertion that "unfitness" corresponds to the "endangerment" requirement of section 518.18 arguably suggests a different and significantly higher burden for third party custody: a showing of not just abandonment, but abandonment that endangered the child. Indeed, the court flatly states: "[T]he Wallin court employed section 518.18 in its decision. See id. at 555. In its analysis, the court of appeals stated that the trial court's decision was consistent with the principles enunciated in Wallin. Id. at 557. The Minnesota Supreme Court affirmed the court of appeals decision, engaging in a similar comparison between Wallin and section 518.18. See Durkin v. Hinich, 442 N.W.2d 148, 152-53 (Minn. 1989). Yet it is hard to understand why the court of appeals felt the need to make a comparison in the first place. Section 518.18 provides a "self-contained" analysis, free from any need to be "harmonized" with existing decisions. No matter what the status of the parties—whether the dispute is between two parents, between a parent and a third party, or between two third parties—the analysis provided by section 518.18 is the same so long as there has been a prior custody order by the court.

183. Westpahl, 457 N.W.2d at 229 (emphasis added) (citations omitted).

184. For the notion that abandonment is really a part of the parental fitness analysis, see In re T.R.M.G., No. CX-88-489, 1988 WL 88552, at *3 (Minn. Ct. App. Aug. 30, 1988) ("Unfitness for custody purposes involves 'neglect, abandonment, incapacity. . .'.")
recognition of the importance of considering the child's best interests does not allow a court to remove custody from a parent to non-parents based only on the application of the best interest standard. The court must find that the child's custody endangers the child.\textsuperscript{185}

However, while abandonment endangering a child appears to be clear and convincing evidence of neglect, meeting the standard for termination,\textsuperscript{186} previous decisions modifying custody required only "grave and weighty" reasons "approaching, [but not necessarily meeting] those required for the termination of parental rights."\textsuperscript{187} Requiring endangerment might now exclude as a ground for modifying custody the voluntary, indefinite relinquishment of parental custody not endangering the child. Yet relinquishment done in conjunction with de facto quasi-parental bonding had supported third party custody decisions in the past.

On the other hand, this problem may now be dealt with in two alternative ways. First, the "integration [of a child] into the [third party's] family with the consent of the custodian"\textsuperscript{188} is now an explicit, independent statutory basis for modification to third party custody. Second, in subsuming the "extraordinary circumstances" justification of older decisions, Westpahl also might have included the circumstances of abandonment in conjunction with non-parental bonding as a ground for third party custody. Several unpublished opinions during the 1990s, while not appropriate for citation as authority,\textsuperscript{189} nevertheless provide some clarification on these issues. In 1993, in In re B.L.H \& D.A.H.,\textsuperscript{190} the Minnesota

\textsuperscript{185} Westpahl, 457 N.W.2d at 229 (emphasis added).
\textsuperscript{186} Of course, on the other hand, proceedings for permanent custody may involve different issues and may be maintained concurrently with neglect proceedings. See In re Hall, 268 N.W.2d 418, 420 (Minn. 1978). Further, the concepts of seeking permanent custody and termination of parental rights are not mutually exclusive; a third party could be awarded permanent legal and physical custody subject to reasonable visitation by natural parents. See In re E.A.Q.D. and T.L.D., 405 N.W.2d 262, 264 (Minn. Ct. App. 1987).
\textsuperscript{187} In re T.R.M.G., 1998 WL 88552, at *2 (emphasis added). Westpahl claims that the "endangerment" requirement of section 518.18 "corresponds" to the parental fitness part of the Wallin analysis. See Westpahl, 457 N.W.2d at 229. However, "endangerment" is a term broad enough to encompass matters beyond unfitness. Indeed, it could encompass "extraordinary situations," which would at the same time be included in the so-called "second part" of the Wallin test, whether the transfer would serve the best interests of the child.
\textsuperscript{188} MINN. STAT. § 518.18(d) (ii) (1998).
\textsuperscript{189} See MINN. STAT. § 480A.08, subd. 3(b) (1998).
Court of Appeals stated that:

*Wallin...* provides that a standard of "unfitness" governs cases where a natural parent should lose custody. This standard closely resembles the endangerment standard under the child custody modification statute. *However,* an exception to the requirement of "unfitness" may exist under *Wallin* in compelling circumstances such as those where a child has been integrated into a third party's home. In such cases, the best interests of the child may require the court to preserve a clearly established alternative parenting relationship, even though the natural parent is fit. 191

*B.L.H.* may be reconciled with *Westpahl* in that proceedings for permanent custody involve different issues than neglect proceedings,192 and thus petitions for permanent custody and termination of parental rights are not mutually exclusive. In fact, third parties have been awarded permanent legal and physical custody subject to reasonable visitation by natural parents.

