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CUSTODY AND PARENTING BY PERSONS OTHER THAN BIOLOGICAL PARENTS: WHEN NON-TRADITIONAL FAMILY LAW COLLIDES WITH THE CONSTITUTION

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I. INTRODUCTION

Most family law attorneys study constitutional law at some time during their law school careers, but then promptly place those concepts in the back recesses of their minds once they begin practicing family law. Constitutional issues have long been a rarity in the family law attorney's practice. That may be changing, and if it is not changing, perhaps it should.

One dynamic area of family law practice where constitutional matters are often of critical importance involves disputes between a biological parent of a child and non-parent or entity seeking a parenting role as to that child. The most common context for these issues is third party custody or access disputes where some third party—often a relative, foster parent, or stepparent—seeks either custody or parenting time with a child. Another frequent situation is where an adoption is contemplated and one or both biological parents take issue with the adoption plan. As a result, the rights of the biological parents conflict with the rights of the adoptive parents. Constitutional issues arise in the area of child protection, where it is often the state that seeks to either permanently or temporarily remove children from the care and custody of a biological parent. Such conflicting rights may also arise in the burgeoning area of assisted reproduction, where children are being born with no genetic or biological ties to their legally recognized parents.

Attorneys representing non-biological parents or entities are often surprised that the law is biased toward the biological parent.[1] Those attorneys may be further surprised or even alarmed to discover that the constitutional protections that are afforded to the biological parent may even trump the hoary notion of the best interests of the child. It is clear beyond dispute

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1. Troxel v. Granville, 530 U.S. 57, 65-67 (2000).

that significant deference and protection is accorded the biological parent, and that deference and protection flows directly from basic concepts found in the United States Constitution, which have been applied and interpreted so as to accord near sacred status to the right of biological parents to direct the upbringing of their children without excessive interference by other third parties or the state.[2] To the extent the lawyer representing non-parental clients or entities wishes to challenge that notion, it will be time for the family law attorney to reclaim constitutional law as an area of expertise and closely consider these fundamental constitutional protections as they exist in family law, and as practiced in the twenty-first century in the United States.[3]

These notions of the constitutional rights of biological parents are not, however, unanimously accepted nor universally and consistently applied. Nowhere is that better illustrated than in the case of *Troxel v. Granville*,[4] the latest decision of the United State Supreme Court addressing the rights of a biological parent in a family law dispute.[5] In that case, the parents of two young children had never been married.[6] When the biological father committed suicide, the paternal grandparents, who had a close and loving relationship with their two granddaughters, petitioned a trial court in the state of Washington for an order allowing them overnight access two week-ends per month and on holidays.[7] The mother wanted access limited to one day per month and holidays, with no overnight visits.[8] The trial court, applying a best interest of the child analysis as required by the state statute, ordered access that was less than the grandparents wanted, but more than the mother wanted.[9] When the case reached the Washington Supreme Court, that court struck down the statute as unconstitutional on its face as a violation of the mother's substantive due process rights protected by the Fourteenth Amendment to the United States Constitution, because the

2. *Id.*

3. *See* Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64 (1963) (challenging historians to develop and apply constitutional history as an area of research and writing, and to not completely cede work in the area to political scientists and law professors). The notion of this being a time for family law attorneys to "reclaim" constitutional law as part of their cases and practices stems from this seminal article, written by the author's graduate school advisor, the late Paul L. Murphy, who was a long-time member of the University of Minnesota History Department.

4. 530 U.S. 57 (2000).

5. *Troxel*, 530 U.S. at 60.

6. *Id.*

7. *Id.* at 60-61.

8. *Id.*

9. *Id.*

statute did not give sufficient deference to the mother's right to raise her children as she saw fit.[10]

When the United States Supreme Court weighed in, the conflicted positions of that Court highlighted the unsettled nature of these constitutional issues flowing from the rights of biological parents to control the upbringing of their children. Justice O'Connor authored the tenuous plurality decision. Chief Justice Rehnquist, Justice Ginsberg, and Justice Breyer joined. The Court affirmed the Washington Supreme Court and elaborated on the fundamental due process rights of biological parents to raise their children without undue interference by the courts, the state, and other persons, and further determined that a best interest analysis alone was insufficient to protect the fundamental rights of biological parents.[11]

Justice Souter concurred with the result of the plurality decision, but said the plurality went too deep into the "treacherous field of substantive due process,"[12] and the plurality need not have elaborated on those fundamental rights. Justice Thomas also concurred with the plurality outcome, but said the plurality should have gone even further and explicitly stated that the strict scrutiny standard applied when reviewing these fundamental rights.[13] Justice Thomas stated that he could scarcely imagine any legitimate government interest or compelling interest that would ever justify a court overriding a parent's decision as to who would have contact with his or her children and the nature of that contact.[14]

Three justices offered separate dissenting opinions in *Troxel*, revealing very clearly the unsettled nature of these constitutional issues in family law.[15] Not surprisingly, original intent jurist Justice Scalia questioned the soundness of the entire line of cases giving biological parents constitutionally protected due process rights to direct the upbringing of their children, and chastised his fellow justices for interpreting "unenumerated rights."[16] He considered such parental rights to be inalienable and obvious rights discussed in the Declaration of Independence, but not found in the Constitution.[17] He expressed his fear that this case could usher in a new, unwanted

10. *Id*. at 62-63.
11. *Id*. at 65-75.
12. *Id*. (Souter, J., concurring).
13. *Id*. at 80 (Thomas, J., concurring).
14. *Id*.
15. *Id*. at 80-102. The dissenters were Justices Stevens, Scalia, and Kennedy.
16. *Id*. at 91-93.
17. *Id*.

federal regime of family laws and principles, instead of leaving those issues in the state legislatures where they belonged.[18]

Justice Stevens' dissent questioned whether certiorari should have been granted in the first place, but since it had, he would have reversed the Washington Supreme Court and remanded the matter back for further proceedings focusing on the rights of the children.[19] He believed that biology ought not be controlling, and that a better approach would be to more equitably balance the interests of parents, children, and interested third parties, taking into account the myriad numbers of current family systems and relationships in contemporary society.[20] Justice Kennedy's dissent also advocated for remand, finding that the Washington Supreme Court's constitutional analysis was deeply flawed in its conclusion that the Constitution forbids the application of the best interests of the child standard in any visitation proceeding.[21] Again, the sheer variance among the nine justices reviewing this issue suggests a constitutional analysis that is hardly settled.

These types of situations, with their inherent constitutional issues, are becoming more common in the typical family law practice due to the dramatic changes occurring within the very makeup of families in our present society, as well as the growing frequency of situations where a biological parent is unable or unwilling to parent a child.[22] It should also be

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18. *Id.*

19. *Id.* at 80-86 (Stevens, J., dissenting).

20. *Id.* at 88-91.

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

22. *See id.* at 63-64, 90, 98. All of the justices who authored major opinions in the *Troxel* decision noted these important changing demographics:

> The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household . . . many other children are raised in single-parent households. . . . Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role.

Id. at 63-64. Justice Stevens noted: "The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily." *Id.* at 90 (Stevens, J., dissenting). Justice Kennedy stated:

> My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their

noted that these changing demographics of family and parenting are taking place in the context of a swirling national debate as to the definition of marriage, whether it is limited only to a man and woman, and whether same-sex couples should be allowed to adopt or have custody of children. Indeed, there is no escaping the fact that fundamental changes have been happening to the institution of the family for several decades, and that this has implications for the family law practitioner.[23]

One can pick up a newspaper, review discussions on the internet, or simply visit an elementary classroom these days to see that the nature of the family is dramatically changing.[24] No longer are families limited to situations where a man is married to a woman and the only disputes as to custody and visitation arise in a divorce where custody and access is litigated in family court. Now, single parents quite commonly raise children, gay and lesbian parents adopt or have children through assisted reproduction, and many relatives, stepparents and foster parents have children in their care and custody.[25] Adopted children have long had a presence in American society, but with fewer Caucasian domestic children available for adoption, it has become increasingly common for children born in foreign countries or adopted through the child welfare system to be of a race or ethnic heritage different from their adoptive parents.[26] There are also children who have been born of donated eggs, sperm, and embryos, who may be unaware that they are genetically or biologically unrelated to their legal parents.[27]

The context of these demographic changes to the family and related developments is significantly driven by the historical developments of the family, historical notions of childhood and parenting, the concept that children have rights and interests separate and apart from their parents, and

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> childhood. This may be so whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment.

Id. at 98 (Kennedy, J., dissenting) (citation omitted).

23. As a family law practitioner for 20 years and the father of a grade-school age child, this author witnesses the following changes on a nearly daily basis: children in schools have same sex parents, children are being raised by grandparents or other relatives, same sex clients who are building families through assisted reproduction and talking about going to other states or countries to get married, and clients want information on adopting children from other countries or special-needs children in foster care.

24. *Id*.

25. According to Resolution 384 passed by the United States Senate on November 15, 2007, on that date there were approximately 514,000 children in the foster care system in the United States, with approximately 115,000 of them waiting for families to adopt them. S. Res. 384, 110th Cong. (2007). Justice O'Connor cited statistics of similar import in the *Troxel* decision regarding the numbers of children living with persons other than parents in 1996. *Troxel*, 530 U.S. at 64.

26. *Supra* note 24.

27. *Id*.

the changes in these concepts over the years. In the early years of this country, situations where a biological parent could not parent his or her child were resolved informally through family arrangements, local community charities, and social service networks.[28] Now they are more commonly resolved in courts of law. The unique nature of the American legal culture has played a significant role in these developments. It will be important to understand this history as well as this legal culture in assessing non-traditional family law issues and constitutional issues that come into play.

While the historical and legal context is important, the seminal issues in these types of cases remain the same: What is the best placement for the child? What rights are at stake for the various holders who have an interest in the placement of the child? What role should the state have in regulating or intervening in these matters? What role should the three branches of government have in these matters? Who ultimately should get to decide where a child is placed and what would be in that child's best interest? The Constitution significantly impacts the answers to these questions when placement is to be with someone other than a biological parent, as constitutional law addresses the priority to be given to the rights of the stakeholders (i.e., parent, child, and the state or court) in these disputes, and how the litigation addressing the resolution of these disputes will be structured.[29]

This article shall begin by identifying the types of cases where the issues of custody and parenting by non-biological parents arise.[30] This will then be followed by a detailed discussion of the historical context in which these disputes have arisen.[31] This will include a historical look at the concept of the family, the concept of childhood, and the impact of the so-called "children's rights" movement. We will then take a look at the culture of legal rights and adversarial litigation in these matters, as well as the constitutional jurisprudence that affects these cases.[32] The article will end with analyses of where we are in handling these cases and what the family law practitioner can do to address the best interests and placement of the child in the face of the strong constitutional preference favoring biological parents.[33] The best approach, in the opinion of this author, rests in elevating the interests of the child and any long-standing caregivers who have or will love and nurture the child, while at the same time maintaining a

28. *See generally* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: A HISTORY OF CHILD CUSTODY IN THE UNITED STATES 30-46, 63-81 (1994).

29. *See infra* Part II.

30. *See infra* Part II.

31. *See infra* Part III.

32. *See infra* Part IV.

33. *See infra* Part V.

healthy, although not absolute, respect for the interests and rights of the biological parent.

II. TYPES OF FAMILY LAW CASES WHERE CONSTITUTIONAL ISSUES ARISE

There are several typical types of cases involving family law matters where the issues of constitutional law, the rights of biological parents, and the rights of third parties who wish to parent arise. This list is not exhaustive, but these are the most common.

