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DETERMINING DETRIMENT TO THE CHILD 
IN THIRD-PARTY CUSTODY CASES IN 
CONNECTICUT 

CAROLYN WILKES KAAS*

INTRODUCTION

Third-party custody cases are disputes over the custody of a child between the biological or legally-adoptive parent and any third party. They force courts to face issues different from and more complex than those applicable in a traditional custody dispute between two biological parents whose status as “parent” is equal.1

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1. In this article, the term “parent” refers only to biological parents and those who have adopted a child through appropriate legal channels, as long as the adoption is final. “Parent” does not include “psychological parents” or any other care-givers. The term “non-parent” includes grandparents, other members of the child’s extended family, and all “biological strangers,” regardless of their level of emotional attachment to the child. Legally, their status as non-parent is the same. Hao Thi Popp v. Lucas, 438 A.2d 755, 758 n.3 (Conn. 1980). See also Lucy S. McGough & Lawrence M. Shindell, Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes, 27 Emory L.J. 209, 212 n.19 (1978).

2. Connecticut, like most other states, has adopted the “best interests of the child” standard for deciding which parent shall retain custody after dissolution of marriage, Conn. Gen. Stat. § 46b-56 (1995), or in any other custody dispute between parents, regardless of whether they are married, living separately, or whether an action for
Rather, these cases require courts to protect the interest of the family — parent and child — in remaining together, balancing that interest against the needs of the child to be safe and well cared-for.3 In this way, these custody cases have much more in common with guardianship cases in probate court4 and abuse or neglect proceedings in the Juvenile Matters Division of superior court5 than they do with parent-versus-parent disputes in superior court.

In some jurisdictions, the courts6 apply the same standard to third-party custody disputes as they would to parent-versus-parent custody disputes.7 Other jurisdictions apply different standards.8 Connecticut, like a majority of these other jurisdictions,9 treats third-party custody cases differently from disputes between two parents. In 1985, the Connecticut legislature adopted a parental preference statute10 that presumes it is in the best interests of the
dissolution or separation is pending, § 46b-61 (1995). The Connecticut custody and guardian statutes are gender-neutral. Since 1901, Connecticut has recognized that the rights of both parents to custody are equal. See Dunham v. Dunham, 117 A. 504, 505 (Conn. 1922) and § 45a-606 (1995), stating that both parents are joint guardians of their child. This statute has existed in some form since 1902.

4. §§ 45a-603 to 45a-622 (1995). See infra part II.B.
6. In some jurisdictions, the third-party custody standard is judicially created; in others, the legislature has mandated the test for the courts to apply.
7. Hawaii, for example, has adopted a best interests test by statute and even gives a presumption of sorts to a non-parent with whom the child has been living:

   Custody may be awarded to persons other than the father or mother whenever the award serves the best interests of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall be entitled prima facie to an award of custody.

8. There are two types of approaches that differ from a best interests test. One is a “parental rights” standard, requiring that the parent be awarded custody unless the non-parent can show that the parent is unfit. See Sheppard v. Sheppard, 630 P.2d 1121 (Kan. 1981), cert. denied, 455 U.S. 919 (1982); Michael B. Thompson, Child Custody Disputes Between Parents and Non-parents: A Plea for the Abrogation of the Parental Rights Doctrine in South Dakota, 34 So. Dak. L. Rev. 534 (1989). The second approach is a moderate one, falling in between the best interests and the parental rights tests. The second test creates a presumption in favor of the parent.
10. § 46b-56b.
child to be with her parent. Under the statute, proof by a preponderance of the evidence that awarding custody to the parent would be "detrimental to the child" can rebut the presumption.

Third-party custody cases are decided within two contexts: removal and reunification cases. What distinguishes the two is whether the parent-child custodial relationship is intact when the litigation ensues. If the child is living with her parent when the non-parent makes a claim for custody, the court must decide whether to remove the child from her home. If the child has already been in the care of someone other than her parent for a period of time when the parent seeks custody, the court must decide whether to reunite the child with her parent, at the expense of the existing bond between the child and her third-party caretaker.

