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## Who are My Real Mommy and Daddy? Third Party Child Custody Determinations and the Need for Legislative Guidance in North Dakota with this Policy-Laden Area of Law

John Schroeder

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WHO ARE MY REAL MOMMY AND DADDY? THIRD-PARTY  
CHILD CUSTODY DETERMINATIONS AND THE NEED FOR  
LEGISLATIVE GUIDANCE IN NORTH DAKOTA WITH THIS  
POLICY-LADEN AREA OF LAW

ABSTRACT

Children are increasingly being raised by persons other than their biological or adoptive parents. When disputes arise between parents and third parties seeking custody, there are many of the traditional child custody dynamics at play, but also some unique ones. North Dakota has judicially crafted the means and standards by which a third party may petition for custody of a child. Due to the highly sensitive nature of assigning rights and responsibilities with regard to the care of children, the North Dakota Legislative Assembly should give the courts of North Dakota statutory guidance on how third parties can gain custody of a minor child. By using the experiences of other states and the American Law Institute's guidance on the subject, the Legislature should craft law that will aid trial and appellate courts in this highly sensitive area.

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## I. INTRODUCTION

Despite past notions of family, a significant number of children in the United States are not living with both of their biological parents.<sup>1</sup> The incidence of children living in households with an adult who is not that child's biological parent is also significant.<sup>2</sup> North Dakota is not immune from the phenomenon of children being raised by persons other than their biological parents.<sup>3</sup> When parents seek to regain custody of their children from third parties that had been raising the children, it is not a straightforward decision as to whether the parent should regain the custody of his or her child.<sup>4</sup> The extent to which the third party remains in the child's life is also often disputed.<sup>5</sup> The law surrounding these types of claims is anything but certain, and North Dakota statutes provide little guidance.<sup>6</sup>

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1. See U.S. CENSUS BUREAU, AMERICA'S FAMILY AND LIVING ARRANGEMENTS: 2011, tbl.C9 (2011), available at <http://www.census.gov/population/socdemo/hh-fam/cps2011/tabC1-all.xls> (showing only sixty-nine percent of children in United States are living with both parents).

2. See *id.* (showing 8.3% of children in the United States live in a household with at least one stepparent, grandparent, or other non-parent, excluding adoptive parents).

3. KAREN OLSON, N.D. KIDS COUNT, NORTH DAKOTA KIDS COUNT 2011 FACT BOOK 11 (2011), available at [http://www.ndkidscount.org/factbook/complectefactbook/NDKCFactBook\\_2011.pdf](http://www.ndkidscount.org/factbook/complectefactbook/NDKCFactBook_2011.pdf) (noting that four percent of children in North Dakota live with a grandparent alone, and that only seventy-two percent of North Dakota children live with both parents).

4. See *McAllister v. McAllister*, 2010 ND 40, ¶ 31, 779 N.W.2d 652, 662-64 (Crothers, J., concurring) (surveying North Dakota cases on the subject).

5. See *id.*

6. North Dakota has specific language applying to custody that was adopted in 2009. See N.D. CENT. CODE § 14-09-00.1 (2009). Rather than using those definitions, throughout this Note, the term custody will be used, referring to physical custody, now known in North Dakota as primary residential responsibility, and visitation will be used, which is now known as parenting time. See *id.* §§ 14-09-00.1(5)-(6), 14-09-33. The use of the term custody for third parties is intentional, in part, for the reason set forth later concerning standing. See discussion *infra* Part IV.A.

This Note reviews the United States Supreme Court precedent articulating the constitutional rights that parents have at stake in any proceeding between a parent and a third party, reviews the statutory law and case law in North Dakota concerning third party custody claims in North Dakota, and draws upon other states' experiences and the American Law Institute's guidance on providing a clear statute to guide both litigants and courts in making determinations that are both fair to parents and beneficial to children.

## II. PARENTING IS A FUNDAMENTAL RIGHT

Parents have a constitutional right to the care and custody of their children.<sup>7</sup> The history, refinement, and current questionable status of parental rights are analyzed in this section. Part A looks at the Supreme Court's early articulation of parental rights. Part B examines at the Supreme Court's refinement of parental rights over time. Finally, Part C analyzes the Supreme Court's most recent case on parental rights and shows that things are not quite as clear as many people once thought.

### A. *MEYER* AND *PIERCE* MAKE THE FIRST FORAY INTO PARENTAL RIGHTS

The Supreme Court's first recognition of the fundamental nature of parental rights occurred in 1923, in *Meyer v. Nebraska*,<sup>8</sup> in response to a question regarding the education of children.<sup>9</sup> In *Meyer*, a parochial school teacher was found guilty of violating a Nebraska statute, which criminalized teaching a student in a language other than English.<sup>10</sup> The teacher challenged the prohibition as a violation of due process under the Fourteenth Amendment.<sup>11</sup> The Nebraska Supreme Court defended the prohibition on security and pedagogical concerns of the state, and found the restriction on teaching foreign languages a proper exercise of police power and not a violation of due process.<sup>12</sup>

The United States Supreme Court reversed Meyer's conviction, holding the criminal statute was applied arbitrarily and did not have a reasonable relation to a proper state interest.<sup>13</sup> The Court found the liberty interests of the teacher were implicated in such a prohibition, but more

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7. *E.g.*, *McAllister*, ¶ 14, 779 N.W.2d at 658.

8. 262 U.S. 390 (1923).

9. *Meyer*, 262 U.S. at 396-97.

10. *Id.*

11. *See id.* at 397.

12. *Id.* at 397-99 (quoting *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1923)).

13. *Id.* at 403.

importantly, that the liberty interest of the Fourteenth Amendment includes the right “to marry, establish a home and bring up children” and “the power of parents to control the education of their own.”<sup>14</sup> The Court did not rely solely on the basis of the parents’ “essential” rights to control the education of their children, but also on the right of a modern language teacher to practice his occupation, and of citizens to speak languages other than English.<sup>15</sup> Thus, while not a case squarely dealing with a parent’s rights, *Meyer* stands as the first pronouncement that a parent’s authority over a child is one of the “fundamental rights which must be respected” under the Fourteenth Amendment.<sup>16</sup>

The Supreme Court readdressed the issue of parental rights in an educational context two years later in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*.<sup>17</sup> In *Pierce*, the Supreme Court held parents cannot be forced to send their children to a public, as opposed to a private or parochial, school.<sup>18</sup> In 1922, the voters of Oregon passed the Compulsory Education Act, which made failure to send a child between age eight and sixteen to a public school a misdemeanor for any parent or custodian of that child.<sup>19</sup> Both a Catholic school system, the Society of the Sisters of the Holy Names of Jesus and Mary (“Society of Sisters”), and a military academy, Hill Military Academy, sought an injunction against enforcement of the Act, as it would irreparably destroy their business, having no student enrollment.<sup>20</sup> Although no parents were parties to the suits, the Society of Sisters did run an orphanage, and would have fallen under the Act’s prohibition as custodian of children.<sup>21</sup> Unlike the Court in *Meyer*, the *Pierce* Court squarely placed its holding on the implication of parents’ right to control their children.<sup>22</sup> The Court wrote “the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>23</sup> The Court focused on parental rights despite being invited by the Society of Sisters to

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14. *Id.* at 399, 401.

15. *See id.* at 401-03.

16. *Id.* at 401; *see also* Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1012-16 (1992) (noting that the litigants and the state courts focused on claims of religious freedom and freedom of educators to practice their occupation, not primarily on the rights of parents to direct the education of their children).

17. 268 U.S. 510 (1925).

18. *Pierce*, 268 U.S. at 534-35.

19. *Id.* at 530-31.

20. *Id.* at 531-33.

21. *See id.* at 532.

22. *Id.* at 534-35.

23. *Id.*

invalidate the Act on the other interests implicated in *Meyer*.<sup>24</sup> The most lasting impact of *Pierce* has been the idea that the child is not primarily identified with the state, but rather, the family.<sup>25</sup> The Court wrote “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>26</sup>

B. THE INTEREST OF PARENTS BECOMES A FUNDAMENTAL RIGHT,  
OR IS IT A FUNDAMENTAL LIBERTY INTEREST?

The rights of parents concerning their children were readdressed by the Supreme Court in 1944 in *Prince v. Massachusetts*.<sup>27</sup> In *Prince*, a Jehovah’s Witness was convicted of violating child labor laws when she took her niece, whom was in the aunt’s custody, on a street mission distributing copies of religious periodicals.<sup>28</sup> The aunt challenged her conviction as being a violation of her rights to direct the upbringing of the child in her custody, as guaranteed by the Fourteenth Amendment, and of the child’s religious freedoms, as guaranteed by the First Amendment.<sup>29</sup> The Court acknowledged parents have priority in the “custody, care and nurture of the child” and there is a “private realm of family life which the state cannot enter.”<sup>30</sup> Despite reaffirming the fundamental right of parents to control their children, the Court acknowledged there are limits to this power when the public interest and the protection of children necessitate intervention.<sup>31</sup> The Court ultimately upheld the conviction, finding the protection of children from the harms of preaching on a public street are of such a magnitude that the state was within its constitutional bounds to entirely prohibit such activity.<sup>32</sup>

In 1968, the Court again upheld a challenge to the constitutionality of a criminal statute, attacked in part on parental rights grounds, in *Ginsberg v. New York*.<sup>33</sup> The owner and operator of a Long Island store and deli

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24. *See id.* at 532 (noting the Society of Sisters complaint urged enjoinder of the Act on the basis of children’s rights to direct their own education and teachers to practice their occupation, in addition to parents’ rights to direct the education of their children).