A. DELEGATIONS OF PARENTAL AUTHORITY, ESTATE PLANNING TOOLS, AND STANDBY CUSTODIANS

Most states have informal and voluntary procedures, often completely extra-judicial in nature, which allow a biological parent to place a child temporarily in the care and custody of another person. Minnesota, for example, has a statute that, like a statutory short-form power of attorney, allows for a delegation of parental authority whereby a parent can temporarily place a child with another person, giving that person the authority to make basic parenting decisions on behalf of the child, such as medical care and school enrollment.[34] Another extra-judicial action is for parents of children to have guardianship and conservatorship provisions inserted in their wills so as to designate a caregiver upon the death of the parents.[35] The actual appointment of such a guardian, however, needs to be provided for by a court order, which in Minnesota would be entered in a probate court proceeding.[36]

Minnesota law also provides for something called a "standby custodian."[37] Here, the statute provides that a parent may designate a person to care for their child in the event the parent becomes incapacitated.[38] The powers are temporary in nature, the form must be in writing and witnessed, and may be approved by the court.[39] Notice must be given to the other parent and the delegation may be revoked at any time by the designating parent.[40] The document does not take away any of the designating parent's parental rights.[41] The designation is usually used in the

34. MINN. STAT. § 524.5-211 (2003).
35. *See, e.g., id.* §§ 524.5-211 (covering all areas of child protection).
36. *Id.* § 524.5-202(e); *see infra* notes 53-54.
37. *See* MINN. STAT. §§ 257B.01-257B.10 (2000).
38. *Id.* § 257B.01(12).
39. *Id.* § 257B.04.
40. *Id.* § 257B.05(2).
41. *Id.* § 257B.02.

situation of temporary illness of the parent, to provide for a future caregiver.[42]

These types of placements are typically voluntary in nature, are somewhat informal, and do not require the involvement or intervention of the state or the courts. Thus, they do not raise significant constitutional issues. Nevertheless, they are valuable tools available to the family law practitioner in dealing with situations where a biological parent, for whatever reason, cannot parent his or her child on a temporary basis.

B. THIRD PARTY CUSTODY

Third party custody actions involve more formalities and typically extensive use of the judicial system.[43] Here, a biological parent may either voluntarily or involuntarily have their child placed with another third party, usually on permanent basis. In this situation, while the biological parents' rights are not terminated, many of those rights are placed with some other person and remain in effect and binding unless there is an agreement by all parties that leads to a court order modifying the prior order, or a court order is entered following a judicial proceeding that modifies the prior custody arrangement.[44] These types of cases, because of the significant procedural requirements and the potentially significant powers of a court in actually taking some parental rights away from a biological parent, do raise significant constitutional implications that will be discussed further below. This is perhaps the most common situation where a family law attorney will encounter constitutional issues in his or her practice.

C. FOSTER CARE PLACEMENTS

Foster care placements typically involve significant activity and intervention by state agencies and courts. These cases and situations involve a temporary or permanent removal of a child from the care and custody of a biological parent. There are significant constitutional and procedural protections in place, usually spelled out in detailed child protection statutes and comprehensive procedural rules for the courts that address child protection

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42. *Id.* § 257B.01(12).

43. Most states have their own third party custody statutes. In Minnesota, it is found in Chapter 257C. This statute also contains provisions for third party visitation, which were cited with approval by the United States Supreme Court in *Troxel*. Troxel v. Granville, 530 U.S. 57, 70 (2000). Like most statutes, the Minnesota statute spells out in great detail who may petition for third party custody and visitation, how and where the petition is filed, the best interest factors that are to be considered, the powers of the custodian, how modifications are to occur, and other such provisions. *See* MINN. STAT. § 251C (2003) (covering third party custody).

44. MINN. STAT. § 257B.06(6) (2000).

matters.[45] In many states, as in Minnesota, the parents may be eligible for court-appointed legal representation, and the children may have their own attorney representing them.[46] The courts also often appoint a guardian ad litem to investigate and advocate for the best interests of the child.[47] Frequently the state, through its local child protection bureau, is a party to the proceeding, represented by a local governmental attorney. Often, foster parents and relatives can be made parties to these proceedings as well.[48] These cases raise enormous issues as to the power and authority of the state, especially with regard to the executive branch and its child protection office, as well as the judicial branch of government, which actually orders and supervises any out-of-home placement of the child.[49] The legislative branch is also heavily involved, as it sets out the statutory basis for maltreatment investigations, determinations, and the nature and permanency of any out-of-home placements that occur.[50] Foster parents, who often assume the daily care, custody, and placement of the child who cannot return to his or her parents, are heavily regulated by state administrative authorities, including licensing and training requirements and periodic inspections by the local social service entity.[51] As with third party custody, the constitutional ramifications in these cases are quite significant.

D. GUARDIANSHIP

Guardianship is typically a placement that occurs in a probate court setting where there has been a death of the biological parent or parents.[52] These types of proceedings raise constitutional issues in the sense that the court and the state are once again stepping in to make a court-ordered placement of a child with someone other than a biological parent. If the parent had planned his or her estate, the probate court does nothing more than ratify a deceased parent's intentions. If there is no estate planning in place, usually family members approach the probate court with a guardianship

45. *See, e.g.*, *id.* §§ 260C.001-.446; MINN R. JUV. PROTECTION PROC. 1.02.

46. MINN. R. JUV. PROTECTION PROC. 25.01.

47. *See, e.g.*, MINN. STAT. § 260C.325 (1999). As opposed to an attorney appointed to represent a child, whose role is to advocate the desires of the child, the guardian ad litem is an expert appointed by the court whose role is to investigate the needs and best interests of a child or incompetent adult and make recommendations to the court as to how it would be best to protect or advance those best interests.

48. *See, e.g.*, MINN. R. JUV. PROTECTION PROC. 22, 23.

49. *See generally* MINN. STAT. § 260C (laying out the powers of the juvenile court in child protection matters).

50. *Id.*

51. *See, e.g.*, MINN R. JUV. PROTECTION PROC. 37 (setting forth the foster parent regulations).

52. *See* MINN. STAT. § 524.5-201 (2003).

petition, or a state human services agency will step in and the state assumes the role of guardian. Regardless of how the matter gets before the court, there are strict notice requirements to any interested family members, fiduciary obligations for the appointed guardian, and periodic judicial reviews.[53]

E. ADOPTION

Adoption is the most permanent of all the placement options where a child is placed with a person who is not a biological parent. Adoption results in a permanent and complete severance of parental rights of a biological parent and the creation of a new legally recognized parent-child relationship by operation of law.[54] Significant constitutional issues may exist in an adoption, including issues of notice to a biological parent that an adoption plan is being contemplated. A biological parent is entitled to notice of the adoption, and a question will arise as to whether a biological parent voluntarily consents to an adoption, whether the statutory procedures have been properly followed, and whether consent has been voluntarily and knowingly obtained from the biological parent.[55] If the biological parent's rights are terminated by a court rather than consent to the adoption being executed, significant constitutional protections exist for the biological parent.[56] If the child being adopted is Native American, the intricate and complex federal statute known as the Indian Child Welfare Act will apply.[57] This Act has its own unique notice and procedural requirements that may elevate an Indian tribe to party status in the proceeding.[58] Constitutional issues are also implicated by the widespread existence of birth fathers' adoption registries, which set forth procedures for notice to birth fathers who notify the state of their desire to be notified of any adoption proceeding involving their children.[59]

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53. *Id.*

54. *See, e.g.*, MINN. STAT. § 259.35 (2007).

55. *See, e.g.*, *id.* §§ 259.24, 259.49.

56. *See, e.g.*, *id.* § 260C.307; Santosky v. Kramer, 455 U.S. 745, 768 (1982).

57. 25 U.S.C. § 1901 (2007). The Indian Child Welfare Act also applies in child protection situations when a child is placed with an entity or person who is not a biological parent. Readers should also be aware that many states have their own "mini ICWA" statutes that impose similar notice and procedural requirements under state law that also must be complied with in child protection and adoption cases involving children of Native American ancestry. *See* MINN. STAT.§§ 260.751-260.835 (2007) (laying out Minnesota's Indian Family Preservation Act).

58. 25 U.S.C. § 1901 (2007).

59. *See, e.g.*, MINN. STAT. § 259.52 (2007).

F. ASSISTED REPRODUCTION

Assisted reproduction is the newest and perhaps least understood of all of these various child custody and placement actions that raise potential constitutional issues. With an assisted reproduction matter, a child may be born using genetic material (i.e., eggs, sperm, or embryos) that is implanted into an unrelated gestational carrier, who then gives birth to a child, who will then be placed with the intended parents.[60] In other less complex situations, intended parents may just use donor eggs or sperm and the intended mother delivers the child, or only donor sperm is used. In many of these cases, pre- or post-birth parentage proceedings are commenced, or there may need to be an adoption if the intended parents are not genetically related to the child and a gestational carrier is used. Contract law and the creative use of statutes and other family court procedures are often used to establish legal parentage with the intended parents.[61]

There are significant constitutional issues that arise in these cases in terms of the right to contract, the rights of a gestational carrier to terminate such a pregnancy, the amount of control that is to be asserted by intended parents over a gestational carrier or donor of genetic material, medical regulations dealing with the disposition of genetic materials, and the issue of who legally possesses the embryos and related genetic materials that go into making embryos.[62] The science and technology in this area is years ahead of the legal frameworks used to regulate this area of the law.[63] Both courts and legislatures are struggling to keep up with these new, and often controversial, developments.

G. PARENTING TIME

There are also situations, involving disputes between biological parents and persons who are not parents, which do not involve the actual placement of a child. In such situations persons who may or may not be biologically related to the child are seeking to have access and parenting time with the child. Most frequently this arises in the context of grandparents or other

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60. *See, e.g.*, In re Paternity and Custody of Baby Boy A, No. A07-452, 2007 WL 4304448, *passim* (Minn. Ct. App. Dec. 11, 2007); *see infra* notes 276-78.

61. *Id.* at *3-7.

62. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 595-601 (Tenn. 1992). *Davis* involved a dispute between divorcing parents as to who would be granted possession and use of their frozen embryos. *Id.*

63. *See, e.g.*, MINN. STAT. § 257.56 (2007) (setting forth Minnesota's artificial insemination statute). Many states have very few laws directly addressing the assisted reproduction area, and often the few laws on the books are hopelessly out of date and not particularly helpful in this area of the law.

relatives seeking visitation rights with their grandchildren or related children over the objection of a biological parent. There are also growing numbers of stepparents who desire to have ongoing parenting time with a step child following a divorce or legal separation from that child's parent. Perhaps the most difficult situations involve gay and lesbian couples who have parented children together, split up, and want to have ongoing access with those children. These cases are complicated by the inability of same sex couples to be married in most states or the widespread restrictions on their ability to adopt children together, resulting in one of the parents having no legally recognized relationship to the child. These third party visitation disputes generate complex constitutional issues as to the rights such persons have to contact and visit children over the objection of the legally recognized parent.[64]

III. THE HISTORICAL CONTEXT[65]

The constitutional issues underlying these non-traditional family law disputes have been significantly affected by historic changes to the very concepts of childhood, the family, and the placement of children when their parents either could not or would not parent them.[66] There has also been a burgeoning children's rights movement over the last several decades that has sought to dramatically change the legal status of children within our society and bring order and consistency to a fragmented children's rights jurisprudence.[67] It is helpful to consider these historical trends when analyzing the constitutional dimensions of placement disputes between biological parents, individuals, and entities who are not the legally recognized parents of a child.

A. THE HISTORY OF CUSTODY AND CHILDHOOD

The legal treatment of custody and the notions of childhood have evolved over the years.[68] This history is important when considering

64. *See, e.g.*, MINN. STAT. § 257C (2007). Justice O'Connor in her plurality opinion in *Troxel* listed all of the state statutes then in existence, and as a result of that seminal case, many of those statutes have been challenged on constitutional grounds and substantially revised. Troxel v. Granville, 530 U.S. 57, 73-74 (2000).

65. For this author's previously published historical analysis on this issue, see Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 J. AM. ACAD. MATRIMONIAL LAW. 75, 79-95 (1998) [hereinafter Debele]; Wright S. Walling & Gary A. Debele, *Private CHIPS Petitions in Minnesota: The Historical and Contemporary Treatment of Children in Need of Protection or Services*, 20 WM. MITCHELL L. REV. 781, 783-802 (1994).

66. *See* MASON, *supra* note 28.

67. *See infra* part C.2.