Finally, in deciding *In re A.D.W.*194 in 1997, the court of appeals held that abandonment "contradicts the presumption that a natural parent is entitled to custody [but it is] only one part of the two-prong test that looks at both parental preference and the best interest of the child."195 First, the nonparent has the burden of presenting evidence to overcome the presumption of parental fitness and must show that the natural parent is unfit to have custody. . . . Second, the best interests of the child is the 'overriding consideration' in custody determinations."196 Thus, it seems that even where circumstances fall short of grounds for termination of parental rights, voluntary parental abandonment of

191. *Id.* at *1* (emphasis added) (citations omitted). In 1994 as well, in *In re K.K.M.* No. C0-93-1584, 1994 WL 62149, at *2 (Minn. Ct. App. Mar. 1, 1994), the Minnesota Court of Appeals cited *Wallin* for the proposition that "[t]he presumption that a natural parent is fit to raise his or her own child may be overturned if it is established that the parent is unfit or that the parent's custody otherwise would not be in the best interests of the child." *Id.* (emphasis added).

192. *See In re Hall*, 268 N.W.2d 418, 420 (Minn. 1978).


195. *Id.* at *2*.

a child to a "clearly established alternative parenting relationship" may allow for third party custody under several theories. 197 What remains, perhaps, is the question of how future courts might effectively and accurately determine exactly when these circumstances have occurred. 198

VII. ANALYSIS

Post-Wallin, it is clear that either unfitness or abandonment that may not amount to neglect sufficient for terminating parental rights will negate any preferences in child custody disputes. If, in addition, a child also has bonded with other adult caregivers and it would be in the child’s best interests to reside with those third parties, custody in third parties is a likely result. In the future, therefore, courts might advantageously devote more effort to interpreting and reinforcing the statutory direction provided by the Minnesota Legislature as to how to determine a child’s best interests. 199 Through a thoughtful provision, the legislature


198. Illinois courts, for example, historically evaluate a series of factors, such as the circumstances under which the third party obtained custody, the duration of custody, and various potential indicia of parental “consent” to the third party relationship. See generally Lawrence Schlam, Children “Not in the Physical Custody of One of [Their] Parents”: The Superior Rights Doctrine and Third Party Standing Under the Uniform Marriage and Dissolution of Marriage Act, 24 S. ILL. U. L. REV. 405 (2000).

199. Minnesota Statutes section 257.025, titled “Custody Disputes,” provides:

(a) In any proceeding where two or more parties seek custody of a child the court shall consider and evaluate all relevant factors in determining the best interests of the child, including the following factors:
(1) the wishes of the party or parties as to custody;
(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
(3) the child’s primary caretaker;
(4) the intimacy of the relationship between each party and the child;
(5) the interaction and interrelationship of the child with a party or parties, siblings, and any other person who may significantly affect the child’s best interests;
(6) the child’s adjustment to home, school, and community;
(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
(8) the permanence, as a family unit, of the existing or proposed custodial home;
(9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363.01, of a proposed custodian or the child shall not be determinative of the custody of the child, unless
provided factors by which courts should determine the best interests of a child "in any proceeding where two or more parties seek custody of [the] child ...." This provision, enacted four years after Wallin, does not appear to have been explicitly adopted in decisions relating to third party custody disputes. At present, courts seem content to either mention this provision in passing or not mention it at all.

In addition, instead of preserving by default previous dicta indicating the existence of a "two-part" analysis in child custody determinations, one in which parental "preferences" must be rebutted before a court can analyze a child's best interests, it should be made clear that the sole issue is whether the child's best interests dictate that custody should be with the parent or the non-parent. Factors to consider in this determination should be those contemplated by section 257.025, including available evidence of "grave and weighty" reasons "approach[ing] those required for the

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the proposed custodial arrangement is not in the best interest of the child;
(10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture, religion, or creed, if any;
(11) the child's cultural background; and
(12) the effect on the child of the actions of an abuser, if related to domestic abuse as defined in section 518B.01, that has occurred between the parents or the parties.
The court may not use one factor to the exclusion of all others. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.
(b) The fact that the parents of the child are not or were never married to each other shall not be determinative of the custody of the child.
(c) The court shall not consider conduct of a proposed custodian that does not affect the custodian's relationship to the child.
(d) The court shall consider evidence of a violation of section 609.507 in determining the best interests of the child.
(e) A person may seek custody of a child by filing a petition or motion pursuant to section 518.156.
(f) Section 518.619 applies to this section.