25. *See* Woodhouse, *supra* note 16, at 997-98.

26. *Pierce*, 268 U.S. at 535. *See generally* Woodhouse, *supra* note 16, for a scholarly argument that *Meyer* and *Pierce* are based on very conservative notions that children are the property of their parents.

27. 321 U.S. 158 (1944).

28. *Prince*, 321 U.S. at 159-60.

29. *Id.* at 164.

30. *Id.* at 166.

31. *Id.* at 166-67.

32. *See id.* at 170.

33. 390 U.S. 629 (1968).

challenged his conviction under a state statute for selling an obscene magazine to a child, despite such magazine having been adjudicated to not be obscene for adults.<sup>34</sup> Ginsberg argued, implicitly, the prohibition on such sales violates parents' freedom to choose what materials their children can read.<sup>35</sup> The Court rejected this argument, thus reinforcing the state's role in protecting children from harms.<sup>36</sup> The Court noted the New York Legislature used a rational law to advance this interest.<sup>37</sup> The Court went even further and found the prohibition on sales of obscene materials to children enhanced parents' control over their children's upbringing.<sup>38</sup>

Having moved away from parents' interests as a priority in the 1940s to 1960s, the Court reasserted a concern for parents as opposed to state interests in *Stanley v. Illinois*.<sup>39</sup> In *Stanley*, the Supreme Court held a state cannot presume a father who is not married to his children's mother should not have custody of his children when the mother dies.<sup>40</sup> The Court, citing *Meyer* and *Prince*, found a father's "interest in retaining custody of his children is cognizable and substantial."<sup>41</sup> The Court did not dispute that Illinois has a legitimate interest in ensuring children are cared for by fit parents, but the presumption that unwed fathers are unfit was not reasonable.<sup>42</sup>

In the same year it decided *Stanley*, the Court reaffirmed parents' rights to control his or her children's upbringing, no matter how different from mainstream society, in *Wisconsin v. Yoder*.<sup>43</sup> In *Yoder*, several Amish parents challenged their convictions of violating a Wisconsin statute

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34. *Ginsberg*, 390 U.S. at 631-34. The magazine that Ginsberg sold to the minor was a copy of *Sir*. *Id.* at 634 n.3. This same magazine was challenged as being obscene generally, and in a per curiam opinion, the Supreme Court rejected such a finding. *Id.* (citing *Redrup v. New York*, 386 U.S. 767 (1967)). In *Redrup*, a consolidated case, the Supreme Court reversed an Arkansas injunction in an in rem proceeding against the distribution of certain magazines, including *Sir*. *Redrup*, 386 U.S. at 769-70.

35. *See Ginsberg*, 390 U.S. at 638-39. Ginsberg's main argument was that minors' First Amendment rights were being violated since the material was not obscene when adults were concerned, and there could not be two standards of obscenity, one for adults and another for minors. *See id.* at 636-37. He also challenged the prohibition as being void because it was so vague that it does not give a possible violator fair warning as to what the statute prohibits. *Id.* at 643.

36. *Id.* at 640-41.

37. *Id.* at 643.

38. *See id.* at 639 (noting this law support's parents in ensuring children's well-being and that parents can always choose to give the materials to their children, if the parent so decides).

39. 405 U.S. 645 (1972).

40. *Stanley*, 405 U.S. at 658.

41. *Id.* at 652.

42. *See id.* at 352-53 ("We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.").

43. 406 U.S. 205 (1972).



requiring attendance of children under sixteen in either a public or private school.<sup>44</sup> The challengers believed sending their children, who were graduates of the eighth grade but not yet sixteen years old, to high school, would lead to damnation and violated their religious tenants.<sup>45</sup> With regard to the rights of parents to control their children, the Court noted the educational choices made for children were for parents to decide, and, when there is a religious nature to the decision, it comes to be a “fundamental interest of parents.”<sup>46</sup> The Court in *Yoder* articulated a higher standard of review for statutes tending to implicate parents’ religious choices for their children, but did not give a clear standard of what review is required.<sup>47</sup>

The right of parents to the care and control of their children was recognized of requiring special procedural requirements in a parental rights termination proceeding in *Lassiter v. Department of Social Services*<sup>48</sup> and *Santosky v. Kramer*.<sup>49</sup> In *Lassiter*, the Court held a state was not required to provide an indigent parent appointed counsel in every instance, but in many instances, due process would require appointment of counsel, and trial judges should make such determination.<sup>50</sup> In a stronger ruling than *Lassiter*, the Court in *Santosky* held a clear and convincing evidence burden of persuasion for the state was mandated by the Fourteenth Amendment Due Process Clause in a parental rights termination proceeding.<sup>51</sup> Since both of these decisions were about procedural rules concerning parental rights, they were not subjected to a rational basis, or other type of scrutiny used for substantive due process challenges, but rather, a balancing of interests test.<sup>52</sup> Despite being focused on procedure, *Santosky* is probably

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44. *Yoder*, 406 U.S. at 207-09.

45. *Id.*

46. *Id.* at 214, 232.

47. *See id.* at 233 (noting the statute at issue in *Prince* was upheld for being reasonable but “when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required”).

48. 452 U.S. 18 (1981).

49. 455 U.S. 745 (1982).

50. *Lassiter*, 452 U.S. at 31-32.

51. *Santosky*, 455 U.S. at 769.

52. *Id.* at 754, 758 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Lassiter*, 452 U.S. at 27). In *Eldridge*, the Supreme Court reviewed a claimed violation of due process when the Social Security Administration’s procedures permitted termination of disability benefits prior to an evidentiary hearing. 424 U.S. at 349. In evaluating a state’s chosen procedure,

specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

the strongest-worded articulation of parents' substantive rights, describing them as a "fundamental liberty interest of natural parents in the care, custody, and management of their child."<sup>53</sup>

The articulation of parental rights as fundamental is significant because fundamental rights are subject to strict scrutiny under the Fourteenth Amendment Due Process Clause.<sup>54</sup> The standard requires the government to have a compelling interest for the action chosen, and its action must be narrowly tailored to implement that interest.<sup>55</sup> Other rights not considered fundamental are subject to rational basis review, where the government only needs a legitimate interest and its actions only need to be rationally related to that interest.<sup>56</sup> The determination of whether a right is really fundamental, and therefore the correct level of constitutional scrutiny to be applied, is key because the outcome of the case often depends on what level of scrutiny a court will use.<sup>57</sup>

### C. *TROXEL* SAYS FUNDAMENTAL RIGHT, BUT DOES THE SUPREME COURT REALLY MEAN IT?

The Supreme Court's most recent consideration of a claimed violation of a parent's rights over her children came in the year 2000, in *Troxel v. Granville*.<sup>58</sup> There was no majority opinion issued in *Granville*, with a plurality opinion, two concurrences, and three dissents filed.<sup>59</sup> The case involved a challenge to a Washington statute that provided a right for any person to petition the court for visitation with a child at any time, and required the court to order visitation if it would be in the best interest of the child.<sup>60</sup> The dispute arose out of grandparents seeking court ordered visitation with their grandchildren after their former daughter-in-law

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*Id.* at 335.

53. *Santosky*, 455 U.S. at 753.

54. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

55. *Id.*

56. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

57. See David B. Howlett, *Illegitimate Children and Military Benefits*, 132 MIL. L. REV. 5, 17 (1991). At one point Justice Marshall endorsed a view of strict scrutiny as "strict in theory, but fatal in fact." *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). Subsequent Courts have disavowed using this view as analysis. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). While not a use for analysis, the phrase still has descriptive weight.

58. 530 U.S. 57 (2000).

59. *Troxel*, 530 U.S. at 59.