68. *See generally* LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW (2004); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN

constitutional issues that arise in placement and access disputes in contexts ranging from third party custody, to adoption, to permanency planning for abused and neglected children who have been removed from their families. During the colonial period, children were viewed primarily as important economic producers and as little adults who were expected to work hard and contribute to the support of the entire family; they were generally considered property "owned" by their fathers or their guardians rather than as young, fragile beings to be nurtured and loved.[69] When colonial courts became involved in the placement of a child, it was usually when they were asked to enforce contracts for indentures or to resolve conflicts regarding child labor; the notion of having custody so as to provide the child with love, nurture, and emotional attachment was many decades away.[70] "Colonial mothers had no legal right to their children when the husband/father was alive, and only restricted rights upon his death."[71] During this period, "divorce was an unusual event."[72]

From 1790 to 1890, there was a shift from father's common law rights to custody and control of their children toward an emphasis on the need to "nurture, care for, and love the child."[73] The "best interests" of the child notion first emerged during this period.[74] At the same time as these changes were occurring, "slavery was abolished and indentured servitude for children was increasingly frowned upon."[75] "The changing status of women, [including] their acquisition of greater property rights and the elevation of their position within the family as primary nurturer of the child, led to the emergence of the 'tender years doctrine' that favored placing

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NINETEENTH CENTURY AMERICA *passim* (1985); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: A HISTORY OF CHILD CUSTODY IN THE UNITED STATES *passim* (1994); RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY *passim* (1988); LAWRENCE STONE, ROAD TO DIVORCE: A HISTORY OF THE MAKING AND BREAKING OF MARRIAGE IN ENGLAND, 1530–1987 *passim* (1990). For a general discussion of the history of childhood and the family, see also PHILIP ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE *passim* (Robert Baldick trans., 1962); JOHN DEMOS, PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY *passim* (1986); JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA, 1790 TO PRESENT *passim* (1977); VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN *passim* (1985).

69. In *Troxel*, the concern that current constitutional jurisprudence still treats children as mere chattel by elevating the rights of biological parents, was forcefully articulated by Justice Stevens. Troxel v. Granville, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting). This allegation was vigorously responded to by Justice O'Connor in her plurality decision. *Id*. at 64-65.

70. MASON, *supra* note 28, at xii-xiii.

71. Debele, *supra* note 65, at 81; MASON, *supra* note 28, at xiii.

72. Debele, *supra* note 65, at 81; MASON, *supra* note 28, at xiii.

73. Debele, *supra* note 65, at 81.

74. *Id*.

75. *Id*.

children in the care and custody of their mothers."[76] Such trends would significantly impact the notion of a parent's relationship to a child being near sacred and off limits from state or third party intrusion.

During the Progressive Era at the end of the nineteenth and beginning of the twentieth century, the state began to more actively regulate the care, custody, and control of children.[77] "Legislation was enacted that insisted upon compulsory education and strict controls on child labor, the first juvenile courts were created, and new standards emerged to evaluate parental competence and prevent child abuse and neglect"; this was the era when the state and county social workers furthered the concept of child protection under the supervision of juvenile courts and governmental boards.[78] Parents who violated these laws could have their children taken from them.[79] During this time, the state could consider providing services to poor mothers so as to correct their shortcomings as parents, rather than having relatives, churches or local charities step in and simply remove the children from the offending parent.[80] "All of these developments in the Progressive Era led to the creation of the modern child welfare system."[81]

"While states during the Progressive Era were increasing their involvement in the regulation and intervention in families," the notion of "individual family and parental autonomy was being reaffirmed at the national level. It was during the 1920s that the United States Supreme Court began to apply the United States Constitution to family autonomy matters"—what Justice Scalia refers to in his *Troxel* dissent as "unenumerated parental rights."[82] In *Meyer v. Nebraska*,[83] the Supreme Court included the right to marry, establish a home, and bring up children as the individual parent saw fit within its definition of constitutionally protected liberty interests.[84] In *Pierce v. Society of Sisters*,[85] the Supreme Court reaffirmed the fundamental and constitutionally protected interest held by parents and guardians to direct the upbringing and education of children under their control.[86] In

76. *Id*.
77. *Id*.
78. *Id*.
79. MASON, *supra* note 28, at 100-108.
80. *Id*. at 92-100.
81. Debele, *supra* note 65, at 81.
82. *Id*. at 82; Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting). Of the *Troxel* plurality decision, Justice Scalia opined that "[t]he sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases [*Meyer*, *Pierce* and *Yoder*] has small claim to *stare decisis* protection." *Troxel*, 530 U.S. at 92.
83. 262 U.S. 390 (1923).
84. *Meyer*, 262 U.S. at 399.
85. 268 U.S. 510 (1925).
86. *Pierce*, 268 U.S. at 534-35.

Prince v. Massachusetts,[87] the Supreme Court said that it was cardinal that the custody, care, and nurture of the child—which the state can neither supply nor hinder—"resides first with the parents."[88]

While parental rights received strong constitutional protection in the early decades of the twentieth century, and while those protections had enormous staying power, there was also a growing view that the powers of the parents were limited, and that certain basic standards to protect the emerging view that children were fragile and dependent gained strength at the same time. The state began to take a more active role in monitoring standards of parental conduct, with county child protection agencies and juvenile courts removing children from their parents' care and custody and placing them in foster care.[89]

These often contradictory trends also existed in Supreme Court jurisprudence. In *Wisconsin v. Yoder*,[90] the United States Supreme Court acknowledged that the power of parents may be limited if it appeared that parental decisions would endanger the safety or health of their child, or have a potential for social burdens.[91] Other cases upheld stringent limitations on the state's ability to intervene in family affairs.[92] Even in cases where the child was harmed or neglected, "the United States Supreme Court determined that the Constitution calls for a balance to be struck by requiring states in cases of child neglect to prove by the heightened clear and convincing evidence standard the need for the termination of parental rights."[93]

Beginning in the 1970s, dramatic changes in custody law sharply reversed what had been a long-entrenched preference for mothers in custody disputes, a development that would also have important ramifications for cases where children were placed with persons or entities other than biological parents.[94] Most states adopted laws conferring an equal status on the custodial rights of mother and father, with a favorable attitude

87. 321 U.S. 158 (1944).

88. *Prince*, 321 U.S. at 166.

89. MASON, *supra* note 28, at xiii–xiv.

90. 406 U.S. 205 (1972).

91. *Yoder*, 406 U.S. at 229-36.

92. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("Constitutional interpretation has consistently recognized that the parent's claim to authority in their own household to direct the rearing of their children is basic in the structure of society."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The rights to conceive and raise one's children have been deemed essential . . . basic civil rights of man . . . and rights far more precious than property rights."); *Yoder*, 406 U.S. at 233 (invalidating a Wisconsin law that compelled Amish children to attend school, because the strong state interest in compulsory schooling of children failed when balanced against parents' rights to direct their children's religious upbringing).

93. Debele, *supra* note 65, at 81; *see* Santosky v. Kramer, 455 U.S. 745, 747-48, 751 (1982).

94. MASON, *supra* note 28, at 123-29.

towards joint custody.[95] This issue has been discussed at length in a previous article that I authored, entitled *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*.[96] The text approaches the history of family and custody as follows:

> The state took a more active role in monitoring standards of parental conduct, frequently intervening to take temporary and permanent custody.[97] The state also began supporting an ever-growing population of single parents, allowing them to maintain custody of their children.[98] New reproductive technology, separating conception and childbearing, challenged the ingenuity of lawmakers and courts.[99] Such trends clearly supported views that persons other than biological mothers could effectively parent children.
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> As part of these modern developments, there would be an increased reliance in custody disputes on social and behavioral scientists to provide guidelines for what constitutes the "best interests" of the child. Increasingly by the 1970's, expert witnesses—especially psychologists—began to be called upon to evaluate the relationship between the parent and the child.[100] With this shift from a father's preference to a mother's preference, and then to the multi-faceted, social-scientific best interest standard for custody decisions, came a new emphasis on joint custody, and in cases between biological parents and non-parents, the possibility of deemphasizing the biological connection and looking instead to the particular and individual needs of the child.[101]

As with the history of custody and placement, a brief consideration of the history of childhood also illuminates further the complex nature of the issues involved in placement disputes between a biological parent and a

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95. *Id*. at 129-32. California led the way in custody initiatives, as it had in no-fault divorce, by introducing a preference for joint custody in 1980. By 1988, thirty-six states had followed its lead. *Id*. at 130.

96. Debele, *supra* note 65, at 83-86.

97. MASON, *supra* note 28, at 149-56.

98. *Id*. at 144-49.

99. *Id*. at xii.

100. *Id*. at 167-78. As Mason notes, the psychological authorities most frequently cited by courts were law professor Joseph Goldstein, child analyst Anna Freud, and psychiatrist Albert Solnit, who wrote a book in 1973 called *Beyond the Best Interests of the Child*, which created the concept of the "psychological parent": the one individual, not necessarily the biological parent, with whom the child was most closely attached. *Id*. at 168. In their opinion, this person should have custody or placement of the child. *Id*.

101. *Id*.

non-parent individual or entity. The history of childhood is also outlined in *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*:

> In his discussion of the history of childhood in America, Joseph Kett traces changes occurring during the tumultuous eighteenth and nineteenth centuries.[102] During the colonial era and early years of the nation, there was little demarcation between childhood and adulthood.[103] Early in their lives, children began working and extended formal education was unusual.[104] This trend continued as young people were increasingly uprooted from agriculture and moved to urban areas where they worked in factories.[105] Accompanying this development was more variety in the types of labor young people did, as well as a trend toward increasing disorderliness and even violence in youth oriented educational and social institutions.[106] While the dependency of childhood was of shorter duration than in modern times, semi-dependency lasted longer.[107] Youth were generally seen as reckless and few institutions then existed which marked passage from childhood to adulthood.[108] This limited notion of childhood supported a law of custody favoring fathers' rights to the labors of their children.[109]
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> While the environment of young people prior to 1840 was likely to have been casual and unstructured, it became increasingly patterned and regulated as the century wore on.[110] The changes began with an increase in the number of public schools with their emphasis on supervision, training, order and formation of character.[111] Evangelical protestants were especially active in the growing institutional and intellectual concerns with the welfare of young people.[112] Also important were the changes occurring in the social position of women, rendering the feminine influence more

102. KETT, *supra* note 68, at 11-85.
103. *Id.* at 7.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

pervasive and important in the nurturing of children.[113] An increasingly widespread romantic notion developed that the period of childhood was a time fraught with peril and danger requiring increasing parental and societal control.[114] By the last decades of the nineteenth century, industrialization required more schooling if children were to advance economically.[115] Declining birth rates created a kind of family in which self-conscious nurture rather than remote government of children was possible and indeed vital to the industrial society.[116] Middle class values of self-restraint and self-denial thus were asserted in an extreme form, and conscious efforts were made by parents, clergy, educators, and social workers to enforce the obedience and dependency of children.[117] This, of course, led to the rise of the "tender years" doctrine discussed above which favored mothers when custody disputes arose.

During the Progressive Era children came to be seen not only as the victims of American society, but also as its saviors. Salvation from current social problems seemed to lie in the innocence of children and their amenability to education.[118] Social order and national greatness were thought to depend on their care and protection, a concept unheard of in earlier centuries.[119] During this critical period of history from 1880 to 1920, these dramatic changes occurring in the American family and in the concept of childhood impacted developments in family law.[120] While the notion of a period of childhood innocence first took root in the Enlightenment in Europe in the seventeenth century, it reached its peak in the United States at the beginning of the twentieth century.[121] Child labor laws, universal education, and the juvenile justice system all emphasized as never before the ways children differed from adults, thereby requiring necessary differences in treatment.[122]

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113. *Id*.
114. *Id*.
115. *Id*. at 85.
116. *Id*.
117. *Id*.; *see also* ZELIZER, *supra* note 68.
118. MASON, *supra* note 28; GROSSBERG, *supra* note 68; DEMOS, *supra* note 68; DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980).
119. Kett, *supra* note 68, at 111-87.
120. *Id*.
121. *Id*.
122. *Id*.

According to noted social critic Neil Postman, the period between 1850 and 1950 represented the high water mark of the concept of the child.[123] In America, successful attempts were made during these years to get all children into school and out of factories, into their own clothing, their own furniture, their own literature, their own games, their own social world.[124] In hundreds of laws, children were classified as "qualitatively different from adults;" in hundreds of customs they were assigned a preferred status and offered protection from the upheaval and uncertainty of adult life.[125] This was the period during which the stereotype of the modern family was cast, and it was the period in which the parents were expected to develop a full measure of empathy, tenderness, and responsibility toward their children.[126] By the turn of the century, childhood had come to be regarded as every person's birthright and an ideal that transcended social and economic class.[127]

Postman explains in his study of the disappearance of childhood how a new and revolutionary media has caused the expulsion of childhood from its venerated position as discussed above.[128] This is evidenced in the merging of tastes and styles of children and adults, as well as the changing perspectives of relevant social institutions such as the law, the schools, and sports.[129] Additional evidence of this disappearance of childhood is found in the earlier onset of alcohol consumption, drug use, sexual activity, and serious crime, all of which, according to Postman, implies a fading distinction between childhood and adulthood.[130] With these trends, some states even began dismantling the juvenile justice system.[131] In education, the school often came to be viewed as a workplace: recess has been eliminated; school children everywhere are tested like laboratory rats; the education debate is relentlessly framed in terms of international competition and training future workers; and

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123. NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 67 (1994). For further discussion of Postman's theories, see Peter Applebone, *No Room for Children in a World of Little Adults*, N.Y. TIMES, May 10, 1998, at Section 4. *See also* Debele, *supra* note 65, at 85-86.