200. MINN. STAT. § 257.025 (a).
termination of parental rights.”

A preliminary focus on the “superior rights” doctrine imposes what has been called an “adult-centric” perspective in child custody matters. In reinforcing that doctrine, courts inevitably give undue priority to the constitutional or natural rights of parents, instead of children’s important interests in maintaining relationships with adults who provide support, care and nurturing that parents have refused or been unable to provide. This depreciates the interests and role of those other adults, who by reason of consistent nurture and day-to-day care, allowed themselves to become “psychological” parents. Children develop unique attachments to adults they perceive to be parents; failing to maintain a child’s relationship with “psychological” parents can be devastating to that child. Moreover, in pursuing the interests of children under the automatic assumption that parents should have superior rights to custody, courts may fail to focus on establishing useful precedent regarding seemingly more important questions—what kinds of caregiving relationships with children ought to justify custody and why?

204. In practice, the child’s best interests are often balanced and made subordinate to parents’ rights. See GOLDSTEIN ET AL., supra note 4, at 54. Property concepts distort the modern focus on “best interests” in custody determinations as a result of the preservation of the archaic “superior rights” doctrine in the UMDA’s third party custody standing provision. See, e.g., Eric P. Salthe, Note, Would Abolishing the Natural Parent Preference in Custody Disputes Be in Everyone’s Best Interest?, 29 J. FAM. L. 539, 541 (1990-1991) (referring to preferences for natural parents as “archaic” and “harmful”).
205. “The bias against third party custody . . . involves an assumption that the interests of most children are best served by protecting the rights of their parents. In some cases, however, if the best interests of children are evaluated independently, a conflict arises between the rights of parents and the welfare of their children.” MAHONEY, supra note 2, at 140.
206. See O’Keefe, supra note 7, at 1100.
207. See id. at 1101.
208. See id. at 1102.

Under contemporary approaches to child custody decisionmaking, the decision of who qualifies as a parent clearly affects the outcome of the
Stepparents present a unique problem. Undeniably, parents who maintain relationships with their children and have not knowingly encouraged relationships with third parties are fit and should enjoy preference in custody determinations. Yet, generally the “best interests” of most children will require that those who have become de facto parents—such as stepparents—should obtain custody. The question of “best interests” in third party custody disputes, therefore, ideally should involve just one single balancing test. Courts should evaluate the extent to which a parent successfully maintains her parental responsibilities as compared with the extent to which third parties, such as stepparents, have psychologically bonded with the child after having a significant impact on the life, health and well being of that child.

application of the best interest of the child standard. Although the rhetoric remains centered on the child, the focus in child custody decisionmaking is, in actuality, displaced from the child’s best interests to the parents’ rights.

Id.

210. If the parent has maintained regular contact with the child, the chances of regaining custody are good. See In re Krause, 444 N.E.2d 644, 647 (Ill. App. 1982); see also Kaas, supra note 14, at 1117. “The only ground sufficient to overcome the preference in favor of a capable parent is [, at least in a reunification case, should be] proof that the change in custody [back to the parent] will cause the child significant and long-term psychological harm.” Id. at 1119. However, “[t]he closer the bond between the nonparent and the child, the more likely the court will be to find that a move will cause emotional trauma to the child.” Id. “This emphasis on the impact on the child is not a novel concept. Justice Joseph Story recognized that the question [is] ‘whether [returning the child to the parent] will be for the real, permanent interests of the infant.’” Id. at 1117 n.376 (citing United States v. Green, 26 F. Cas. 30, 31 (D. R.I. 1824)).

211. Those cases in which the child is living with a nonparent as a result of the formation of a second family and the subsequent absence of or abandonment by the biological parent “is one of the few third party custody cases in which a best interests approach is constitutionally permissible.” Kaas, supra note 14, at 1098.