60. *Id.* at 61 (citing WASH. REV. CODE § 26.10.160(3) (1994)). The statute provided "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." WASH. REV. CODE § 26.10.160(3).

curtailed visitation following her ex-husband's suicide.<sup>61</sup> The state trial court awarded the grandparents visitation, the mother appealed, and eventually the Washington Supreme Court held the statute violated the United States Constitution, because it did not require a showing of harm to the child if visitation was not ordered; the statute was also found to be overbroad because there were no restrictions on who could petition for visitation.<sup>62</sup>

Justice O'Connor authored the plurality opinion, in which Chief Justice Rehnquist, and Justices Ginsberg and Breyer joined.<sup>63</sup> The plurality described "the interest of parents in the care, custody, and control of their children [as] perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>64</sup> However, the plurality was not consistent in its terminology, later in the opinion calling this interest a "fundamental right" of parents.<sup>65</sup> The plurality upheld the Washington Supreme Court's decision because the statute was "breathtakingly broad" and gave no weight to the decision of a fit parent.<sup>66</sup> The plurality endorsed two presumptions concerning parental rights: first, that a parent is fit until shown otherwise, and second, that a fit parent acts in his or her child's best interests.<sup>67</sup> Significantly, the plurality specifically declined to hold, as the Washington Supreme Court had, the Due Process Clause requires a showing of harm, or potential harm, to the child prior to a third party being granted visitation.<sup>68</sup> The plurality did not want to create a "per se" rule for third party visitation "[b]ecause much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter."<sup>69</sup> Thus, it is not clear what test – rational basis, strict scrutiny, or some intermediate – the plurality applied to invalidate this statute.<sup>70</sup>

Justice Souter concurred in the judgment affirming the Washington Supreme Court's decision, but wrote separately because he argued the

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61. *Troxel*, 530 U.S. at 60-61.

62. *Id.* at 63 (citing *In re Custody of Smith*, 969 P.2d 21, 28-31 (Wash. 1998) (en banc)). *In re Custody of Smith* was a consolidated case involving three separate constitutional challenges to the Washington statute. 969 P.2d at 23.

63. *Troxel*, 530 U.S. at 60 (plurality opinion).

64. *Id.* at 65.

65. *Id.* at 66.

66. *Id.* at 67.

67. *See id.* at 68-69.

68. *Id.* at 73.

69. *Id.*

70. *See id.* ("We do not, and need not, define today the precise scope of the parental due process right in the visitation context.")

plurality justices went too far by analyzing the actual facts of the case.<sup>71</sup> Justice Souter noted the Washington Supreme Court held the visitation statute invalid on its face, and not in its application to any facts, finding the plurality's factual analysis to be problematic "in the 'treacherous field' of substantive due process."<sup>72</sup> Despite this difference in approach, Justice Souter essentially found the same overbreadth problem, and, like the plurality, specifically declined to decide whether a showing of harm to the child is required to allow the state to infringe upon the parent-child relationship.<sup>73</sup> Notably, Justice Souter did not use the word fundamental to describe a parent's interest in controlling their children, and specifically noted the parental interest protected by the Fourteenth Amendment is not clearly defined.<sup>74</sup>

Justice Thomas also concurred in the judgment, but would have invalidated the visitation statute as a violation of due process under the Court's current due process precedent.<sup>75</sup> Justice Thomas had the clearest articulation of the parental right at stake.<sup>76</sup> He argued the right is fundamental, and as such, strict scrutiny applies to reviewing an infringement of that right.<sup>77</sup> Despite Justice Thomas arguing strict scrutiny was the appropriate measure, he would have invalidated the statute if either rational basis review or strict scrutiny were applied, noting "the State of Washington lacks even a legitimate governmental interest – to say nothing of a compelling one – in second-guessing a fit parent's decision regarding visitation with third parties."<sup>78</sup>

Justices Stevens, Scalia, and Kennedy all filed dissenting opinions.<sup>79</sup> Justice Stevens would have denied certiorari in the first instance, but having decided the merits, would not have invalidated the statute on a facial challenge, since all applications of the statute would not be unconstitutional.<sup>80</sup> Justice Stevens argued the typical case would likely be someone with a close relationship with the child seeking visitation and thus is not sufficient to hold a statute facially invalid.<sup>81</sup> Further, Justice Stevens

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71. *Id.* at 75-76 (Souter, J., concurring).

72. *Id.* at 76.

73. *Id.* at 76-77.

74. *Id.* at 77, 78-79.

75. *Id.* at 80 (Thomas, J., concurring). Justice Thomas would hold that there are not unenumerated rights that are protected by the Fourteenth Amendment, but recognizes that under the Court's current due process analysis, this statute violates the Constitution. *See id.*

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.* at 80, 91, 93.

80. *Id.* at 80-81 (Stevens, J., dissenting).

81. *Id.* at 85.

argued a showing of harm has never been required to limit parental rights.<sup>82</sup> He also did not agree with the plurality's presumption that a fit parent acts in the best interests of his or her children.<sup>83</sup> Finally, Justice Stevens questioned how the constitutional rights of children should be weighed against the decisions that parents make concerning the child.<sup>84</sup> Justice Stevens also called the interest of parents "a fundamental liberty interest in caring for and guiding their children."<sup>85</sup> However, he did not apply strict scrutiny analysis, and only limited his holding to the argument that the statute cannot be facially invalid.<sup>86</sup>

Justice Scalia's dissent generally attacked the idea of unenumerated rights under the Due Process Clause.<sup>87</sup> He also noted the due process rights of parents were articulated in an era of substantive due process that has long been repudiated.<sup>88</sup> Justice Scalia argued the definition of a "parent" can be slippery, and federal courts should avoid excursions into family law, which is the proper province of state legislatures.<sup>89</sup>

Finally, Justice Kennedy disagreed with the holding of the Washington Supreme Court that a finding of harm must always be made in order for a third party to be granted visitation with a child over a parent's objection.<sup>90</sup> He noted the best interest standard for visitation disputes has a long history and tradition as the basis for decision.<sup>91</sup> Finding that being free from an application of the best interest standard in all third party custody cases is not "implicit in the concept of ordered liberty," Justice Kennedy would not have held the Washington statute facially unconstitutional.<sup>92</sup> This basis alone would have been sufficient for Justice Kennedy to remand the case to the Washington Supreme Court for a decision on the application of the statute to these facts.<sup>93</sup>

Given the Supreme Court's precedent concerning parental rights, there is no clear answer as to the scope and nature of the right, nor whether

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82. *Id.* at 85-86.

83. *See id.* at 89 ("The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.").

84. *Id.* at 89.

85. *Id.* at 87.

86. *Id.* at 90-91.

87. *Id.* at 91-92 (Scalia, J., dissenting).

88. *Id.* at 92 (citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

89. *Id.* at 92-93.

90. *Id.* at 94 (Kennedy, J., dissenting).

91. *Id.* at 99.

92. *Id.* at 100.

93. *Id.* at 95, 101-02.

parental rights really are fundamental rights subject to strict scrutiny.<sup>94</sup> One commentator has noted that prior to *Troxel*, the nature of parental rights as fundamental, and subject to strict scrutiny, was firmly established, but following *Troxel* parental rights are not as firm.<sup>95</sup> The majority of Justices in *Troxel* rejected applying a strict scrutiny analysis to the statute, and rather pointed towards a balancing of interests type of standard, which is wholly inconsistent with the Court's prior approach to fundamental rights.<sup>96</sup> Thus, following *Troxel*, there is a good argument the proper standard for evaluating parental rights is a balancing of interests, and not an application of strict scrutiny.<sup>97</sup>

The confusion of where parental rights fit within the Court's constitutional precedent has prompted some in Congress to propose an amendment to the Constitution to provide "the liberty of parents to direct the upbringing and education of their children is a fundamental right" that can only be infringed when the government can show that its "interest as applied to the person is of the highest order and not otherwise served."<sup>98</sup> The Court has also recently declined an invitation to clarify the two open questions left after *Troxel*.<sup>99</sup> The Court was asked to determine (1) whether parental rights are fundamental and (2) whether a third party visitation statute has a showing of harm requirement.<sup>100</sup>

### III. NORTH DAKOTA'S THIRD PARTY CHILD CUSTODY LAWS

North Dakota is in the minority of jurisdictions that recognize the placement of custody in a third party absent statutory authority.<sup>101</sup> Many state courts have explicitly rejected awarding custody to a non-parent over a parent's objection without some statutory authority to do so.<sup>102</sup> This section first describes the areas where North Dakota has some statutory guidance,

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94. See Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 985-92 (1987) (questioning whether parental rights really are fundamental rights subject to strict scrutiny).

95. David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1132-33, 1152-55 (2001).

96. *Id.* at 1152-55.

97. *Id.*

98. H.R.J. Res. 97, 110th Cong. (2008). The same amendment has been proposed in each subsequent Congress. H.R.J. Res. 3, 112th Cong. (2011); H.R.J. Res. 42, 111th Cong. (2009).