11. See infra part III.B for a detailed discussion of the passage of § 46b-56b.
12. Depending on the procedural posture of the case, the burden of persuasion may be on the parent to disprove detriment or on the non-parent to prove detriment. In Perez v. Perez, 561 A.2d 907 (Conn. 1989), the mother had filed a motion for modification to regain custody of her children from the paternal grandparents. The court held she had the burden of persuasion, just as any movant for modification would have. Id. at 915. See infra notes 125-132 and accompanying text.
13. For ease of reference, I will refer in any hypothetical examples to the child as female and the parent as male. By no means do I suggest that the standards would vary in any way based on the gender of either the child or the parent.
14. For example, a grandparent, concerned that neither of his granddaughter's parents are capable of caring for her, might intervene in the parents' divorce and request the court to award custody to him.
15. For example, a child who has lived with her mother and stepfather for a number of years may become the subject of a custody dispute if the mother dies and the biological father seeks to take custody of the child from the stepfather. Or perhaps a parent has voluntarily entrusted her children to a distant family member or friend while she is ill or in a substance abuse treatment program, and the caretaker later refuses to return the children.
16. There will always be cases that do not fall neatly into either of these categories. Consider, for example, a parent and child who live together with a non-parent and create a family unit. (The non-parent may be of the same or opposite sex as the parent, and it is irrelevant whether the two adults were married to each other.) If the parent and non-parent separate, the child will face removal from one or the other adults, both of whom have enjoyed a caretaking role in the child's life, and both of whom the child loves regardless of the biological factor. Consider also the facts of the case of Haftel v. Haftel, FA 91-0060834, 1994 Conn. Super. Ct. LEXIS 1892 (July 27, 1994). The child had lived since birth with his biological father and the father's wife, whom the child believes is his biological mother. The child is the off-spring of a woman who was artificially inseminated with the father's sperm because of the wife's fertility problem. Now that the husband and wife are divorcing, the father is claiming a superior right to custody solely because of his genetic link to the child.

One choice is to force cases such as these into either the removal or reunification category, based on whether the main focus is the child's separation from the parent or from the non-parent. A more logical approach is to treat these types of cases as identical to custody cases between two biological parents and apply a best interests test.
Removal and reunification cases present courts with very different equitable considerations. Curiously, however, the Connecticut courts and the legislature have not distinguished between removal and reunification cases, nor have they analyzed which facts are relevant in light of the differences. They also have not examined in any depth the similarities between third-party custody cases and the other statutory schemes already in place for separating children from their parents: the guardianship and juvenile matters proceedings. These failures by both the courts and the legislature have created confusion in the courts about the effect of the presumption, the definition of detriment, and what type of evidence is relevant to the court’s inquiry.

This Article examines the Connecticut legislature’s intent in adopting the presumption standard and explores the similarities between these custody cases and the other types of child removal cases. It also describes the jurisdictional and procedural considerations that determine in what posture third-party custody cases arrive in superior court. This Article recommends a method for applying the parental presumption in Connecticut by proposing varying levels of proof and separate definitions of detriment that respond to the fundamentally different questions presented by removal and reunification cases.

I. Overview of Constitutional Rights

The United States Supreme Court has held, in several cases, that biological parents have a fundamental liberty right to protect their relationship with their children. The Fourteenth Amendment of the United States Constitution guarantees that the state cannot intervene in family matters absent a compelling need. At the root of the constitutional protection of parents' rights are two

biological parent has participated in the creation of a family unit and encouraged the strong attachment between the child and the other adult. Having done so, he should be estopped from claiming any other basis for deciding custody.


18. The state’s authority to intervene in a family actually comes from two distinct sources. The first is the state’s inherent police power to prevent citizens from harming one another and to promote community and public welfare. The second is the paternalistic power to protect incompetents, to insure the individual incompetent’s best interest and safety. For a thorough discussion of the two types of power, their origins, and their application, see Note, Developments in the Law: The Constitution and the Family, 93 Harv. L. Rev. 1156, 1198-1235 (1980) [hereinafter Developments].
types of interests: the broad interest of each family member in insulating the family from outside intervention and the interest of "the parent in protecting his or her relationship with and authority over the child." The state also has its own interest in protecting family autonomy. Its interest normally converges with that of the family itself, because autonomy enhances warm, enduring, and important familial bonds and ensures that child-rearing is performed.

A parent's interest in having an on-going relationship with his children "undeniably warrants deference and, absent powerful countervailing interest, protection." The message from a series of Supreme Court cases is that the Constitution will protect biological parent-child relationships for those parents who have developed an actual relationship with their children and have shouldered their parental responsibilities. The Constitution also protects the parental rights of parents who are having trouble living up to their responsibilities, requiring states to prove unfitness by clear and convincing evidence before it can terminate a parent's rights. The Court has observed that the "fundamental liberty interest of natural parents in the care, custody and management of their child does not apply when a parent abandons his or her child by criminal negligence, as by desertion or battery."
evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”26 In contrast, the Constitution does not protect a relationship between a child and a non-parent even if that relationship “stems from the emotional attachments that derive from the intimacy of daily association.”27 Thus, parental status and biological ties continue to play a major role in the constitutional protection analysis of the rights of parents and non-parents.

A presumption standard, like the one enacted by the Connecticut legislature, is undoubtedly a constitutionally valid approach for a state to choose in resolving third-party custody disputes. It is consistent with the emerging message from the Supreme Court that biology is an important, but not the exclusive, mark of parenthood. The Connecticut test allows a court to recognize the biological ties without being blind to other factors displayed by the parent, such as the level of parental responsibility and commitment to the child.