212. See Susan L. Brooks, A Family Systems Paradigm For Legal Decision Making Affecting Child Custody, 6 CORNELL J.L. & PUB. POL’Y 1, 11 (1996). Legislatures seeking to deter the bringing of frivolous claims by imposing reasonable requirements which must be met before granting standing to stepparents implicitly state the contours of a de facto parental relationship, such as that stepparents have resided with the child for a certain length of time, that they have assumed partial or primary financial responsibility for the child, that the relationship began with the consent of the custodial parent, that the child wants to continue the relationship, and that doing so would not be detrimental to the child. See Kristine L. Burks, Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve, 24 GOLDEN GATE U. L. REV. 223, 256-57 (1994). Similarly, courts do the same by granting standing after making findings of in loco
Many states, of course, have awarded custody to third parties such as stepparents in the "best interests" of children. As in Minnesota, several state legislatures have attempted to overcome the effect of the "superior rights" doctrine either by broadening the definition of those with standing to petition for custody of children or broadening the concept of "parent" itself. Connecticut, for example, now allows any interested third party to intervene in child custody proceedings. In a conceptually similar approach, states such as Oregon define the parental relationship solely in terms of the nurturing and support an individual has given the child, which benefit stepparents who have acted in loco parentis.

\quantity[213]{See Mangnall, supra note 3, at 419 (citing HAW. REV. STAT. § 571-46(2) (1993)) ("Custody may be awarded to persons other than the mother or father whenever the award serves the best interest of the child."); see also N.D. CENT. CODE § 14-09-06.1 (1991)). Michigan also gives standing to third parties and does not require parental unfitness before a claim can be asserted. See MICH. COMP. LAW §§ 722.21 and 722.25 (West Supp. 1999-2000); Ruppel v. Lesner, 339 N.W.2d 49, 51 (Mich. App. 1983); see also COLO. REV. STAT. § 14-10-123(2), 14-10-124 (1999); OR. REV. STAT. § 109.119 (1990); In re Sorenson, 906 P.2d 838, 840 (Or. Ct. App. 1995) (stepparents and others "who [have] established emotional ties creating a parent-child relationship with a child" may intervene in divorce proceedings or otherwise request custody).

\quantity[214]{See CONN. GEN. STAT. ANN. § 46b-57 (West 2000) (emphasis added); see also HAW. REV. STAT. § 571-46 (1999) (establishing best interests standard for third party custody cases); N.D. CENT. CODE § 14-09-06.1 (1997 & Supp. 1999); N.H. REV. STAT. ANN. § 458:17 (1992 & Supp. 1995) ("An award of custody may be made to a stepparent if the court determines that such an award is in the best interest of the child."). These and other states dissatisfied with the parental preference standard, have made the best interest standard the sole test in all third party custody disputes. See David R. Fine & Mark A. Fine, Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies, 97 DICK. L. REV. 49, 56 (1992).}

\quantity[215]{A relationship that exists or did exist... within the six months preceding the filing of an action... and in which relationship a person having physical custody of a child or residing in the same household... supplied... food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay, and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. Id.}
In *Buness v. Gillen*, for example, the Alaska Supreme Court found that a stepfather developed a strong emotional bond with a child. He lived with the child’s natural mother and although he never married her, he had been the child’s primary caregiver and “father figure.” Wisconsin courts now simply require that third parties requesting custody establish, *inter alia*, a parent-like relationship. This may be accomplished by showing:

1. that the biological or adoptive parent consented to, and fostered, the petitioner’s relationship with the child;
2. that the petitioner and the child lived together in the same household;
3. that the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and
4. that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

Wisconsin’s approach, however, is problematic. That state’s recent law continues to unduly focus on the “superior rights” of parents by insisting on parental consent to or fostering of the non-parent’s relationship, an often difficult matter of proof. In *Ellison v. Ramos*, on the other hand, a North Carolina court recently interpreted that state’s third party standing provision as calling for a simple balancing test. (This might be a point of clarification useful to the Minnesota Supreme Court.) The North Carolina statute provides—as does Minnesota’s, essentially—that “[a]ny parent, relative, or other person . . . claiming the right to custody of

216. 781 P.2d 985 (Alaska 1989).
217. See id. at 989.
a minor child may institute an action or proceeding for the custody of such child . . . .\textsuperscript{220} In *Ellison*, therefore, the father's former companion petitioned for custody of his diabetic daughter.\textsuperscript{221} She alleged that during her relationship with the father, she, rather than the father, was responsible for rearing and caring for the child, that the father wanted to take the child to Puerto Rico to live with his paternal grandparents, and that those grandparents were incapable of meeting the child's special needs.\textsuperscript{222}