99. *E.R.G. v. E.H.G.*, 123 S. Ct. 1535 (2012) (No. 11-311) (denying certiorari).

100. Petition for Writ of Certiorari at 5-6, *E.R.G. v. E.H.G.*, 123 S. Ct. 1535 (2012) (No. 11-311), 2011 WL 4048829.

101. *McAllister v. McAllister*, 2010 ND 40, ¶ 32, 779 N.W.2d 652, 664 (Crothers, J., concurring).

102. *Id.* ¶ 34, 779 N.W.2d at 665.

and then reviews some of the North Dakota case law developing a third party's right to claim custody.

#### A. SOME RIGHTS OF THIRD PARTIES ARE STATUTORY

North Dakota's laws on child custody are predominantly statutory.<sup>103</sup> Part 1 discusses the statutory rights grandparents have with regard to visitation in North Dakota. Part 2 discusses other more ephemeral statutory rights that third parties have with regard to custody and visitation in North Dakota.

##### 1. *Grandparent Visitation*

Grandparents and great-grandparents can petition for visitation with an unmarried minor child.<sup>104</sup> To award visitation, the district court must find that visitation would be in the best interest of the child and not interfere with the parent-child relationship.<sup>105</sup> North Dakota's grandparent visitation statute is basically the same as was originally enacted in 1983,<sup>106</sup> but it has not always been that way.

In 1993, the Legislative Assembly significantly revised North Dakota's grandparent visitation statute to provide a presumption that visitation is in the child's best interests, and visitation will be denied only when it is shown to not be in the child's best interests.<sup>107</sup> In *Hoff v. Berg*,<sup>108</sup> the North Dakota Supreme Court held this presumption was an infringement of due process.<sup>109</sup> After reviewing the nature of parental rights, in both North Dakota and other jurisdictions, the court determined that controlling whom one's child associates with is a parents' fundamental right, and is to be reviewed under strict scrutiny.<sup>110</sup> The court held the statute violated both the due process clauses of the federal and state constitutions, because of the presumption in favor of visitation and the burden was on the parents to show visitation would interfere with the parent-child relationship.<sup>111</sup> The finding that parental interest in the care, custody, and control of their children is a fundamental right under the state constitution is significant

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103. See N.D. CENT. CODE ch. 14-09 (2009).

104. *Id.* § 14-09-05.1(4).

105. *Id.* § 14-09-05.1(1). The best interest factors the court must consider are codified. *Id.* § 14-09-06.2.

106. Compare 1983 N.D. Laws 486, with 2009 N.D. Laws 610-11.

107. 1993 N.D. Laws 619.

108. 1999 ND 115, 595 N.W.2d 285.

109. *Hoff*, ¶ 18, 595 N.W.2d at 291-92.

110. *Id.*, ¶¶ 14-17, 595 N.W.2d at 290-91.

111. *Id.* ¶ 18, 595 N.W.2d at 291-92.

because “[t]he North Dakota Constitution may afford broader individual rights than those granted under its federal counterpart.”<sup>112</sup> Thus, despite the apparent erosion of parental rights as “fundamental” in *Troxel*,<sup>113</sup> the North Dakota Supreme Court has reaffirmed that under the North Dakota Constitution parental rights are fundamental rights.<sup>114</sup> The status of strict scrutiny being applied to this fundamental right, however, is unclear because the North Dakota Supreme Court has not addressed the question since *Hoff*.

## 2. *Aunt, Uncle, and Grandparent Temporary Custody Pending Adoption and Domestic Violence Placement*

North Dakota statutory law also provides for the placement of custody with different family members pending an adoption.<sup>115</sup> All other assignments of parental rights by a parent without court order are void.<sup>116</sup> Third-party custody is also authorized when it is necessary to protect the welfare of a child that has been exposed to serious domestic violence.<sup>117</sup> Again, there is a preference, though not a requirement, that this third party be a suitable relative of the child.<sup>118</sup>

### B. MOST CLAIMS OF THIRD PARTIES TO CUSTODY ARE JUDICIALLY CREATED

North Dakota recognizes that when exceptional circumstances are present, a third party can make a claim for custody of a child, notwithstanding the constitutional claims that a parent has to the child.<sup>119</sup> The exceptional circumstances justify granting the third party custody is to prevent harm to the child.<sup>120</sup> Exceptional circumstances have been recognized in three different cases: claims by grandparent-caregivers, claims by stepparents, and claims by voluntarily appointed guardians.<sup>121</sup>

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112. *State v. Mittleider*, 2011 ND 242, ¶ 16, 809 N.W.2d 303, 308.

113. *See* discussion *supra* Part II.C.

114. *Hartlieb v. Simes*, 2009 ND 205, ¶ 20, 776 N.W.2d 217, 224. The erosion of this right might not be recognized by the North Dakota Supreme Court. *See id.* (citing *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000)) (“It is undisputed that parents have a fundamental right to the custody and control of their children.”).

115. N.D. CENT. CODE § 14-10-05 (2009).

116. *Id.*

117. *Id.* § 14-09-06.2(1)(j).

118. *Id.*

119. *McAllister v. McAllister*, 2010 ND 40, ¶ 14, 779 N.W.2d 652, 658.

120. *Id.*

121. *See* discussion *infra* Part III.B.1-3.



1. *Grandparental Custody Actions Not Based on Statutory Authority*

Many of the cases in North Dakota regarding the placement of custody with a third party, over a parent's objection, involved grandparents who had taken the responsibility to care for their grandchildren with the consent of at least one of the parents.<sup>122</sup> In *McKay v. Mitzel*,<sup>123</sup> a father petitioned for custody of his children following the death of his ex-wife.<sup>124</sup> The North Dakota Supreme Court affirmed granting custody to the maternal grandparents, finding this arrangement to be in the best interests of the children because the grandparents had provided care for the children in the grandparents' home, and the children preferred to remain there.<sup>125</sup>

In a similar case, the North Dakota Supreme Court granted grandparents custody of their grandson, in large part because the grandparents had formed a strong bond with their grandson during the father's absence.<sup>126</sup> The North Dakota Supreme Court held the proper standard was the best interest of the child, and continuity in the child's custody would best serve him.<sup>127</sup> The court recognize the grandfather was the only "father" this child had ever known.<sup>128</sup> The court took note of recent literature on the best interests of the child, and found the grandparents were the child's "psychological parents": the person who has shared memories with and who the child feels valued by.<sup>129</sup> Accordingly, the court reversed the trial court's award of custody to the boy's father, and restored it to the grandparents.<sup>130</sup> Throughout the cases in North Dakota involving third party claims for custody, a vast majority involve grandparents seeking the custody of their grandchildren following a parent's absence or death.<sup>131</sup>

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122. See *McAllister*, ¶ 31, 779 N.W.2d 652, 662-63 (Crothers, J., concurring).

123. 137 N.W.2d 792 (N.D. 1965).

124. *McKay*, 137 N.W.2d at 793. At the time the procedure was to file a writ of habeas corpus to have the child's custody determined when the parent who had physical and legal custody had died. *Id.* at 793-94.

125. *Id.* at 793-95.

126. *In re Custody of D.G.*, 246 N.W.2d 892, 893-94 (N.D. 1976).

127. *Id.* at 895. The court did not discuss any constitutional issues with this standard. *Id.*

128. *Id.*

129. *Id.* (citing JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973)).

130. *Id.* at 895-96.

131. See *McAllister v. McAllister*, 2010 ND 40, ¶ 31, 779 N.W.2d 652, 662-63 (Crothers, J., concurring) (surveying cases).

## 2. *Stepparents Can Petition for Custody if They Are Psychological Parents*

Another occurrence where claims of a third party arise is when a stepparent claims custody over a child's biological parent. In *Worden v. Worden*,<sup>132</sup> the North Dakota Supreme Court reversed the award of custody of a stepdaughter to her stepfather in a divorce between the mother and stepfather.<sup>133</sup> The district court had found exceptional circumstances justified awarding the stepfather custody, because the mother's life was unstable and the child's biological father did not visit her.<sup>134</sup> The North Dakota Supreme Court reversed, finding there was no evidence the stepfather had become the psychological parent of the child given the short time the couple was married, only two years, developing such a bond was unlikely.<sup>135</sup> The court noted "each case in which such a placement has been upheld by this court has involved a child who has been in the actual physical custody of the third party for a sufficient period of time to develop a psychological parent relationship with that third party."<sup>136</sup> In *In re Guardianship and Conservatorship of Nelson*,<sup>137</sup> a stepparent figure was awarded custody, despite never having been married to the child's father.<sup>138</sup> Most recently, the same doctrine that has been used to award custody of a stepchild to a stepparent has been invoked to allow a court to order visitation when there is a psychological parent relationship, despite custody not being found to be in the best interests of the child.<sup>139</sup>

## 3. *Other Exceptional Circumstance Cases*

The only other area where the North Dakota Supreme Court has found an exceptional circumstance warranting a custody award in someone other than a natural or adoptive parent is when a parent voluntarily places his or her child into a guardianship with another person. In *In re Guardianship of*

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132. 434 N.W.2d 341 (N.D. 1989).