Analysis of whether a legal standard is constitutional does not end, however, with an examination of the standard’s language. It is for the trial courts to apply the standard to the facts of each case and to decide when the presumption is overcome. To do so, the Connecticut courts must define the phrase “detrimental to the child” in a manner consistent with the complex guidelines established by the Supreme Court.

The recognition that a third-party custody dispute involves either a removal or a reunification scenario begins to put some structure in the determination of what detriment means. A removal case necessarily involves an intact family.28 The court must, therefore, tread lightly when considering removal by setting a very high hurdle for the non-parent to overcome. In a reunification case, the court may find the parent’s rights are offset by the child’s interest in preserving her ties with her existing psychological family.

26. Id. at 753.
27. Smith v. Organization of Foster Families, 431 U.S. 816, 844-46 (1977) (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)). The Court stressed that the foster family relationship is not protected because the state is the contractual source of the relationship. Id. at 845. However, biology does not guarantee constitutional protection. In Michael H. v. Gerald D., 491 U.S. 110 (1989), the Court upheld a California statute prohibiting a biological father from challenging the presumption that a mother’s husband is the father of the mother’s child born during the marriage. The Constitution does not preclude a state from preferring the family unit that the mother and her husband have created, even if the biological link between husband and child is absent.
28. All that is necessary to create an “intact family” is one parent residing with one child.
The biological family's right to be together again has not disappeared, but it may very well have faded in intensity, allowing the courts to find more easily that the non-parent has rebutted the presumption.

II. SUBJECT-MATTER JURISDICTION IN CONNECTICUT

A. Superior Court

1. Family Relations Matters

Beginning in colonial days, the Connecticut probate court had primary jurisdiction to decide custody and other matters concerning the welfare of children. The superior court had only the power to decide custody between parents, incidental to a divorce action, and to decide actions brought by writ of habeas corpus.

The Connecticut legislature has consistently expanded the superior court's authority to act in child custody matters; all "family relations matters" are now within the jurisdiction of the superior court. The superior court has subject matter jurisdiction to make custody orders in dissolution, annulment, and legal separation cases. It also has jurisdiction over complaints for custody filed by parents living separately, regardless of their marital status or whether any other type of action is pending. Habeas corpus cases continue to be family relations matters within the equitable powers of the superior court, although there is no longer any need for a parent to use this type of equitable proceeding against another

30. The Connecticut Supreme Court previously held that even a modification of custody between former spouses was not within the jurisdiction of the superior court but rather, was a matter for probate court. Dunham v. Dunham, 117 A. 504 (Conn. 1922), overruled by Freund v. Burns, 40 A.2d 754 (Conn. 1944).
31. lb.
32. LaBella v. LaBella, 57 A.2d 627, 629 (Conn. 1948).
33. Several types of custody disputes are now defined by statute as family relations matters. See § 46b-1. Family relations matters also include cases brought under the provisions of §§ 46b-90 to 46b-114, the Uniform Child Custody Jurisdiction Act ("UCCJA"). However, the UCCJA does not grant to the superior court subject matter jurisdiction over additional types of cases. The underlying case would have to be an action brought pursuant to §§ 46b-56, 46b-61, or a habeas case. The UCCJA sets forth criteria and procedures for deciding which state should issue initial decrees and modifications of custody. The purpose of the UCCJA, adopted at least in part in all 50 states, is to avoid jurisdictional competition among the states. §§ 46b-90 to 46b-114.
34. § 46b-56.
35. § 46b-61. Many habeas cases would now fit within this statute. See Pi v. Delta, 400 A.2d 709 (Conn. 1978); Doe v. Doe, 307 A.2d 166 (Conn. 1972).
parent. 36

The habeas corpus action has existed from "time immemo-
rial." 37 Originally, it was the only procedural route available for a
parent to test another's right of custody in superior court, other
than in a pending divorce or separation action. 38 Only parents have
standing to bring a habeas corpus case. 39 The power of the superior
court to decide custody in the absence of specific statutory author-
ity arose from the court's inherent equitable powers. 40 Because
children were considered wards of the state, the court could act on

36. A parent seeking custody from the other parent would move in superior court
to modify the previous order or would initiate an action pursuant to § 46b-61. The
Connecticut Appellate Court has taken a broad view of the types of cases over which
the superior court has jurisdiction, refusing to sustain objections that amount to form
1986). The Franklin case involved a complaint for custody brought by an unmarried
father against the mother and maternal grandparents. The court stated that the habeas
action would have been the "usual method" of bringing the action but was not the
"exclusive method." Id. Indeed, the case could have been pleaded as an action pursuant
to § 46b-61 with an intervening non-parent. Id. The court properly recognized that
the trial court had subject matter jurisdiction whether or not the plaintiff had clearly
articulated the basis for that jurisdiction in his complaint. Id.