In resolving a motion to dismiss, the court noted that a "broad grant of standing [does] not convey an absolute right upon every person who allegedly has an interest in the child to assert custody."\textsuperscript{223} Nevertheless, the goal is to "promote the best interests of the child in all custody determinations,"\textsuperscript{224} and "the relationship between the third party and the child is the relevant consideration."\textsuperscript{225} The court found that the third party had standing to petition because she alleged such a relationship and then discussed whether she also had stated a claim given the "constitutionally mandated presumption that, as between a natural parent and a third party, the natural parent should have custody."\textsuperscript{226} Consistent with but more clearly stated than in Minnesota precedent, the North Carolina court reasoned that:

[T]he parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. [Conduct] inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the "best interest of the

\textsuperscript{221} See *Ellison*, 502 S.E.2d at 893.
\textsuperscript{222} See id.
\textsuperscript{223} Id. at 894 (citation omitted).
\textsuperscript{224} "What is in the best interests of the child is now considered to be the most important, overriding factor in a court's decision awarding custody." *Legal Rights of Children*, supra note 5, at § 2.04, 38 (citations omitted). "In some of these states, it is said to be the exclusive factor on which a court should base its custody decisions." Id. (citations omitted).
\textsuperscript{225} See *Ellison*, 502 S.E.2d at 894. "Accordingly, we hold that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." Id.
\textsuperscript{226} Id. at 896. The U.S. Supreme Court has recognized "a fundamental liberty interest of natural parents in the care, custody, and management of their child . . . ." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
child” test without offending the Due Process Clause.227

Thus, because a period of voluntary non-parent custody constituted conduct inconsistent with a parent’s protected status where the parent did not indicate that the period of non-parent custody was intended to be temporary,228 the petition was sustained.229 Otherwise, “the action [should be] appropriately dismissed, as the natural parent presumption [would] defeat the claim as a matter of law.”230 This approach to jurisdiction and ultimate decisions on the merits presented by Ellison is somewhat more permissive of third party interests than in Minnesota, especially those of de facto step-parents, but appears to be an ideal approach toward protecting parental rights while focusing on the ultimate best interests of children.

VIII. CONCLUSION

To some extent, courts faced with determining the proper role of parental preferences in custody determinations inevitably will anticipate and accomplish children’s “best interests” by contorting legal reasoning and straining to fit available facts into quasi-property notions of proper relinquishment of parental rights.231 These efforts, of course, involve considerations unrelated to children’s “best interests”232 and create the unfortunate irony of a state purporting to act in the best interests of children in custody determinations, while in fact focusing more immediately on protecting the quasi-property rights of parents.233 Moreover, this

227. Ellison, 502 S.W.2d at 896. The due process clause is not offended by the application of the best interest test to recognize a family already in existence. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978).
228. See Ellison, 502 S.E.2d at 897 (citing Price v. Howard, 484 S.E.2d 528, 536-37 (N.C. 1997)).
229. See id.
230. See id.
231. See supra Part IV.F.
232. The continuing use of presumptions favoring parents indicates that third party custody decisions are not so much based on the best interests of the child as they are on claims to the ownership of property. See Erin E. Wynne, Children’s Rights and the Biological Bias: A Comparison Between the United States and Canada in Biological Parent Versus Third-Party Custody Disputes, 11 Conn. J. Int’l L. 367, 381-82 (1996).
233. “Patriarchal notions of ownership do not lend themselves to a child-centered theory of custody or parenthood. The patriarchal tradition assumes that parent’s rights exist for the parent and not . . . for the child.” Barbara Bennett Woodhouse, Who Owns the Child?: Meyer and Pierce and the Child as Property, 33
approach often tends not to illuminate the proper relationship between parents' "superior rights" and the "best interests" of children.

Minnesota child custody provisions tend to minimize these problems. Still, legislative efforts may be required, especially where the rights of stepparents who may not currently be in residence with their stepchildren are concerned. Minnesota lawmakers also might consider further amending the state's custody provisions to more clearly establish a single "best interests" analysis, one that, as in Ellison, simply balances evidence of parental responsibility or irresponsibility against third party claims of consensual psychological bonding. Finally, the Minnesota Supreme Court might profitably encourage the judiciary to articulate the factors in Minnesota Statute section 257.025, which favor or disfavor parents and third parties in third party custody disputes. Such modifications might allow greater flexibility in protecting the best interests of children and encourage greater focus on the nature of de facto parent-child relationships that properly militate in favor of custody in third parties.