124. POSTMAN, *supra* note 123, at 67.

125. *Id*.

126. *Id*.

127. *Id*.

128. *Id*. at 120.

129. *Id*.

130. *Id*.

131. *Id*. at 134.

> the high stakes race for college admission is now preceded by the high stakes race for preschool admission.[132]
>
> Up until the 1960's media images paid homage to the notion of childhood innocence. This has given way to increasingly sexualized images of ever younger childlike models and ads for various products.[133] In some ways this blurring between childhood and adult has become inevitable, a function of changes in biology, communications and society.[134] Because of better nutrition and health care, children grow up faster. As they grow up physically faster, children are exposed to the world at an ever accelerated pace.[135] Also, as women have increasingly left the home for work, the gatekeeper of the separation between adulthood and childhood is increasingly unavailable to play that role.[136]

This disappearance of romantic notions of childhood and children, when coupled with a view of custody decisions based on social scientific best interests criteria without a preference for either the mother or father (or even a biological parent) has significant meaning to this discussion of the rights of biological parents in custody and placement disputes involving their children. It clearly supports a notion of children as separately protected participants apart from their biological parents with their own interests and rights. Such rights must be considered separate and independent of the biological connection to parents.

B. THE CHILDREN'S RIGHTS MOVEMENT

While approaches to custody and the concept of childhood change, and as notions of individual (i.e. parental) rights and individual autonomy continue to be central to our culture, the children's rights movement has emerged.[137] A review of the history of this movement is helpful to this analysis of constitutional issues in non-traditional family law disputes involving the placement of children with persons and entities other than biological parents.

According to law professor Martha Minow, in the 1970s many lawyers, scholars, and activists began a "children's liberation" movement, arguing

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132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *See* Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, *passim* (1995) (providing the best overview of this movement).

that questions of children's competence should be decided on a case-by-case basis and that children deserved rights to participate fully in society.[138] Another group of lawyers, scholars, and activists argued at the same time that instead of simply liberating young persons from the constraints of childhood status, the emphasis should be upon providing protections, services, and adequate care for children.[139] "Whether liberationists or protectionists . . . growing numbers of advocates for children in the 1960s and 1970s found that the language of 'rights' offered a way to argue for both more protection and more independence for [a variety of] children."[140]

Minow refers to this concept as the "rhetoric of children's rights." It began with the discussion moving from notions of children's needs to children's rights.[141] This rhetoric of rights was not only used to attempt to place children in the same legal positions as adults, but also to seek special protections.[142] These developments in the 1960s and 1970s were a dramatic departure from the previous view of children as property of parents subject to parental and institutional authority beyond state review.[143] With the rise of the counter-culture and various liberation movements in the 1960s, such authorities came to be increasingly questioned and deemed untrustworthy.[144] Indeed, the United States Supreme Court "began to recognize children as distinct individuals deserving a direct relationship with the state under a legal regime protecting liberties against public and private authorities."[145]

A brief review of the Supreme Court's treatment of children's rights is instructive. Until the 1960s, most Supreme Court cases involving children adjudicated conflicts between parents and the state. As discussed above, in 1923, *Meyer v. Nebraska*[146] established a fundamental right of parental authority, declaring that the right of parents to "establish a home and bring up children," including the control of their education, is protected by the

138. *Id.* at 269-70.

139. *Id.*

140. *Id.*

141. *Id.* at 273. This switch was from a parent's moral obligation to provide his or her child with education, shelter, food, and clothes, to a notion that children had legally enforceable rights for which they could petition. *Id.* at 273-75.

142. *Id.*

143. This author has previously written about the due process revolution as affecting children in the 1960s and 1970s in the area of juvenile delinquency, finding this trend followed logically from the due process revolution for blacks and women that started with the seminal decision of *Brown v. Board of Education*, 347 U.S. 483 (1954). Gary A. Debele, *The Due Process Revolution and the Juvenile Court: The Matter of Race in the Historical Evolution of a Doctrine*, 5 LAW & INEQUALITY 513, 518 (1988).

144. Minow, *supra* note 137, at 273-75.

145. *Id.* at 277.

146. 262 U.S. 390, 399 (1923).

Liberty (Due Process Clause of the Fourteenth Amendment.[147] The Supreme Court reinforced this principle in *Prince v. Massachusetts*,[148] when it announced that "the custody, care, and nurture of the child reside first in the parents."

In discussing the issue of parental authority, I again refer to *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*.[149] In my article, I cite Susan Gluck Mezey, who also analyzes parental authority:[150]

> According to law professor Susan Gluck Mezey, with few exceptions, in cases of conflict between parent and state the Court has held fast to this principle.[151] The Supreme Court's adherence to the doctrine of parental authority was grounded in cases in which it was assumed that a harmony of interests existed between parent and child; when the interests of the parent and child diverged, the Court was forced to reconcile the principle of parental authority with the child's constitutional rights.[152]
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> The rhetorical principles guiding the Supreme Court in these cases have been that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[153] and that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[154] In reaching its decisions, the Supreme Court was forced to balance these principles against the state's responsibility for the education, moral development, and in some cases, rehabilitation, training, and punishment, of the child.[155]

Mezey observed that not only does an analysis of Supreme Court decisions affecting children's rights demonstrate decreasing support for children's rights claims, the cases also demonstrate a great deal of inconsistency in the way the Supreme Court has handled children's rights cases:[156]

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147. *Meyer*, 262 U.S. at 399.
148. 321 U.S. 158, 166 (1944).
149. Debele, *supra* note 65, at 90.
150. *Id*. at 90-93.
151. Susan Gluck Mezey, *Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953 to 1992*, 27 FAM. L.Q. 307, 309 (1993).
152. *Id*.
153. In Re Gault, 387 U.S. 1, 13 (1967).
154. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).
155. Mezey, *supra* note 151, at 309.
156. *Id*. at 309-10.

> Mezey cites as examples that the Supreme Court accorded adult status to children in situations such as death penalty sentencing, but not in abortion rights.[157] The Supreme Court was willing to override state policy by favoring children who are disadvantaged by their parents' marital status, yet unwilling to do so for children who were disadvantaged by their parents' economic status.[158] Over the years, the Supreme Court appears to have assigned a lower priority to the children's interest than to the competing interests of the state and family.[159] Consequently, as the cases demonstrate, the Supreme Court's rulings often yield contradictory results: at times, applying adult principles of law to children, other times not; at times extending children's autonomy, other times not; at times protecting children from a hostile world, other times not. Moreover, the rationales for the decisions in these cases are often elusive.[160]

This trend is certainly seen in *Troxel* and offers hope to family law practitioners seeking to reduce the power of the biological connection in placement, custody, and access disputes between parents and third parties.

According to Mezey, the Supreme Court's rulings lie in traditional principles of constitutional law and "appear to be motivated more by the jurisprudence of the constitutional claim than by adherence to a child welfare theory."[161] The Supreme Court has looked at children's rights issues in a variety of contexts. The Court has considered criminal proceedings,[162] illegitimacy issues,[163] rights of children in the schools,[164] rights to

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 321.

161. *Id.* at 321-22.

162. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (death penalty); Schall v. Martin, 467 U.S. 253, 255-56 (1984) (pretrial detention); Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (death penalty); Breed v. Jones, 421 U.S. 519, 541 (1975) (double jeopardy in juvenile court adjudicatory hearings); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (jury trial for juveniles); In re Winship, 397 U.S. 358, 368 (1970) (standard of proof in juvenile courts); In re Gault, 387 U.S. 1, 41 (1967) (right to counsel); Kent v. United States, 383 U.S. 541, 552-54 (1966) (waiver of jurisdiction by the juvenile court).

163. Clark v. Jeter, 486 U.S. 456, 465 (1988); Reed v. Campbell, 476 U.S. 852, 854-56 (1986); Pickett v. Brown, 462 U.S. 1, 18 (1983); Mills v. Habluetzel, 456 U.S. 91, 101 (1982); Lalli v. Lalli, 439 U.S. 259, 275-76 (1978); Trimble v. Gordon, 430 U.S. 762, 776 (1977); Matthews v. Lucas, 427 U.S. 495, 516 (1976); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 175-76 (1971); Levy v. Louisiana, 391 U.S. 68, 70-72 (1968) (equal protection issues in an illegitimacy case).

164. *See, e.g.*, Kadramas v. Dickinson Pub. Sch., 487 U.S. 450, 465 (1988) (payment of school bussing fees); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (student

abortion,[165] and child protection and commitment issues.[166] The Supreme Court "cases show that despite the urging of children's rights scholars and advocates, the Court has not arrived at a coherent theory to guide the outcome of cases brought by or on behalf of children."[167] *Troxel* certainly supports that observation.[168]

As a result of these trends, a legal ambivalence came into the children's rights movement over the last several decades. Faced with repeated efforts by advocates to extend constitutional rights to children, as is apparent in the above review of cases, in the 1970s the Supreme Court began balancing two starkly contrasting alternatives: extending adult rights to children, or simply treating "children in important ways as subject to different authorities, institutions, and relationships than adults."[169] According to Minow, a third position emerged in the 1970s stressing traditional authority and warning "against the conflicts and disorder that rights for children would engender."[170] Such rights, these critics claimed, "would inject conflict and individualism into the sphere of family life and disturb the usual arrangements for caring for children."[171] This view presumably supports and strengthens the biological connection, elevating the power and control of biological parents.

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newspaper); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (lewd speech in high school); New Jersey v. T.L.O., 469 U.S. 325, 332 (1984) (searches in high school); Martinez v. Bynum, 461 U.S. 321, 333 (1983) (school residency requirements); Bd. of Educ. v. McCluskey, 458 U.S. 966, 971 (1982) (school suspension); Bd. of Educ. v. Pico, 457 U.S. 853, 875 (1982) (removing books from school library); Plyler v. Doe, 457 U.S. 202, 230 (1982) (tuition for undocumented aliens); Ingraham v. Wright, 430 U.S. 651, 682-83 (1977) (corporal punishment in schools); Goss v. Lopez, 419 U.S. 565, 584 (1975) (school suspension without hearing); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58-59 (1973) (school financing); Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (compulsory education for Amish); Tinker v. Des Moines Ind. Cmty Sch. Dist., 393 U.S. 503, 514 (1969) (protests in school).

165. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2832 (1992) (parental consent for abortion); Guile v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 520 (1990) (parental consent for abortion); Hodgson v. Minnesota, 497 U.S. 417, 455 (1990) (parental consent for abortion); Planned Parenthood Association v. Ashcroft, 462 U.S. 476, 492-93 (1983) (parental consent for abortion); Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 439-42 (1983) (parental consent for abortion); H.L. v. Matheson, 450 U.S. 398, 411-13 (1981) (parental consent for abortion); Bellotti v. Baird, 443 U.S. 622, 642-44 (1979), (parental consent for abortion); Carey v. Population Serv. Int., 431 U.S. 678, 697-99 (1977) (contraception); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976) (parental consent for abortion).

166. *See, e.g.*, DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189, 203 (1989) (state's duty to protect a child); Sec'y of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640, 649-50 (1979) (procedure for voluntary commitment); Parham v. J.R., 442 U.S. 584, 620 (1979) (procedure for voluntary commitment).

167. Mezey, *supra* note 151, at 322.

168. *See* Troxel v. Granville, 530 U.S. 57, 80-101 (demonstrating a multitude of opinions and approaches to the issue).

169. Minow, *supra* note 137, at 277.

170. *Id.* at 281.

171. *Id.* at 284.