133. *Worden*, 434 N.W.2d at 341-43.

134. *Id.* at 342.

135. *Id.* at 343.

136. *Id.* at 342-43.

137. 519 N.W.2d 15 (N.D. 1994).

138. *In re Nelson*, 519 N.W.2d at 19-20. The petitioner in *Nelson* was the live-in girlfriend of the child's father. *Id.* at 16. They had been living together for four years, including the father's two children from a previous marriage and the girlfriend's three children from a previous relationship. *Id.* Over this time the girlfriend did not work, but rather provided the daily care for all of the couple's children. *Id.* The guardianship became necessary because the father had died. *Id.*

139. *McAllister v. McAllister*, 2010 ND 40, ¶¶ 16, 20, 779 N.W.2d 652, 658-60; *Edwards v. Edwards*, 2010 ND 2, ¶¶ 10-11, 777 N.W.2d 606, 609-10.

*Barros*,<sup>140</sup> the North Dakota Supreme Court held a voluntarily created guardianship is, as a matter of law, an exceptional circumstance permitting the district court to begin with a best interest analysis when the parent seeks to terminate the guardianship and the guardian opposes termination.<sup>141</sup> The majority held the proper standard for the removal of a guardianship of a minor is that the parent initially prove by a preponderance of the evidence the reasons justifying the guardianship in the first place are no longer valid.<sup>142</sup> Once this has been shown, the guardian opposing the termination must show continuation of the guardianship is in the best interests of the child.<sup>143</sup> The court specifically rejected the application of a clear and convincing evidence standard to the best interest analysis, because the parental rights had not been fully infringed upon with the creation, and possible continuation, of the guardianship.<sup>144</sup>

Justice Kapsner dissented from the court's holding that a preponderance burden is the appropriate measure for continuing a guardianship against a parent's wishes.<sup>145</sup> Justice Kapsner believed a suspension of parental rights, which appointment of and continuation of a guardianship accomplishes, is more akin to a termination of parental rights and, as such, would apply a clear and convincing evidence standard.<sup>146</sup> In a subsequent case involving the same issue, Justice Kapsner did not dispute that a preponderance standard was appropriate for the best interest analysis.<sup>147</sup>

#### IV. A PROPOSED STATUTE TO CLARIFY NORTH DAKOTA'S THIRD PARTY CUSTODY LAW

North Dakota has a strong preference for setting policy through the Legislative Assembly rather than through the court system.<sup>148</sup> North Dakota judges and justices also prefer to not set policy, but rather defer to elected officials where possible.<sup>149</sup> This Part looks at particular issues that are calling for legislative attention in North Dakota. Part A shows where some ambiguity lies in current North Dakota third party custody law. Part

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140. 2005 ND 122, 701 N.W.2d 402.

141. *In re Barros*, ¶ 19, 701 N.W.2d at 409.

142. *Id.* ¶ 19, 701 N.W.2d at 408.

143. *Id.*

144. *See id.* ¶¶ 16-19.

145. *Id.* ¶ 26, 701 N.W.2d at 410 (Kapsner, J., concurring in part and dissenting in part).

146. *Id.* ¶ 28, 701 N.W.2d at 411.

147. *Hartleib v. Simes*, 2009 ND 205, ¶¶ 21-22, 48, 776 N.W.2d 217, 224, 231.

148. *See* N.D. CENT. CODE § 01-02-01 (2008).

149. *McAllister v. McAllister*, 2010 ND 40, ¶ 35, 779 N.W.2d 652, 666 (Crothers, J., concurring).

B looks at other states' legislative approaches to third party custody. Part C analyzes the American Law Institute's approach to third party custody. Finally, Part D makes some suggestions on how North Dakota could approach some of the issues in its current third party custody law via legislation.

#### A. ASPECTS OF NORTH DAKOTA'S LAW THAT NEED CLARIFICATION

There are several aspects to North Dakota's judicially crafted law surrounding third party custody claims that is unclear and could benefit from statutory guidance. First, as shown by the disagreement between the majority and the dissent in *In re Barros*, the question of the appropriate burden of persuasion is a significant issue when the government is using its authority to contravene the wishes of a fit parent.<sup>150</sup> Though the North Dakota Supreme Court ruled the burden on the third party is a preponderance of the evidence when the best interests of the child are being determined, there is also another burden of persuasion issue at play in third-party custody cases.<sup>151</sup> The third party must show there are exceptional circumstances that justify a best interest analysis, and under current case law, this burden is by a preponderance of the evidence.<sup>152</sup>

Second, the North Dakota Supreme Court has stated preventing harm to the child is a predicate to awarding custody to a third party, but it is not clear whether the concern for harm is to be evaluated in determining if exceptional circumstances exist, or when considering the best interests of the child.<sup>153</sup> In *McAllister v. McAllister*,<sup>154</sup> the North Dakota Supreme Court wrote that the exceptional circumstances were only a predicate to conducting the best interest analysis when the prevention of harm to the child was to be evaluated.<sup>155</sup> In *Edwards v. Edwards*,<sup>156</sup> the North Dakota Supreme Court held granting visitation with a stepfather was appropriate

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150. See *In re Barros*, 2005 ND 122, ¶¶ 13-18, 701 N.W.2d at 407-09; *id.* ¶¶ 26-28, 701 N.W.2d at 410-11 (Kapsner, J., concurring in part, dissenting in part).

151. See, e.g., *Hamers v. Guttormson*, 2000 ND 93, ¶ 9, 610 N.W.2d 758, 761; see also *McAllister*, ¶ 37, 779 N.W.2d at 666 (Crothers, J., concurring).

152. *Hamers*, ¶ 9, 610 N.W.2d at 761; *McAllister*, ¶ 37, 779 N.W.2d at 666.

153. See *Edwards v. Edwards*, 2010 ND 2, ¶ 11, 777 N.W.2d 606, 610.

154. 2010 ND 40, 779 N.W.2d 652.

155. See *McAllister*, ¶ 15, 779 N.W.2d 652, 658 ("Establishment of a psychological parent relationship does not end the trial court's inquiry in making a custody decision, but merely furnishes a justification for the award of custody to a party other than the natural parent. . . . [T]he natural parent's paramount right to custody prevails unless the court finds it in the child's best interests to award custody to the psychological parent to prevent serious harm or detriment to the welfare of the child.").

156. 2010 ND 2, 777 N.W.2d 606.

because the requirement to prevent harm arises from the exceptional circumstances themselves.<sup>157</sup>

Also troubling is the constitutional issue of the harm requirement.<sup>158</sup> As noted above, a harm requirement has not been decided to be constitutionally mandatory by the United States Supreme Court.<sup>159</sup> However, the North Dakota Supreme Court has determined a finding of harm or serious detriment is necessary to award custody to a third party over a fit parent.<sup>160</sup> Yet the North Dakota Supreme Court did not require any type of harm or detriment showing on the part of a guardian when a parent seeks to terminate the guardianship.<sup>161</sup> Thus, despite the harm requirement being a constitutional mandate in North Dakota,<sup>162</sup> a court-appointed guardian does not need to show harm or detriment to the child that would occur from ending the guardianship.<sup>163</sup> Such a harm or detriment requirement is required under the North Dakota Supreme Court's constitutional decisions because the state only has a compelling interest when the child's well-being is threatened, and for the termination of guardianships, it is not now required in North Dakota.<sup>164</sup>

Finally, the largest need for clarification is the standing of third parties to bring a claim following recent amendments to North Dakota's child custody statutes. Under North Dakota law, standing is a question of the courts' jurisdiction to determine the case before it.<sup>165</sup> In 2009, the North Dakota Legislative Assembly repealed and replaced a significant portion of North Dakota Century Code chapter 14-09.<sup>166</sup> Specifically, the Legislative Assembly changed terminology to be used in child custody proceedings, defined terms, and repealed the prior "best interests" section, replacing it with updated factors for a court to consider.<sup>167</sup> All of these new definitions

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157. See *Edwards*, ¶ 11, 777 N.W.2d at 610 ("[I]n some cases exceptional circumstances may require [visitation], in a child's best interests and in order to prevent serious harm or detriment to the child.").