According to Minow, by the 1980s, "the movement for children's rights had failed to secure a coherent political or intellectual foundation, not to mention a viable constituency with political clout."[172] Into this framework entered Robert Mnookin who captured the patchwork of judicial decisions governing children's legal status by stating three distinct themes.[173] First, he argued "that parents have primary responsibility to raise children"; second, "the state has special responsibilities for children to intervene and protect them"; and third, "that children as people have rights of their own and have rights as individuals in relation to the family and in relation to the state."[174] According to Minow, these themes are constantly in conflict.[175] *Troxel*, with its myriad views and positions on these issues, shows that we still have not reached consensus on fundamental constitutional issues affecting the placement of children with third parties and access by third parties to these children.

According to Minow, four reasons exist for the historic failure of children's initiatives.[176] These include first, that "children do not vote, and no other lobby has appeared on their behalf."[177] Second, America has experienced cycles of child welfare reform and disillusion; the reforms of one generation, become the problems to be reformed by a later generation, with the early reforms and subsequent problems cautioning against further reform.[178] Third, children's needs are connected to larger intractable issues, such as economic problems, women in the work force without adequate child care, negative views of poor parents, failures of public education, abortion, and crime control.[179] Fourth, our culture and ideology "produce great resistance to state intervention in families[,] a resistance articulated by both the political left and right," and as a result, we treat other people's children as beyond public concern.[180]

Minow considers a final option, based on international human rights for children, that remains to be significantly explored.[181] The human rights argument seeks to treat children not as candidates for children's rights or

172. *Id*. at 287.

173. *See* Glenn Collins, *Debate Over Rights of Children Is Intensifying*, N.Y. TIMES, July 21, 1981 at A1 (quoting Professor Robert Mnookin, professor of law at University of California at Berkeley).

174. *Id*.

175. Minow, *supra* note 137 at 287.

176. *Id*. at 295.

177. *Id*.

178. *Id*.

179. *Id*.

180. *Id*.

181. *Id*. at 296.

child protection, nor as adults with rights, but simply as human beings with certain basic human rights.[182] Under this approach to children's rights, as human beings children deserve the rights of dignity, respect, and freedom from arbitrary treatment. Dignity, respect, and freedom do not displace or undermine parents, but instead reminds parents and other adults of their fundamental responsibilities towards children.[183]

This excursion through the history of childhood and custody, and review of theory and Supreme Court case law regarding children's rights, is instructive in our present examination of constitutional issues in non-traditional family law disputes involving the placement of children with persons who are not biological parents. If nothing else, this analysis indicates that we are now at a place where we need to shift the focus away from the near supreme and unassailable right of biological parents to possess and control their children, no matter what the deficiencies in parenting, to a higher concern of really determining what is best for the child. This view has been articulated somewhat by the dissents of Justices Stevens and Kennedy in *Troxel*.[184] In this author's views, the notion that biology trumps all else is not supported by historical or jurisprudential trends. To find a better approach, a close analysis of the uniquely American approach of addressing the legal aspects of family law disputes and constitutional law is necessary.

IV. THE LEGAL CONTEXT

One of the aspects of the way American society resolves these types of family disputes is the significant role of the courts and litigation. At the heart of this approach is the fundamental notion, enshrined in our Constitution, that individual American citizens enjoy the substantive due process rights to life, liberty, and the pursuit of happiness. One category of such cherished individual rights is the right of biological parents to control and direct the upbringing of their children, with limited state and judicial interference or claims by persons who are not biological parents. Indeed, Justice Scalia, who does not find such a right specifically discussed in the Constitution, does find it to be among the category of "inalienable rights" mentioned in the Declaration of Independence, which states "all men are endowed by their Creator."[185] When we discuss in this article the rights of biological

182. *Id*.
183. *Id*.
184. Troxel v. Granville, 530 U.S. 57, 80-91, 93 (2000) (Stevens, J., dissenting) (Kennedy, J., dissenting).
185. *Id*. at 92 (Scalia, J., dissenting).

parents to raise their children without undue interference by the state or other persons, it is this constellation of rights that can be asserted and protected in courts of law, a view that is uniquely American and at the heart of these disputes involving the family and the Constitution.

A. THE AMERICAN LEGAL CULTURE

One cannot ignore the uniquely American emphasis on individual rights that each American citizen deems to be his or her birth rights. One of the central theses of this article is that children also have individual rights that must be elevated and protected in custody and placement disputes. At least a passing discussion of this uniquely American notion of individual rights is necessary to fully comprehend and ultimately accept the view that biological parentage should not be determinative in child placement disputes between biological parents and other persons and entities. Justice Kennedy in his *Troxel* dissent highlights the significant role that litigation can play in these complex family disputes involving third parties and the Constitution.[186]

According to political scientist Stuart A. Scheingold, there has long been a tradition of American beliefs accepted as mainstream, taught in our schools, and advanced throughout society emphasizing individualism, private property, the market economy, and limited government.[187] While there may be differences between the major political parties in this country as to how these values are emphasized and used in society, there does tend to be a widespread belief that private property, in whatever form, is

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186. *Id.* at 101 (Kennedy, J., dissenting). Justice Kennedy observed as follows:

> It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship. We owe it to the Nation's domestic relations legal structure, however, to proceed with caution.

Id.

187. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 18-20 (1974). For an outsider's observation of America's unique fixation on rights and litigation, see ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1959). For classic historical studies of these uniquely American characteristics, see LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955); RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (1955).

identified as the secret of individual achievement and satisfaction, the individual with a stake in the existing system is the cornerstone of stable government, there is a widespread distrust of the power of the state, and the purpose of politics is to serve needs defined from a personal prospective.[188] In short, there is a widespread and fundamental notion at work through all classes and regions of the country that the integrity of the individual is embodied in the idea of equality before the law and protected against governmental intrusion in a variety of ways spelled out in provisions of the Bill of Rights.[189] The perception is pervasive that individual rights in American culture are asserted, and indeed protected, in our burgeoning judicial system. Americans talk freely, openly and frequently about their rights regardless of the nature or level of the dispute. Family law disputes, like any other, are played out in our culture as a battle of competing rights which, if they cannot be worked out between the parties by themselves without judicial or other state involvement, end up in the judicial system for resolution.[190]

Despite this extreme American focus on individual rights, liberties, and the frequent use of litigation to protect such rights and interests, there has also been a historical reluctance to extend these rights to certain less powerful segments of society. This has included blacks, women, gays and lesbians, and of course, children. As an example of this cultural refusal to recognize children's rights, an interesting article addressing probate and inheritance issues notes that the United States, nearly alone among modern nations, allows parents to disinherit their children.[191] Although the author, Ronald Chester, acknowledges a number of reasons for this situation, he believes an explanation of this phenomenon most likely lies in the extreme tolerance for individual control over property in American culture, even after death. Clearly, these entrenched notions of individualism and rights are important concepts, given our nation's early approach to custody and childhood.[192]

While no one outwardly considers children to be property anymore, neither children nor the family appears to be held in high enough esteem to overcome this cultural desire for individual control.[193] Chester notes: "Americans exhibit a strain of individualism that often takes on an anti-

188. SCHEINGOLD, *supra* note 187, at 18-20.

189. *Id.*

190. *Id.*

191. Ronald Chester, *Should American Children be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405, 406 (1997).

192. *Id.* at 406-07.

193. *Id.* at 407.

government slant."[194] In other words, "many Americans would not want an organ of the state, including a court, to have broad discretion over the disposition of their property."[195] The same notions exist in family related matters. As a result, thewidespread American beliefs in parental autonomy for parents and children make family protection more difficult to realize.[196] This is certainly true in family court disputes where courts must decide between disputing biological parents and other interested persons and entities where a child must be placed.

In this time of international terrorism by fundamentalist religious zealots, we hear much talk about the importance of the rule of law. According to political scientist Richard Kagan in his seminal study of the American legal system, the concept of the rule of law is generally viewed as a positive thing, and when "compared to other economically advanced democracies, American civic life is more deeply pervaded by legal conflict and by controversy about legal processes."[197] The United States "relies on lawyers, legal threats, and legal contestation in implementing public policies, compensating accident victims, striving to hold governmental officials accountable, and resolving business disputes."[198] "Attorneys are more detailed, complicated, and prescriptive [than they are in other countries]. . . . American methods of litigating and adjudicating legal disputes are more costly and adversarial."[199] Kagan refers to this uniquely American method of policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation as "adversarial legalism."[200]

According to Kagan, "adversarial legalism can be distinguished from other methods of governance and dispute resolution that rely instead on bureaucratic administration, or on discretionary judgment by experts or political authorities, or on the judge-dominated style of litigation common in most other countries.[201] While the United States often employs these other methods too, it relies on adversarial legalism far more than other economically advanced democracies."[202] Kagan believes this has both its positive and negative effects.[203] This system is especially open to new kinds of

194. *Id*. at 413.
195. *Id*.
196. *Id*. at 436.
197. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001).
198. *Id*.
199. *Id*.
200. *Id*.
201. *Id*.
202. *Id*.
203. *Id*.

justice claims and political movements.[204] American courts are particularly flexible and creative.[205] This adversarial system of judges and lawyers serves as a powerful check on official arbitrariness and provides a protection of essential individual rights.[206] The very nature of this unique system, while often bemoaned as a big part of the tendency to over-litigate family law disputes, ironically gives hope for a more child-focused approach to cases involving custody on placement with someone or something other than the biological parent.

The negatives highlighted by Kagan include a system that is markedly inefficient, complex, costly, punitive, and unpredictable as a method of governance and dispute resolution.[207] Complexity, fearsomeness, and unpredictability of its processes often deter the assertion of meritorious legal clams, and compel the compromise of meritorious defenses.[208] They often inspire legal defensiveness and contentiousness, which impede socially constructive cooperation.[209] Yet, in this author's opinion, we have not come up with another system in which the protection of individual rights is better protected.

Kagan, like Scheingold, believes that adversarial legalism is deeply rooted in the political institutions and values of the United States.[210] While many family law attorneys believe these disputes would be better resolved in venues other than courts of law, "we must also recognize that Americans are not likely to accept wholesale replacement of legal rights and practices by legal institutions drawn from rather different political traditions."[211] As Kagan states, "[f]or good and for ill, adversarial legalism is the American way of law, and it is likely to remain so."[212] According to Kagan, American adversarial legalism is best viewed not merely as a method of solving legal disputes, but as a mode of governance embedded in the legal culture and political structure of the United States.[213]

The United States has by far the world's largest group of "special cause lawyers" seeking to influence public policy and institutional practices by means of innovative litigation.[214] This is certainly true in the family law

204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 4.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 5.
214. *Id.* at 7.

arena as well, with attorneys specializing in advocating for fathers, for domestic abuse victims, and in the current context, for grandparents and foster parents. In no other country are lawyers so entrepreneurial in seeking out new kinds of business, so eager to challenge authority, or so quick to propose new legal theories.[215] The United States has a remarkable propensity to stage highly publicized knock-down-drag-out legal donnybrooks, such as the custody battle over the six-year-old Cuban refugee Elian Gonzales, made-for-television adoption disputes such as the Baby Richard, Baby Jessica, and Baby M cases, and dramas about who gets to end the life of a wife and daughter in a permanent vegetative state—the very types of cases that inject huge televised doses of politicized legal argument into the nation's everyday experience.[216]

Kagan comments briefly on his notions of adversarial legalism when applied to American family law. He finds legal unpredictability pervades this area, in which judges, not juries, decide alimony, child custody, and marital property distribution disputes, with lawyers and the public having difficulty discerning court standards and being unable to predict outcomes of court processes.[217] Especially in family matters, because of their sheer numbers and emotionally challenging situations, many judges pressure the parties and lawyers to settle cases before trial, further adding to legal uncertainty.[218] Again, in an area of law such as family law, where there are complex constitutional issues in play and very little consensus even from the United States Supreme Court, family law practitioners should accept both the challenges and opportunities that our judicial system presents to us and not hesitate to construct constitutional arguments that will best serve our clients and the children involved.