158. See discussion *supra* Part II.C.

159. See discussion *supra* Part II.C.

160. See *In re Buchholz*, 326 N.W.2d 203, 206 (N.D. 1982).

161. See *In re Barros*, 2005 ND 122, ¶ 19, 701 N.W.2d 402, 409; see also *Hartlieb v. Simes*, 2009 ND 205, ¶¶ 25-26, 776 N.W.2d 217, 226 (affirming the district court's findings that guardianship should be terminated by only looking at best interest factors with no determination about whether guardianship should continue to avoid harm to the child).

162. See *In re Buchholz*, 326 N.W.2d at 206.

163. See *Hartlieb*, ¶¶ 20-23, 776 N.W.2d at 224-25.

164. See *id.*, ¶¶ 25-26, 776 N.W.2d at 226; *Hoff v. Berg*, 1999 ND 115, ¶¶ 15-16, 595 N.W.2d 285, 290-91.

165. *Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau*, 2004 ND 60, ¶ 11, 676 N.W.2d 752, 757-58.

166. 2009 N.D. Laws 609-22.

167. *Id.* at 611, 614-16, 621; N.D. CENT. CODE § 14-09-06.2 (2009).

specifically contemplate parents being the ones that are contesting custody and subject to a court's custody order.<sup>168</sup> Significant for third party claims, the concept formerly known as custody is now known as primary residential responsibility, which is defined as "a parent with more than fifty percent of the residential responsibility."<sup>169</sup>

Despite using the term "parent" throughout section 14-09-00.1, the Legislative Assembly failed to define the term "parent" in the section, or anywhere else in chapter 14-09. Under rules of statutory construction, words are to be given their plain ordinary meaning unless defined in the statutes.<sup>170</sup> Definitions from other chapters in the North Dakota Century Code are to be used to construe later undefined terms,<sup>171</sup> unless the Legislative Assembly has made plain the definition only applies to a particular chapter or title.<sup>172</sup> All definitions of "parent" in the North Dakota Century Code only apply to the chapter where they are located.<sup>173</sup> Since there are no general definitions in the North Dakota Century Code for "parent" we must presume the Legislative Assembly used the term in its ordinary meaning.<sup>174</sup>

The ordinary meaning of parent denotes a child's biological parents.<sup>175</sup> A common definition of parent is "one that begets or brings forth offspring."<sup>176</sup> This general definition of parent, in terms of natural parents, fits well with the intent of the drafters of the definitions in North Dakota's child custody statute.<sup>177</sup> Thus, in adopting the new language defining the contours of parental rights and responsibilities, it would be presumed the Legislative Assembly did not include psychological parents in with those terms.<sup>178</sup> Since the new definitions were adopted for child custody in 2009, there has been no clear answer on whether those definitions exclude

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168. See 2009 N.D. Laws 611; N.D. CENT. CODE § 14-09-00.1(2)-(7).

169. N.D. CENT. CODE § 14-09-00.1(6). Residential responsibility "means a parent's responsibility to provide a home for the child." *Id.* § 14-09-00.1(7).

170. N.D. CENT. CODE § 1-02-02.

171. *Id.* § 1-01-09.

172. *Edinger v. Governing Auth. of the Stutsman Cnty. Corr. Ctr. & Law Enforcement Ctr.*, 2005 ND 79, ¶ 16, 695 N.W.2d 447, 452.

173. See N.D. CENT. CODE §§ 14-15-01, 14-15.1-01, 14-19-01, 30.1-04-14.

174. N.D. CENT. CODE § 1-01-09.

175. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510 (2002).

176. *Id.*

177. See LEGISLATIVE COUNCIL, N.D. LEGISLATIVE ASSEMBLY, REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL 209-14 (2008) (stating concerns with custody in divorce proceedings prompted a review of North Dakota custody law).

178. See *id.* (mentioning parents, but never a third party claim besides grandparent visitation claims).

psychological parents, and it is no longer clear if any third party could bring a claim for custody.<sup>179</sup>

There are also constitutional issues with the current law surrounding third party custody in North Dakota. In *Troxel*, the plurality, along with Justices Thomas, Stevens, and Souter held there is a substantive due process presumption that fit parents act in their child's best interests, and this presumption must be rebutted in order for a court to contravene those wishes.<sup>180</sup> Under current North Dakota case law, no special weight is given to a parent's decision concerning the custody of his or her child.<sup>181</sup> By only using a preponderance of the evidence standard, no special weight is given by the court to a parent's decisions that custody or visitation with a third party is inappropriate, and therefore, the current case law in North Dakota violates parent's rights under *Troxel*.<sup>182</sup>

Another constitutional concern present is the interference that litigation between a parent and a third party over child custody can have on the parent-child relationship.<sup>183</sup> Currently, any third party that can show a strong bond with a child can petition for custody or visitation in North Dakota, triggering litigation that will be time consuming and likely require expert witnesses.<sup>184</sup> A parent would likely require expert witness testimony to rebut a third party's claim of psychological parent status and custody with the third party is necessary to prevent harm to the child.<sup>185</sup> North Dakota statutory law also requires parents to pay for custody investigators and guardians ad litem, if appointed.<sup>186</sup> Given the time necessary to defend a claim from a third party, and the expense that can be incurred in court,

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179. Both *Edwards* and *McAllister* were decided in the North Dakota Supreme Court in 2010, but the pre-amended custody statute was the law in issue because the cases were tried prior to the amendments becoming effective. *McAllister v. McAllister*, 2010 ND 40, ¶ 1 n.1, 779 N.W.2d 652, 654 n.1; *Edwards v. Edwards*, 2010 ND 2, ¶ 3, 777 N.W.2d 606, 607-08.

180. *Troxel v. Granville*, 530 U.S. 57, 68-70 (2000) (plurality opinion); *id.* at 80 (Thomas, J., concurring); *id.* at 77-79 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting).

181. *See In re Barros*, 2005 ND 122, ¶¶ 26-28, 701 N.W.2d 402, 410-11 (Kapsner, J., concurring in part and dissenting in part).

182. *See id.*

183. *See Troxel*, 530 U.S. at 75 (plurality opinion) (stating litigating claims themselves can become so burdensome as to infringe a parent's constitutional rights); *id.* at 101 (Kennedy, J., dissenting) (same).

184. *See Cox v. Cox*, 2000 ND 144, ¶ 23, 613 N.W.2d 516, 522 (affirming award of custody to natural father, in part, based on the lack of expert testimony showing a psychological parent bond between child and third parties). While *Cox*, involved a lack of expert testimony, a parent who faces adverse expert witness testimony will run a serious risk of not finding his or her own expert to rebut that testimony. *See Clark v. Clark*, 2006 ND 182, ¶¶ 6-10, 20, 721 N.W.2d 6, 10-11, 14 (affirming, in a divorce case, both the exclusion of father's expert witnesses from trial, because of late disclosure, and that there was sufficient evidence in record for changing custody).

185. *See Cox*, ¶ 23, 613 N.W.2d at 522.

186. N.D. CENT. CODE §§ 14-09-06.3(4), 14-09-06.4 (2009).

attorney, expert witness, custody investigator, and guardian ad litem fees, a parent might be reluctant to assert his or her parental rights.<sup>187</sup> As a majority of Justices said in *Troxel*, the burden of preserving parental rights in litigation might be a constitutional violation.<sup>188</sup> It may well prompt a parent to settle, and allow custody or visitation to be granted to a third party, when the parent otherwise would not have agreed.<sup>189</sup>

## B. OTHER STATES' STATUTORY SOLUTIONS

Due to the high degree of policy choice inherent in delineating parental rights and the questionable constitutionality of infringing upon them, many state legislatures have chosen to proscribe by statute the availability of third party custody claims.<sup>190</sup> Many courts have also chosen to not recognize a third party claim to custody absent an authorizing statute.<sup>191</sup> Of the states that have adopted legislation on the topic, two stand out.

### 1. *Minnesota's Third Party Custody Statute*

In 2002, the Minnesota Legislature enacted statutory provisions to regulate the types of third parties who can petition for custody and visitation, along with what procedures they must follow to be granted an award.<sup>192</sup> Minnesota law distinguishes between third parties who have been providing care for a child in that person's home without a parent present, called de facto parents,<sup>193</sup> and all other third parties who might be interested in the child's custody.<sup>194</sup> A de facto parent must show he or she has been the primary caretaker for the child in the person's home for two years, and the parent has not had meaningful contact with the child for a significant amount of time.<sup>195</sup> An interested person is one who can show that the parent has neglected the child to an extent the child will be harmed if living with his or her parent, or presence of physical or emotional harm to the

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187. See *Troxel*, 530 U.S. at 75 (plurality opinion); *id.* at 101 (Kennedy, J., dissenting) (same).

188. *Id.* at 75; *id.* at 101.

189. See *id.* at 75; *id.* at 101. In North Dakota this danger is all the more real, as there is often required mediation as a condition of going to trial in family law cases. See N.D. CENT. CODE ch. 14-09.1; N.D. SUP. CT. ADMIN. ORDER 17 (2011).

190. See, e.g., *McAllister v. McAllister*, 2010 ND 40, ¶ 33, 779 N.W.2d 652, 665 (Crothers, J., concurring) (surveying authority).

191. See *id.* ¶ 34, 779 N.W.2d at 665-66.

192. 2002 Minn. Laws 429-36, 444. The sections concerning voluntary placement with a third party by a parent and petitions for visitation were not newly adopted. *Id.* 444.

193. MINN. STAT. § 257C.01, subdvs. 2-3 (2012).

194. *Id.* § 257C.03, subd. 7.

195. *Id.* § 257C.01, subd. 2(a)(1)-(2). The two years must have elapsed with the child in the de facto parent's care before filing any petition for custody. *Id.* § 257C.01, subd. 2(b).



child trumps preserving the parent-child relationship.<sup>196</sup> If the sworn petition in the action is not supported by enough factual allegations made by the de facto custodian or interested party, the court must dismiss the action prior to holding an evidentiary hearing.<sup>197</sup> Both the de facto custodian and the interested person must show their status by clear and convincing evidence at trial to be granted custody.<sup>198</sup> The status of a non-grandparent seeking visitation in Minnesota must also be established by clear and convincing evidence.<sup>199</sup> Despite the higher burden for showing status, the preponderance of the evidence is only required of the de facto custodian or interested party to show the best interests of the child would be served by placing custody of the child with them.<sup>200</sup>

## 2. *California's Third Party Custody Statute*

Like Minnesota, in 2002, the California Legislature significantly amended its prior third-party custody statute to define the situations when a third party can be granted custody over a parent.<sup>201</sup> Like Minnesota, California requires a parent be awarded custody over a nonparent unless harm or detriment to the child from being placed with the parent would result.<sup>202</sup> This harm must be shown by the third party, by clear and convincing evidence.<sup>203</sup> However, if the third party can show by a preponderance of the evidence the child has been living with the third party for a substantial time in a parental role, then there is a rebuttable presumption that custody being granted to the parent would be harmful.<sup>204</sup> There is no definite time period required, as there is in Minnesota.<sup>205</sup> The

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196. *Id.* § 257C.03, subd. 7(a)(1)(i)-(iii).

197. *Id.* § 257C.03, subd. 2; *In re M.R.P.-C.*, 794 N.W.2d 373, 377 (Minn. Ct. App. 2011).

198. MINN. STAT. § 257C.03, subd. 6(a)(1), subd. 7(a)(1).

199. *Id.* § 257C.08, subd. 4; *SooHoo v. Johnson*, 731 N.W.2d 815, 824 (Minn. 2007). *SooHoo* also held that the placement on the parent to show that any visitation would interfere with the parent-child relationship is unconstitutional because it does not give special weight to a fit parent's decision on visitation. 731 N.W.2d at 824.

200. MINN. STAT. § 257C.03, subd. 6(a)(2), subd. 7(a)(2).

201. 2002 Cal. Stat. 7177. There were amendments in 2006 as well that clarified how the law applied to Indian children. 2006 Cal. Stat. 6541-42.

202. CAL. FAM. CODE § 3041(a) (Deering Supp. 2012).

203. *Id.* § 3041(b).

204. *Id.* § 3041(c)-(d). One California court has stated that the presumption is not inconsistent with the clear and convincing evidence standard because the presumed fact is that clear and convincing evidence exists that placement with the parent would be a detriment to the child, and is not an elimination of the clear and convincing evidence standard. *H.S. v. N.S.*, 93 Cal. Rptr. 3d 470, 476 (Ct. App. 2009).

205. *Compare* CAL. FAM. CODE § 3041(c), *with* MINN. STAT. § 257C.01, subd. 2.

parent can rebut the presumption by showing that harm would not result, by a preponderance of the evidence.<sup>206</sup>

### C. THE AMERICAN LAW INSTITUTE PRINCIPLES

The American Law Institute developed principles to apply to family law, including divorce, support, and child custody and visitation, through the 1990s, with the promulgation of the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION on May 16, 2000.<sup>207</sup> The PRINCIPLES define third parties, with regard to child custody, as de facto parents.<sup>208</sup> The PRINCIPLES also delineate how custody should be apportioned among parents as a default.<sup>209</sup> The relative time given to custody petitioners generally follows the percentage of time that a parent spent caring for the child.<sup>210</sup> For disputes between legal parents and de facto parents, the PRINCIPLES favor a fit parent unless that fit parent has not been providing for the child, or the child would be harmed by favoring the parent.<sup>211</sup> There is no indication what burden of proof is required to show a person is a de facto parent, or that placing the child with a parent is not presumed.<sup>212</sup> The definitions and scheme embodied in the PRINCIPLES does not comport with the current articulations of natural parents' constitutional rights.<sup>213</sup> Due to this deficiency, the PRINCIPLES would not really provide a good stepping stone for a statutory solution in North Dakota.<sup>214</sup> While the recognition that daily tasks concerning a child are important,<sup>215</sup> the fulfillment of only a majority of these functions should not lead to a presumption of custody for a third party, but rather the quality of the relationship is what matters.<sup>216</sup>

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206. CAL. FAM. CODE § 3041(d). The use of the presumption by the Legislature did not violate the parent's constitutional due process rights. *H.S.*, 93 Cal. Rptr. 3d at 476-77.

207. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at xiii-xiv (2002).

208. *Id.* § 2.03(1)(c).

209. *Id.* § 2.08(1).

210. *Id.* Professor Robin Fretwell Wilson critiques the *Principles* on the ground that the caretaking and de facto parent requirements are so lax and do not give proper weight to parents, primarily mothers. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1118-20 (2010). Professor Wilson argues that the *Principles* actually make it easier for child molesters to gain custodial rights to their victims and are rewarded in a third party custody action based on their behaviors with the victims that groom the child for the abuse. *Id.*

211. AM. LAW INST., *supra* note 207, § 2.18.

212. *See id.*

213. David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075, 1085-88 (2001).

214. *See* discussion *supra* Part IV.A.

215. *See* AM. LAW INST., *supra* note 207, §§ 2.03(5), 2.08(1).

216. *See* Wilson, *supra* note 210, at 1135.

#### D. NORTH DAKOTA'S POSSIBLE SOLUTION

The North Dakota Legislative Assembly should endorse a view long-espoused in North Dakota, that the pursuit of happiness as guaranteed in the North Dakota Constitution,<sup>217</sup> includes a right of parents to be free from unwarranted governmental interference in their families.<sup>218</sup> In recognition of this place of parental rights, the North Dakota Legislative Assembly should adopt legislation that provides standing to third party petitioners.<sup>219</sup> The Legislative Assembly also needs to create a process to prevent parents from being drawn into lengthy litigation, and thereby infringe their parental rights.<sup>220</sup> Finally, the Legislative Assembly should require a third party to bear the burden of persuasion by clear and convincing evidence that he or she is, both a proper person to have custody, and that custody with the third party is required to prevent harm or serious detriment to the child. For any visitation granted to a third party, the third party should be required to show that visitation will not interfere with the parent-child relationship.

##### 1. *North Dakota's Standing Solution by Defining Parenthood for Child Custody Actions*

As custody is currently defined in North Dakota, a parent-child relationship is assumed.<sup>221</sup> One solution to grant standing to a third party to seek custody would be to define the term "parent" for the purposes of child custody.<sup>222</sup> Thus, by defining parent in a manner that includes third parties who can appropriately meet the other requirements of a newly adopted statute, they would thereby have standing to bring a claim for custody.<sup>223</sup> It would also give context and meaning to the frequent use of the term "parent" throughout North Dakota Century Code chapter 14-09.<sup>224</sup>

##### 2. *The Need to Insulate Parents from Marginal Third Party Claims*

As a majority of Justices recognized in *Troxel*, the litigation of a claim can pose a large obstacle, even a constitutional concern, for a parent, and

217. N.D. CONST. art. 1, § 1.

218. *Hoff v. Berg*, 1999 ND 115, ¶ 10, 595 N.W.2d 285, 289 (citing *State v. Cromwell*, 9 N.W.2d 914, 919 (N.D. 1943)).

219. See discussion *supra* Part IV.A.

220. See *supra* notes 183-89 and accompanying text.

221. See discussion *supra* Part IV.A.

222. See AM. LAW INST., *supra* note 207, § 2.03(1) (stating that for the purposes of the child custody section of the *Principles* the definition of parent includes a de facto parent).