B. UNITED STATES SUPREME COURT JURISPRUDENCE

The unique approach to protecting individual rights and interests through litigation has also been played out in important ways through the constitutional jurisprudence of the United States Supreme Court. As noted at the outset of this article, most family law practitioners seldom consider constitutional laws and concepts in their cases. This is at least partially the result of the reality that until recently, most of their disputes involved divorces between a husband and wife or custody and support issues in a paternity dispute between a biological mother and biological father. There is also the widely accepted axiom that

215. *Id.* at 7-9.
216. *See id.*
217. *Id.* at 116.
218. *Id.* at 117.

the United States Supreme Court has traditionally left family law disputes to the realm of state courts and state legislatures.[219] However, there are a number of significant United States Supreme Court cases involving family court actions, most notably when family members' fundamental notions of procedural due process were being infringed upon,[220] or parents' claimed fundamental constitutional rights to raise and parent their children were being denied.[221] The legal centerpiece for these family law disputes before the Supreme Court was the Fourteenth Amendment, which provides that "no state shall 'deprive any person of life, liberty, or property, without due process of law[.]'"[222] The United States Supreme Court has long recognized that the

219. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) (holding that there is no federal diversity jurisdiction for domestic relations actions); Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992) (stating that matters involving competing and multifaceted social and policy decisions are best left to local decision making); Palmore v. Sidoti, 466 U.S. 429, 431 (1984) ("The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court."). In the year 2001, a family law practitioner wrote an article in the magazine of the ABA's Family Law Section which listed fifty-three cases in all of Supreme Court jurisprudence through that year that addressed a family law issue. *Supreme Court Cases*, 22 FAM. ADVOC. 15-17 (2001).

220. *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84, 93 (1978) (noting that, in a child support case, visits to a state are insufficient "minimum contacts" to give a state long-arm jurisdiction); Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that Texas law could not exclude nonmarital children from a generally enforceable right to parental support); Boddie v. Connecticut, 401 U.S. 371, 381 (1971) (holding that the state's interest in collecting filing fees was insufficient to justify denying court access to indigents seeking a divorce); Cook v. Cook, 342 U.S. 126, 128 (1951) (stating that the effect of a divorce decree extends to new state); Johnson v. Muelberger, 340 U.S. 581, 587-89 (1951) (holding that the effects of a migratory decree extends to third parties such as children); Estin v. Estin, 334 U.S. 541, 68 S. Ct. 1213 (1948) (holding that the Full Faith and Credit Clause does not apply when divorce is *ex parte*).

221. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) (upholding the traditional presumption of legitimacy that applies to a child born to a married mother and refusing to allow non-spousal father any right to assert paternity or custody); Clark v. Jeter, 486 U.S. 456. 463-64 (1988) (striking down a six-year statute of limitations for paternity action); Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (holding that courts may not consider race as the sole factor in determining the best interests of the child in a custody dispute); Caban v. Mohammed, 441 U.S. 380, 392-93 (1983) (finding de facto relationship where party lived with the children for years, contributed to their support, and saw them frequently after separation; party allowed to block the children's adoption by their mother's new husband); Santosky v. Kramer, 455 U.S. 745, 769-70 (1982) (to terminate parental rights, the state must meet a clear and convincing standard of proof); Lassiter v. Dep't of Soc. Serv. of Durham County, 452 U.S. 18, 33-34 (1981) (due process does not require counsel for indigent parents in termination of parental rights proceeding); Lehr v. Robertson, 463 U.S. 248, 267-68 (1981) (the mere existence of a biological link does not merit equivalent biological protection when the parent has not demonstrated a commitment to the responsibilities of parenthood); Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978) (unmarried father can not have veto power over an adoption when he had never legitimized, lived, nor supported the child); Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 846-47 (1977) (there is no liberty interest requiring due process hearings before a child is removed from a foster home.); Stanley v. Illinois, 405 U.S. 645, 657-58 (1972) (father is entitled to a fitness hearing before his children are taken away and made wards of the state); Armstrong v. Manzo, 380 U.S.545, 551-52 (1965) (stepparent's adoption reversed due to denial of the divorced biological father's procedural due process right to be heard at a meaningful time in a meaningful manner).

222. U.S. CONST. amend. XIV.

Amendment's due process clause, like its Fifth Amendment counterpart, "guarantees more than fair process."[223] The clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."[224] The liberty interest at issue in disputes between a biological parent and other person or entity seeking placement or access is the interest of the parents in the care, custody, and control of their children, noted by the United States Supreme Court in *Troxel* as "perhaps the oldest of the fundamental liberty interests recognized by the United States Supreme Court."[225]

More than 75 years ago in *Meyer v. Nebraska*, the Unites States Supreme Court held that the "liberty" protected by the due process clause includes the rights of parents to "establish a home and bring up children" and "to control the education of their own."[226] Two years later in *Pierce v. Society of Sisters*, the United States Supreme Court again held that "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control."[227] The Supreme Court explained in *Pierce* that "[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."[228] The Supreme Court returned to that subject in *Prince v. Massachusetts* and again confirmed that there was a constitutional dimension to the right of parents to direct the upbringing of their children.[229] The Court stated that it is cardinal that "the custody, care, and nurture of a child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder."[230]

In subsequent cases, the United States Supreme Court recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.[231] This extensive precedent clearly indicates that the due process clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children. This line of cases leaves no doubt that parents have a

223. Washington v. Glucksberg, 521 U.S. 702, 719 (1997).
224. *Id.* at 720. *See also* Reno v. Flores, 507 U.S. 292, 301-02 (1993).
225. Troxel v. Granville, 530 U.S. 57, 65 (2000).
226. Meyer v. Nebraska, 262 US 390, 399, 401 (1923).
227. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
228. *Id.* at 535.
229. Prince v. Massachusetts, 321 U.S. 158 (1944).
230. *Id.* at 166.
231. Santosky v. Kramer, 455 U.S. 745, 753 (1982); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Parham v. J.R., 442 U.S. 584, 602 (1979); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest, absent exceptional circumstances, in doing so without the undue interference of strangers to them and to their child. Moreover, these cases have explained that with this constitutional liberty comes a presumption, albeit a rebuttable one, that the natural bonds of affection leave parents to act in the best interests of their children.[232]

Despite the United States Supreme Court's repeated recognition of these significant parental liberty interests, these interests have never been considered to be without limits. This is where persons and entities who are not biological parents enter with their requests for custody or access rights. In *Lehr v. Robertson*,[233] for example, the Supreme Court held that a putative biological father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother.[234] Of critical importance in the disputes between biological parents and other third parties or entities is the notion coming out of *Lehr* that a parent's liberty interests "do not spring full blown from the biological connection between parent and child; they require relationships that are more enduring."[235] Also significant to the issue at hand, in *Michael H. v. Gerald D.*,[236] the United States Supreme Court concluded that despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child was not sufficiently powerful to overcome a state statutory presumption that the husband of the child's mother was the child's parent.[237] As a result of that presumption, the biological father could be denied even visitation with the child because, as a matter of law, he was not a parent.[238] A plurality of the Court in that decision recognized that the parental liberty interest was a function, not simply of isolated factors such as biology and intimate connection, but of the broader and apparently independent interest in family.[239]

Under United States Supreme Court jurisprudence, a parent's rights with respect to her child have never been regarded as absolute. Rather, such rights are limited by the existence of an actual, developed relationship with a child,

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232. *Parham*, 442 U.S. at 602. *See* Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 895 (1992); *Santosky*, 455 U.S. at 759.

233. 463 U.S. 248 (1983).

234. *Lehr*, 463 U.S. at 267-68.

235. *Id.* at 260 (citing Caban v. Mohammed, 441 U.S. 380, 397 (1979)).

236. 491 U.S. 110 (1989).

237. *Michael H.*, 491 U.S. at 124-27.

238. *Id.* at 127.

239. *Id.* at 123. *See also Lehr*, 463 U.S. at 261; Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 842-47 (1977); Moore v. City of East Cleveland, 431 U.S. 494, 498-504 (1977).

and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of the United States Supreme Court's assumption that a parent's interests in a child must be balanced against the state's long recognized interests as *parens patriae*, and critically, the child's own complementary interest in preserving relationships that serve her welfare and protection.[240]

As Justice Stevens cogently stated in his dissent in *Troxel*, the United States Supreme Court "has not yet had the occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds," however to him it seemed extremely likely that, "to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so too do children have those interests, and so too must their interests be balanced in the equation."[241] At a minimum, prior cases of the United States Supreme Court recognize that children are, generally speaking, constitutionally protected actors requiring rejection of any suggestion that when it comes to parental rights, children are simply chattel.[242] According to Justice Stevens, the constitutional protection against arbitrary state interference with parental rights should not be extended so as to prevent the states from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by interest in the welfare of the child.[243] This could easily include denying interested third parties and entities access rights or custody where appropriate.

As shall be discussed in greater detail below, there certainly is United States Supreme Court jurisprudence to support third party requests for custody, placement, and parental access. *Troxel* has created no small amount of confusion, emboldening parental rights advocates who seek to challenge third party requests for access and custody.[244] Interestingly enough, *Troxel*,

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240. Reno v. Flores, 507 U.S. 292, 303-04 (1993); Santosky v. Kramer, 455 U.S. 745, 760, 766 (1982); Parham v. J.R., 442 U.S. 584, 605 (1979); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

241. Troxel v. Granville, 530 U.S. 57, 88 (2000). The Supreme Court has, on numerous occasions, acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties. *See Parham*, 442 U.S. at 600 (finding a liberty interest in avoiding involuntary confinement); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors, as well as adults, are protected by the constitution and possess constitutional rights."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506-07 (1969) (upholding a First Amendment right to political speech); In re Gault, 387 U.S. 1, 13 (1967) (advocating due process rights in criminal proceedings).

242. *Troxel*, 530 U.S. at 88-89.

243. *Id.*

244. *See, e.g.*, In the Matter of the Custody of N.A.K., 649 N.W.2d 166 (Minn. 2002) (biological father relied on *Troxel* to challenge the award of custody of his daughter to her maternal aunt and uncle).

authored by Justice O'Connor, speaks positively of several states' third party visitation statutes then in place.[245] It does not specifically address any third party custody statutes. The United States Supreme Court jurisprudence in this area, starting at the beginning of the twentieth century, mirrors the historical developments going on across the nation with regard to the history of the family and childhood, the children's rights movement, and third party custody and access issues. Anyone representing third parties or persons and entities who are not biological parents in any of these types of disputes needs to be cognizant of the positive constitutional arguments that can be raised both in support of, and in opposition to, the requested relief.

C. MINNESOTA JURISPRUDENCE

Of course, the United States Supreme Court is not the only judicial entity that considers constitutional claims in addressing custody and access disputes between biological parents and third parties. As this author is a licensed Minnesota practitioner, he is most aware of the law in that state. He assumes, however, that other states in the nation have taken similar paths in the development of their jurisprudence in this area, and that a discussion of Minnesota law would be instructive to practitioners in other states.

In considering historical developments in Minnesota, the trend in this state's case law has similarly mirrored developments across the country. Until relatively recently, third party access and custody was a creature largely of the common law. Statutes that existed and were applicable often did not fit the disputes between biological parents and non-parents well. An understanding of these case law developments was especially critical before both third party custody and access were codified. However, even now with elaborate statutes in place, these cases can be quite complex and factually unique; the analysis offered by Minnesota's appellate courts, including the interplay between constitutional rights and statutory and case law provisions, is often critical to obtaining the relief sought.

In Minnesota, there has long been a bold commitment to the use of the best interests of the child standard by appellate courts addressing the placement and custody of children in a variety of legal contexts. The Minnesota Supreme Court early on "overrode a statutory mandate that fathers receive custody and awarded custody to a mother due to her role as the primary caretaker."[246] The preference was "absolute for some trial judges."[247]

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245. *Troxel*, 530 U.S. 69-71.

246. Gary L. Crippen & Sheila M. Stuhlman, *Minnesota's Alternatives to Primary Caretaker Placement: Too Much of a Good Thing?*, 28 WM. MITCHELL L. REV. 677, 679 (2001) (citing Flint v. Flint, 65 N.W. 272, 273 (Minn. 1895)).

The legislature long deferred to the judiciary in custody and access disputes, and indeed the first legislative reaction to the Court's strong preference for mothers did not come until 1969 when the Minnesota Legislature directed the courts to place no weight on the sex of the parent in determining custody.[248] It was not until 1974 that the legislature revised the statute to detail specific factors for the courts to consider when determining a custodial placement.[249] A multi-factor best interest test has been at the heart of Minnesota custody, placement, and access disputes ever since.