223. See discussion *supra* Part IV.A.

224. See discussion *supra* Part IV.A.

could lead to parents feeling coerced by their circumstances to permit their parental rights to be invaded where they otherwise would not have done so.<sup>225</sup> In light of this concern, a procedure should be adopted to weed out non-meritorious third party custody claims early in litigation.<sup>226</sup> Minnesota requires all third party petitions for custody to be sworn to by the party bringing the action, and the case must be dismissed if insufficient facts are pled to show that a third party fits the statutory definitions of persons with standing to pursue the claim.<sup>227</sup> All of these facts are taken as true to determine this status.<sup>228</sup>

North Dakota should adopt a requirement similar to Minnesota's verified petition. However, given the special constitutional issue at stake, instead of presuming the allegations in an affidavit are true, North Dakota should require the third party petitioner to schedule a hearing where cross-examination is permitted to determine the claims of the third party. This should be done early enough in the litigation, perhaps after sixty days following commencement of the suit, and prior to conducting significant discovery, so that neither the parents or the petitioners will have expended large amounts of time and money.<sup>229</sup> The hearing should be required prior to any referral to a mediation program or appointment by the court of a guardian ad litem or parenting investigator.<sup>230</sup>

### 3. *The Third Party Should Need to Prove His or Her Case by Clear and Convincing Evidence*

Given the parental rights at stake, North Dakota should make a third party seeking custody over the objection of a parent a heavy burden. Many legislatures and several courts have found a clear and convincing evidence standard protects children and respects parents' fundamental rights.<sup>231</sup> North Dakota should follow suit and ensure parental rights are upheld unless it is clearly shown there is a greater harm to the child.

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225. See *Troxel v. Granville*, 530 U.S. 57, 75 (plurality opinion) (stating litigating claims themselves can become so burdensome as to infringe a parent's constitutional rights); *id.* at 101 (Kennedy, J., dissenting) (same).

226. See *In re M.R.P.-C.*, 794 N.W.2d 373, 377 (Minn. Ct. App. 2011).

227. *Id.*

228. *Id.*

229. This procedure is already common in family law cases in North Dakota, and would not require significant adjustment in the practice of the bench and bar. See N.D. CT. R. 8.3 (2011).

230. See N.D. CENT. CODE §§ 14-09-06.3(1), 14-09-06.4 (2009) (permitting court to appoint custody investigator and guardian ad litem, at either request of a party or on its own motion).

231. See discussion *supra* Parts IV.B.

Minnesota requires a third party to show the child's best interests would be served by only a preponderance of the evidence.<sup>232</sup> California does not have a best interest requirement, rather couching the justification for placing the child with the third party in terms of harm prevention.<sup>233</sup> California also requires a prevention of harm to the child to be shown by clear and convincing evidence.<sup>234</sup>

North Dakota should follow the lead of California and be explicit that the third party must show by clear and convincing evidence that placement of the child with the child's parent would be a detriment to the child. To ensure the third party is an appropriate person to have custody, North Dakota should follow Minnesota's lead and require a showing by clear and convincing evidence that the third party has a proper relationship with the child.<sup>235</sup> However, North Dakota should not apply the interested party status as defined in Minnesota, as it only collapses the harm requirement.<sup>236</sup> Rather, the de facto parent definition properly fits with a current conception of who is currently entitled to bring an action in North Dakota.<sup>237</sup> In order to give both courts and litigants clear guidance about which third parties can bring an action,<sup>238</sup> the specific time frames used by Minnesota in defining a de facto parent should be adopted, as well.<sup>239</sup> Finally, having clear guidance about when a parent has not taken an appropriate role in the care of his or her children, as embodied in the list of caregiving tasks and parenting task as defined in the *Principles*,<sup>240</sup> would likewise give clear guidance on what things a parent needs to take care of in order to avoid a third party custody claim.

#### 4. *A Third Party Granted Only Visitation Must Show that Visitation Will Not Interfere with the Parent-Child Relationship*

Currently, the only third parties that are statutorily entitled to bring an action for visitation in North Dakota are grandparents and great-

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232. MINN. STAT. § 257C.03, subdiv. 6(a)(2), subdiv. 7(a)(2) (2012).

233. See CAL. FAM. CODE § 3041(a) (Deering Supp. 2012).

234. *Id.*

235. MINN. STAT. § 257C.03 subdiv. 6(a)(1), subdiv. 7(a)(1).

236. *Id.* § 257C.03, subdiv. 7(a)(1).

237. See *McAllister v. McAllister*, 20100 ND 40, ¶¶ 14-15, 779 N.W.2d 652, 658 (defining "psychological parent"); *In re Barros*, 2005 ND 122, ¶ 18, 701 N.W.2d 402, 408-09.

238. See *McAllister*, ¶ 37, 779 N.W.2d at 666 (Crothers, J., dissenting) (noting development of third party claims through case law does not give parties, courts, or attorneys much guidance on the subject).

239. MINN. STAT. § 257C.01, subdiv. 2(a)-(c).

240. AM. LAW INST., *supra* note 207, § 2.03(5)-(6).

grandparents.<sup>241</sup> Since the Legislative Assembly has chosen to allow grandparents and great-grandparents this right only on a preponderance of the evidence, a similar right for other third parties to request visitation should be allowed. As visitation is a lesser intrusion into the parent-child relationship than custody, having only a preponderance of the evidence standard does not necessarily implicate the same constitutional concerns as when custody is at issue.<sup>242</sup> Non-grandparent third parties should still be required to prove their relationship with the child by clear and convincing evidence, however. The grandparental statute only requires that the best interest analysis show that visitation should apply, and as such, the same standard should apply to those third parties that can show a proper relationship to the child.

One critique leveled at the PRINCIPLES, which could grant significant visitation rights with third parties, is that a third party receiving visitation would not be required to pay any kind of child support.<sup>243</sup> Normally, a parent has both rights and responsibilities to a child, but under the PRINCIPLES, and possibly under current North Dakota law, third parties granted visitation have no responsibility to provide support to the child.<sup>244</sup> Currently, grandparents are not subject to pay child support for their grandchildren when granted visitation, and it is not clear if third parties would be obligated to pay child support.<sup>245</sup> Stepparents are required to support their stepchildren while a part of the stepparent's family,<sup>246</sup> but this obligation ceases when the stepparent and parent divorce.<sup>247</sup> North Dakota should recognize if third parties wish to gain rights to a child, they should also bear responsibilities to that child. At a minimum, the third party, or grandparent for that matter, should be required to bear a majority of the expenses incurred in exercising visitation.<sup>248</sup>

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241. N.D. CENT. CODE § 14-09-05.1 (2009).

242. See *Edwards v. Edwards*, 2010 ND 2, ¶ 8, 777 N.W.2d 606, 609.

243. Wilson, *supra* note 210, at 1114-15. Professor Wilson argues that requiring third parties to be at risk of paying child support if granted visitation serves an important screening process to ensure that only sufficiently invested third parties seek custody or visitation. *Id.* at 1114 n.70.

244. *Id.* at 1114-15; *McAllister*, ¶¶ 3, 8-10, 779 N.W.2d 652, 655-57.

245. See *Johnson v. Johnson*, 2000 ND 170, ¶¶ 30-32, 52, 617 N.W.2d 97, 107-08, 111-12 (holding that only parents who equitably adopt a child is required to pay child support). There is not really a question that a parent would have to pay child support to a third party. N.D. CENT. CODE § 14-09-09.10(12).

246. N.D. CENT. CODE § 14-09-09.

247. See *Johnson*, ¶ 31, 617 N.W.2d at 107.

248. See N.D. ADMIN. CODE § 74-02-04.1-09(2)(j) (2011) (allowing deviation from child support guideline amount for obligor who is required to bear all the expenses of court ordered parenting time).

## V. CONCLUSION

North Dakota cases have carved out a unique place for psychological parents to gain custody of children they have neither legally adopted or parented in the biological sense.<sup>249</sup> Given the nature of creating policy through case law, parents and third parties who would seek custody have many unanswered questions.<sup>250</sup> Considering the further complication in the United States Supreme Court's language articulating parental rights, the North Dakota Legislative Assembly should enact legislation to give clear guidance to judges, parents, and third party caregivers about who can petition for custody and what that person would have to prove.<sup>251</sup> This guidance will hopefully lead to clearer court decisions and decreased litigation, all in the best interests of North Dakota's children.

*John D. Schroeder\**

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249. *See* discussion *supra* Part III.B.

250. *McAllister v. McAllister*, 2010 ND 40, ¶¶ 36-37, 779 N.W.2d 652, 666 (Crothers, J., concurring).

251. *Id.*; *see* discussion *supra* Part II.C.

\* J.D. Candidate at the University of North Dakota School of Law. I would like to thank my wife, Shawnda Schroeder, and my son, Aiden Schroeder, for always providing me love, support, and a great life. I also want to thank my parents and parents-in-law for all the support you give to our education. I also want to thank Patti Jensen and Ron Galstad for their professional support throughout my time in law school.