In its developing jurisprudence following these statutory multi-factor enactments, the Minnesota Supreme Court explained that the trial courts must make findings of fact on all of those factors that are brought into dispute because detailed findings facilitate judicial review and unmask hidden biases in decision making. Similarly, in subsequent cases, the Minnesota Supreme Court suggested an interest in protecting primary caretaking mothers from judges inclined to arbitrarily overlook the interest of the child in being with the child's mother.[250]

The primary caretaker factor has been significant in third party custody, placement, and access issues. Many third party claimants rest their claims to access or custody on the existence of a long and nurturing relationship with a child. Hence, it is critical to focus on the judicial and legislative treatment of that factor. In Minnesota, a judicial recognition of the interest served by the primary caretaker placement culminated with the Minnesota Supreme Court's decision in *Pikula v. Pikula*,[251] with the court declaring that children should be placed with their primary parent.[252] The supreme court had hoped that preference would reduce litigation and provide more predictable results in recognition of the tension between giving the trial courts discretion to make individualized decisions in the interest of justice while providing predictable decision making.[253]

According to retired Minnesota Court of Appeals Judge Gary L. Crippen in his recent study of the primary caretaker factor, the *Pikula* presumption favoring primary caretakers produced a backlash that badly diminished the strength of these caretakers' cases for sole custody and placement. Four years after *Pikula*, the legislature amended the list of best interests factors by adding

247. *Id*. at 679.

248. MINN. STAT. § 518.17 (1969).

249. MINN. STAT. § 518.17(1) (1974).

250. Rosenfeld v. Rosenfeld, 249 N.W.2d 168, 171 (Minn. 1976); Bernt v. Bernt, 292 N.W.2d 1, 2 (Minn. 1980); Weatherly v. Weatherly, 330 N.W.2d 890, 892 (Minn. 1983)

251. 374 N.W.2d 705, 713 (Minn. 1985)

252. *Pikula*, 374 N.W.2d at 713.

253. Crippen & Stuhlman, *supra* note 246, at 679-80.

a statement that prohibited the court from using "one factor to the exclusion of all others."[254] While this change occurred because fathers contended that *Pikula* caused the courts to unduly confine their consideration of statutory best interest factors and thus deprive fathers of success in their efforts to obtain child custody, the change had ramifications for best interest considerations in grandparent custody and access disputes. The amendment further required the courts to make detailed findings on all of the best interest factors. When reflecting on the best interest factors, the Minnesota Supreme Court in *Maxfield v. Maxfield*[255] stated that primary caretaking is "the golden thread running through any best interest analysis" because it bears on all other factors.[256] In response, the legislature further clarified its intent, amending the statute once again to declare that "the primary caretaker factor may not be used as a presumption in determining the best interests of the child."[257] While third parties in their custody and access disputes with biological parents also had other factors to emphasize, the requirement of a true, multi-factored consideration also applied to them.

This trend in making custody and placement determinations open to a broad and complete best interests analysis occurred at the same that Minnesota reaffirmed a strong preference for placements with relatives when biological parents were unfit or had abandoned the child. In the seminal case for relative placement preferences in the state of Minnesota, the Minnesota Supreme Court in *In the Matter of the Welfare of M.M.*[258] stated that it has long been a familial phenomenon that the absence, inability, or incapacity of the natural parents to provide and care for their children has prompted other relatives to step forward to assume the benefits and responsibilities of that role.[259] While at one time judicial intervention was unnecessary, a body of common law developed according a custodial preference to near relatives.[260] The Minnesota Supreme Court in *M.M.* stated that there remains a strong preference to award the permanent care and custody of a child to a relative if either or both of the natural parents are unable to perform that responsibility.[261] In fact, according to the Minnesota Supreme Court, on examination of the cumulative legislation addressing the many aspects of child custody concerns, it becomes clear that the legislature has strongly endorsed the societal goal of strengthening and

254. MINN. STAT. § 518.17 (supp. 1989).
255. 452 N.W.2d 219, 223 (Minn. 1990).
256. *Maxfield*, 452 N.W.2d at 223.
257. MINN. STAT. § 518.17 (1990).
258. 452 N.W.2d 236 (Minn. 1990).
259. *M.M.*, 452 N.W.2d at 241.
260. Waldron v. Bienek, 193 N.W. 452, 452-53 (Minn. 1923).
261. *M.M.*, 452 N.W.2d at 238 (citing MINN. STAT. § 257.02 (1980)).

preserving the biological family structure.[262] *M.M.* also takes the maxim of *Maxfield*, referring to the golden thread running through any best interests analysis stating that a bond between a child and a "primary parent" should not be disrupted without strong reasons, and assumedly equates that primary parent bond to the bond existing between a maternal grandmother and her grandchild.[263]

Indeed, Minnesota has a long line of third party custody and placement decisions extending back to at least the turn of the twentieth century where the courts have considered requests by third parties, some related and some not, and has found in many of the cases that placement with them would be in the best interests of the child.[264] Minnesota case law has developed, in

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262. *Id.* As illustrative examples, the Minnesota Supreme Court cited the following statutes then in affect: MINN. STAT. § 256F.01 (1988); MINN. STAT. § 260.011(2)(a) (1988); *but see infra* note 267 for the discussion of the Adoption and Safe Families Act. This federal statute, which significantly redirects child protection placements away from a focus on family preservation to permanency and efficient decision-making, has many requirements for the states and is now being felt in juvenile court proceedings where children removed from homes are returned more quickly or sent with relatives in transfers of custody or adopted.

263. *M.M.*, 452 N.W.2d at 240.

264. In the Matter of the Custody of N.A.K., 649 N.W. 2d 166 (Minn. 2002) (affirming a parental preference, but indicating that the ultimate determining factor in third party custody is the best interests of the child); Durkin v. Hinich, 442 N.W.2d 148, 153 (Minn. 1989) (affirming award of custody to family friend after finding child had been integrated into friend's household with mother's consent and returning child to mother would result in severe regression); Wallin v. Wallin, 187 N.W.2d 627, 631 (Minn. 1971) (remanding for new hearing because mother had been denied custody merely on the ground that transferring custody might be disruptive); State ex rel. Waslie v. Waslie, 152 N.W.2d 755, 757 (Minn. 1967) (removing child from the grandparent and returning to the parents because family was intact and stable); In re Hohmann's Petition, 95 N.W.2d 643, 648-49 (Minn. 1959) (affirming placement with biological father over step-father, although children wished to stay with step-father); In re Klugman, 97 N.W.2d 425, 432 (Minn. 1959) (finding insufficient evidence to support committing the children to state guardianship); State ex rel. Nelson v. Whaley, 75 N.W.2d 786, 793 (Minn. 1956) (ordering child's return to biological mother, after the infant was inappropriately placed with non-relatives by a physician, without assistance of social agencies); State ex rel. Gravelle v. Rensch, 40 N.W.2d 881, 884 (Minn. 1950) (ruling that an order to show cause in a divorce proceeding was unrelated to a determination of custody between the father and paternal aunt); State ex rel. Merritt v. Eldred, 29 N.W.2d 479 (Minn. 1947) (removing child from step-father and placing with biological father, because although both men were deserving, there was no reason the biological father should be denied custody); Hervey v. Hervey, 230 N.W. 479, 480 (Minn. 1930) (allowing maternal aunt and uncle to retain custody after considering age and sex of the child, conditions in the mother's home, step-father's hostility towards the child, and the suitability of the aunt and uncle's home); State ex rel. Larson v. Halverson, 149 N.W.2d 664, 665 (Minn. 1914) (finding the interests of a child suffering health problems best served by allowing the maternal grandparents to retain custody); D.W. v. C.M. & A.K.M., 627 N.W.2d 687, *passim* (Minn. Ct. App. 2001) (addressing the statutory factors found in Minn. Stat. §518.17(1)(a)); Mize v. Kendall, 621 N.W.2d 804, 810 (Minn. Ct. App. 2001) (placing legal and physical custody with biological father did not constitute abuse of discretion); LaChappelle v. Mitten, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000) (granting biological mother sole physical custody, and granting joint legal custody with the sperm donor); Westphal v. Westphal, 457 N.W.2d 226, 228 (Minn. Ct. App. 1990) (affirming that grandparents were not entitled to an evidentiary hearing absent prima facie showing that the child's present care endangered her physical or emotional health, and the danger of changing custody was outweighed by advantages of such a change); In re the Custody of N.M.O., 399

accordance with national trends, that while biological parents clearly have a constitutionally protected interest in raising their children, the constitutional right is not absolute, and if the third parties can sustain the heavy burden of showing either unfitness, abandonment, or other extraordinary circumstances, *and* that placement would be in the best interests of the child, courts will allow custody placements with grandparents and other relatives, and third parties with significant relationships to the children.[265]

In the area of foster care placements and the child protection system, the Minnesota Legislature has over the years enacted sweeping permanency legislation that mirrors the national mandate set forth in the Adoption and Safe Families Act of 1997 that emphasizes the need to make prompt determinations of whether children can return to their biological parents,[266] and if not, to have a concurrent plan in place that will allow a prompt move to third party custody with a relative or important friend, termination of parental rights followed by adoption, or as a last resort, permanent foster care.[267] This statutory scheme has withstood numerous constitutional challenges by biological parents who objected to their children being removed and put on the fast track to permanency.[268] The balance of the rights of parents versus the need of the state as *parens patriae* to protect the children from neglectful or abusive parents and the rights of the children to have safe and nurturing childhoods has been carefully considered.

In the area of adoption, the Minnesota Supreme Court has moved from the era when a father was found to have an ongoing right to commence a paternity action even after the birth mother was moving forward with an adoption plan and the father had failed to file an affidavit with the state indicating an intention to retain parental rights, as the state laws provided in 1996,[269] to a situation where the state legislature enacted a birth father's

N.W.2d 700, 704 (Minn. Ct. App. 1987) (holding that a step-father was entitled to an evidentiary hearing on the best interests factors set out in MINN. STAT. § 518.17 before the father is awarded custody); Tubwon v. Weisberg, 394 N.W.2d 601, 604 (Minn. Ct. App. 1986) (granting custody to family friend over biological mother, because biological mother was found unfit, and family friend had established a parent-child bond with the child and performed all parental roles).

265. *See* MINN. STAT. § 257C (2007) (a new and comprehensive third party custody and visitation statute that codifies the common law as to parental preferences, but sets forth the best interest of the child factors that must also be considered, as well as the procedures that must be followed); Lewis-Miller v. Ross, 710 N.W.2d 565 (Minn. 2006) (the most recent third party custody case decided by the Minnesota Supreme Court.

266. MINN. STAT. §§ 260.012, 260C.001(3), 260C.193-.215 (2003).

267. Adoption and Safe Families Act Pub. L. No. 105-89, 111 Stat. 2115 (1997).

268. *See, e.g.,* Matter of the Welfare of J.M., 574 N.W.2d 717, 723-24 (Minn. 1998); In re Welfare of S.Z., 547 N.W.2d 886, 893-94 (Minn. 1996).

269. In the Matter of the Paternity of J.A.V., 547 N.W.2d 374, 379-80 (Minn. 1996).

adoption registry[270] that the Minnesota Supreme Court said had to be strictly complied with if the father wished to have any say in an adoption plan affecting his child.[271] Here again, there was a careful balancing of the rights of the biological parents to make an adoption plan or to be notified of an adoption plan and have an opportunity to either support the plan or stop it, the rights of the adoptive parents to proceed with an adoption without having to worry about a biological parent emerging from obscurity to disrupt the adoption, and the rights of the child to move relatively quickly into a permanent custodial placement and live a healthy, happy life.

In the area of assisted reproduction, the appellate courts have addressed such circumstances on two occasions. In one, the dispute involved a lesbian couple that had a child through artificial insemination using sperm donated by a gay couple.[272] The two women went through a second parent adoption, had an informal contact agreement with the gay men, and when disputes arose between them, the two women split up and the man who donated sperm commenced a paternity action and had the adoption vacated.[273] By the time the case arrived at the Minnesota Court of Appeals, the matter had devolved into a three-way custody and access dispute where the constitutional issue was whether the biological mother, who had moved to Michigan, could be compelled to return periodically to Minnesota so the biological father and her former partner, with whom the biological mother shared custody after the adoption was vacated, could exercise parenting time with the child.[274] The Minnesota Court of Appeals held that the state's interest in protecting the child's best interests was compelling enough to justify intrusion into the biological mother's privacy in her familial relationship with the child. Thus, conditioning sole physical custody on the mother's returning to the state from Michigan did not violate her constitutional right of privacy or equal protection.[275]

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270. MINN. STAT. § 259.52 (2003). The Father's Adoption Registry, enacted in 1997, was at least partially a response to *J.A.V.*, 547 N.W.2d at 380.

271. Heidbreder v. Carton, 645 N.W.2d 355, 369-70 (Minn. 2002). In this seminal case, the Court interpreted the Minnesota Father's Adoption Registry and held that the putative father, who had not registered his interest in the child with the state within thirty days of the child's birth, was barred from maintaining a paternity action. *Id*. at 370. The allegedly fraudulent collusion to conceal the mother's location did not relieve him of his obligation to register, as the mother had no fiduciary duty to disclose her location to the putative father. *Id*. The father's "substantial" compliance with the registration (he was one day late) was insufficient to preserve his right to assert an interest in the child, and because of his failure to timely register, with which he had complete control, he lacked a constitutionally protected interest in his relationship with the child. *Id*.

272. In re the Custody of L.M.K.O., 607 N.W.2d 151, 157 (Minn. Ct. App. 2000).

273. *Id*.

274. *Id*.

275. *Id*. at 163-64.

In an unpublished decision by the Minnesota Court of Appeals, an intended father used his own sperm and a donor egg and entered into an arrangement with his niece to be his gestational carrier.[276] When the carrier refused to turn the child over to him after birth, he commenced an action in Minnesota to enforce the terms of the gestational carrier contract.[277] Both the district court and the court of appeals, after applying traditional contract analysis, held in favor of the intended father and awarded him full custody.[278]

The Minnesota Supreme Court has had the opportunity to address third party visitation in several modern cases.[279] Historically, grandparents had virtually no legal right to maintain a relationship with a grandchild independent of the wishes of the child's parents.[280] Reluctance on the part of legislators and courts to intervene in family relationships flowed from the notion that parental authority, with regard to the raising of children, should be impacted by the state as little as possible.[281] However, beginning in the 1970s, states started to address by statute the issue of grandparent visitation rights.[282] In

276. In re Paternity and Custody of Baby Boy A, No. A07-452, 2007 WL 4304448, *1-2 (Minn. Ct. App. Dec. 11, 2007).

277. *Id.* at *2.

278. *Id.* at *9.

279. Olson v. Olson, 534 N.W.2d 547, 548 (Minn. 1995); In re the Petition of Louis Santoro, 594 N.W.2d 174, 174 (Minn. 1999).

280. In re Petition of Bianca Niskanen, 223 N.W.2d 754, 757 (Minn. 1974).

281. *See Olson*, 534 N.W.2d at 549 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

282. For a comprehensive chart of states that have third party visitation statutes for stepparents, grandparents, out-of-wedlock parents, and any interested parties, see Linda D. Elrod & Robert G. Specter, *A Review of the Year in Family Law: State Courts React to Troxel*, 35 FAM.. L.Q., 577, chart 6 (2002). For articles discussing grandparent visitation trends, see Diane L. Abraham, *California's Step-parent Visitation Statute: For the Welfare of the Child, Or a Court-Opened Door to Legally Interfere with Parental Autonomy: Where Are the Constitutional Safeguards?*, 7 S. CAL. REV. L. & WOMEN'S STUD. 125 (1997); Stephen Elmo Averett, *Grandparent Visitation Rights Statutes*, 13 B.Y.U. J.PUB. L. 355 (1999); Alicia Bell, *Public and Private Child: Troxel v. Granville and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225 (2001); Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29 (1996); Joan Catherine Buhl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 DRAKE L. REV. 279 (2000); Sara Elizabeth Cullen, *Legislative Reform, Troxel v. Granville and its Effect on the Future of Grandparent Visitation Statutes*, 27 J. LEGIS. 237 (2001); Tony Eddy, *Grandparent Visitation Rights in Ohio When the Family is Intact*, 28 CAP. U. L. REV. 197 (1999); John Dewitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998); Stephen Hellman, *The Child, the Step-parent, and the State: Step-parent Visitation and the Voice of the Child*, 16 TOUR. L. REV. 45 (1999); Nicole E. Miller, *The Best Interests of All Children: An Examination of Grandparent Visitation Rights Regarding Children Born Out of Wedlock*, 42 N.Y.L. SCH. L. REV. 179 (1998); Karen Alyssa Nellie, *Whose Child is it Anyway? The Unconstitutionality of the Texas Grandparent Visitation Statute*, 51 BAYLOR L. REV. 721 (1999); Meagan E. Peek, *Grandparent Visitation Statutes: Do Legislatures Know the Way to Carry the Sleigh Through the Wide and Drifting Law?*, 53 FLA. L. REV. 321 (2001); Melodies Pelletier, *Grandparent Visitation Rights: The Pitfalls and the Promise*, 2 LAW'S. PUB. INT. L. 177 (2001); Erica L. Strawman, *Grandparent Visitation: The Best Interests of the Grandparent, Child, and Society*, 30 U. TOL. L. REV. 31

1976, the Minnesota Legislature also jumped in to the fray by adopting a statute now found at Minnesota Statute § 257C.08. This statute was cited with approval by the United States Supreme Court in *Troxel* as having a framework that protects the traditional presumption that a fit parent will act in the best interest of his or her child, and also protects the parent's fundamental constitutional right to make decisions concerning the rearing of his or her own child.[283] In its most recent third party visitation case, the Minnesota Supreme Court affirmed the application of the statute in the face of constitutional attack.[284] The statute provides that the court may award grandparent visitation if it is in the best interests of the child and it would not significantly interfere with any parent-child relationship.[285]

The Minnesota Supreme Court also recently considered that third party visitation statute in the context of a dispute between a lesbian couple who had lived together for many years and co-parented two children whom one of them had adopted.[286] When the couple separated, the non-adoptive parent sought court-ordered parenting time under Minnesota's statute allowing visitation to unmarried persons.[287] While the court affirmed that the adoptive parent had a constitutionally protected right to the care, custody, and control of her children, that right was not found to be absolute, and states may intrude on parental rights in order to protect the general interest of the youth's well being.[288] The court found the non-adoptive parent to be "in loco parentis"—having put herself in a situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities of a legal adoption.[289] The Minnesota Supreme Court affirmed the trial court, that access would be in the best interest of the children and would not interfere with the parent-child relationship, and the request for parenting time by the non-adoptive parent was granted.[290] The court went on, however, to hold that because a provision of the non-parental visitation statute impermissibly placed the burden on the custodial parent to prove that visitation would not interfere

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(1998); Richard S. Victor, *Grandparent Visitation Rights in the 21st Century*, 2000 L. REV. MICH. ST. U. DET. C. L. 793 (2000); Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgment of Parent's Constitutional Rights?*, 10 SETON HALL CONST. L. J. 1085 (2000); David T. Whitehouse, *Constitutional Law—Grandparent Visitation Rights: North Dakota Declares the Grandparent Visitation Statute Unconstitutional*, 76 N. D. L. REV. 191 (2000).

283. Troxel v. Granville, 530 U.S. 57, 69-70 (2000).

284. SooHoo v. Johnson, 731 N.W.2d 815, 818 (Minn. 2007).

285. MINN. STAT. § 257C.08(2) (2007).

286. *SooHoo*, 731 N.W.2d at 818.

287. *Id*. at 818-19.

288. *Id*. at 821-22.

289. *Id*. at 823.

290. *Id*. at 821-23.

with the parent-child relationship, that section was deemed unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.[291]

Clearly, the Minnesota statutes and case law in circumstances where non-parents were seeking custody, placement, or access to children have carefully weighed the competing interests and concerns in such disputes between parents and non-parents. In most of these circumstances, the constitutional rights of the parents and the strong preference for protecting biological ties has been maintained, while the courts and legislature have found ways to carefully consider the best interests of the child and give non-parents the ability to be heard and to advance their positions as to why placement or contact with them would be to the benefit of the child.

V. CONCLUSION

This analysis of constitutional issues in non-traditional family law cases where children are placed with persons or entities other than biological parents flows from the current demographics of the family in American society. There are increasing numbers of children who are not living with a biological parent, either because a parent could not or would not properly care for them. There are also countless children who are allowed court-ordered access to persons who are not their biological parents, but who have important relationships with children who need to be supported. Yet, the constitutional protections that accord biological parents near sacred status in the eyes of the law remain. It is either time to change that presumption, or failing that, find ways to creatively address and apply those presumptions to the unique factual situations that require something other than allowing the biological connection to drive the outcome.

Such a dramatic change in a fundamental constitutional notion is not without precedent or support in history and American jurisprudence. As discussed above, long held notions of the family, family structure, and childhood have changed significantly over the years. As a result, more and more members of society are open to and exposed to various configurations of family that did not previously exist. In the long sweep of history, we have also seen dramatic changes in the ways custody and placement decisions are made. For example, we no longer have legally recognized presumptions for mothers or fathers having custody, and we no longer use orphanages, insane asylums, and indentured servitude as placement options. Instead, custody and placement decisions are made based on professional assessments of the needs of the child and abilities of the parents, and we have multifaceted lists of best

291. *Id.* at 823-24.

interests of the child factors that draw on child development theory, advances in mental health, and a variety of community resources. Many experts now assist courts in making custody, placement, and access decisions.

A view that children have rights that are to be protected has seeped into American culture, much as occurred for women, racial and ethnic minorities, and the disabled. The author is not so naïve as to suggest that everyone is now treated fairly or equally in American society, but there has been a groundswell of change that has occurred since the Supreme Court first articulated the fundamental rights of biological parents to parent their children as they saw fit.

In other areas of the law affecting the placement and custody of children, many changes have occurred in how the law considers these issues that certainly bode well for changes in the constitutional jurisprudence surrounding the rights of biological parents. In the child protection arena, for example, while the clear trend has been to give the state significant powers in its capacity as *parens patriae* to protect children and remove them from their parents' care when necessary, federal legislation and growing practice at the state and local level has been to reorient away from returning the children to their parents as quickly as possible to making a permanency decision as quickly as possible, with permanency options being third party custody, adoption, and permanent foster care if the child cannot return home. That enormous change in philosophy and direction in the child protection area has significant ramifications for a call to move away from a near absolute preference for placement with a biological parent over a non-parental third party.

In the adoption area, the birth father's adoption registries blossoming across the county have provided a very workable solution to balance the rights of the biological parents to be heard, the adoptive parents to finalize their adoptions with some degree of certainty and expeditiousness, and to provide the adopted child a permanent home with minimal risk of subsequent disruption.[292] In the assisted reproduction area, contract law is increasingly ordering the system, as is judicial oversight and approval of the contracts, and reasoned determinations of parentage.

If one considers the long jurisprudence of the United States Supreme Court, from the early cases of the 1920s, which elevated the rights of biological parents to near sacred status, to the paternity cases of the 1970s, which required parents to be involved with their children if they wanted to have protected rights, to *Troxel*, where the Supreme Court is shockingly fractured, there are clear indications that the significant rights of biological parents are not absolute. In fact, all of the justices in *Troxel* recognized the dramatic

292. *See, e.g.*, Heidbreder v. Carton, 645 N.W.2d 355 *passim* (Minn. 2002).

changes in family demographics that have occurred over those years.[293] Most hopefully, Justice Scalia questioned the soundness of the analysis underlying the parental rights jurisprudence.[294] Justice Stevens advocated a rebalancing of rights, with a significant focus on the rights of the child;[295] Justice Kennedy highlighted the importance of the multifaceted best interests of the child standards developed at the state and local level as the best approach in resolving these disputes.[296] Indeed, the long-standing view of triumphant rights of biological parents may not be as strong we have long assumed.

While there certainly is much room for improvement in the ways family courts across the land address these difficult cases, we must also be realistic and accept that the way our American legal system operates is not going to change overnight. We live in a litigious society. Americans value their individual rights, and will continue to frame any and all disputes that need resolution in terms of rights and the protection of those rights. In these cases and situations discussed in this article, that approach is going to continue, but we must also look for positive attributes in that system. The American judicial system allows for changes in approach and philosophy, allows litigants and their attorneys to present the particulars of a case and the specific needs of a child, all of which can be evaluated by trained professionals and considered by the common sense of our judicial officers. The arguments for change in the treatment of third parties seeking custody, placement, or access need to be made, however, and hopefully this article will assist family law practitioners in making those arguments.

293. Troxel v. Granville, 530 U.S. 57, 80-101 (2000).
294. *Id*. at 92-93 (Scalia, J., dissenting).
295. *Id*. at 87-89 (Stevens, J., dissenting).
296. *Id*. at 100-02 (Kennedy, J., dissenting).