37. LaBella v. LaBella, 57 A.2d 627, 629 (Conn. 1948).

38. Howarth v. Norcott, 208 A.2d 540, 541 (Conn. 1965), overruled by Hao Thi

39. The issue of who has standing is rarely discussed in the old habeas cases,
probably because all were brought by parents who obviously did have standing. More
recent cases support the conclusion that only parents and other persons who legally
have custody of a child can properly bring a habeas petition. In Doe v. Doe, 307 A.2d
166 (Conn. 1972), a man brought a writ against his ex-wife for custody of their son and
her daughter from a prior relationship. The court quashed the writ as to his request for
custody of his step-daughter but allowed his case for custody of his biological son to
proceed. In Pi v. Delta, 400 A.2d 709 (Conn. 1978), the Connecticut Supreme Court
decided for the first time that an illegitimate father had standing to bring a habeas
corpus case for custody of his child. Then, in Nye v. Marcus, 502 A.2d 869 (Conn.
1985), superseded by statute, the court refused to grant standing to foster parents, stati-
ning that only parents and legal guardians have standing to bring a writ of habeas corpus.
Id. at 873.

There is now a very limited exception to this standing rule. In 1988, the Connecti-
cut legislature granted foster parents and approved adoptive parents standing to make
application for a writ of habeas corpus under some circumstances, thereby overruling
the Nye holding. § 52-466(f). Otherwise, the courts have continued to limit the stand-
ing of others. In Weidenbacher v. Duclos, 640 A.2d 147 (Conn. App. Ct. 1994), the
court refused to grant standing to a man claiming to be the biological father of a child
born during the marriage of the child's mother to another man. The husband's name
was on the child's birth certificate and he was adjudicated to be the child's father at the
time of his divorce from the mother. In June 1994, the Connecticut Supreme Court
accepted certification on the issue of standing but has not yet ruled. Weidenbacher v.
Duclos, 644 A.2d 917 (Conn. 1994).

40. Howarth, 208 A.2d at 543.
behalf of the state as parens patriae, to decide custody for the protection of the child.

Third-party custody disputes are family relations matters within the jurisdiction of superior court and may be either removal or reunification cases. They may arrive at superior court by either of two main paths. The first is the habeas corpus action. If a child is living with a non-parent, a parent has standing to file a habeas corpus action to seek custody of his child. By definition, this type of case would be a reunification case. In contrast, a removal case cannot proceed as a habeas case because the non-parent has no standing to initiate the action. Connecticut does confer, however, a broad right of intervention on non-parents. If a custody action

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41. Parens patriae means "parent of the country." BLACK'S LAW DICTIONARY, 1114 (6th ed. 1990). The term was first used by the English Chancery Court, initially referring to the rights of lords to profit from wards and later evolving into the doctrine authorizing and obligating the state as "supreme guardian" to intervene in families to protect infants, lunatics, and idiots. Lawrence B. Custer, The Origins of the Doctrine of Parens Patriae, 27 EMORY L.J. 195, 195-200 (1978); McGough & Shindell, supra note 1, at 209 n.2. See also In re Gault, 387 U.S. 1, 16 (1967); Thompson, supra note 8, at 551-61.

42. Howarth, 208 A.2d at 543.

43. Although the court's authority to grant habeas corpus relief is an inherent power, Connecticut now has a statute that codifies that authority. CONN. GEN. STAT. § 52-466 (1995).

44. This may have occurred because of a voluntary placement by the parent seeking reunification or by the other parent. If the superior court had previously granted custody to a non-parent, a parent could also initiate a reunification proceeding by filing a motion to modify custody.

45. The only non-parents with standing to bring a habeas corpus petition are those who already have a legal right to the custody of the child, such as a legal guardian or a foster parent. See supra note 39.

46. Section 46b-57, in effect in substantially the same form since 1973, states: In any controversy before the superior court as to the custody of minor children, and on any complaint under this chapter or section 46b-1 or 51-348a, if there is any minor child of either or both parties, the court if it has jurisdiction under the provisions of chapter 8150, may allow any interested third party or parties to intervene upon motion. The court may award full or partial custody, care, education and visitation rights of such child to any such third party upon such conditions and limitations as it deems equitable. Before allowing any intervention, the court may appoint counsel for the child or children pursuant to the provisions of section 46b-54. In making any order under this section the court shall be guided by the best interests of the child, giving consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference.

Id.

Courts must interpret this latter sentence in light of the presumption standard of § 46b-56b. Otherwise, the courts have construed the statute broadly. The Connecticut Supreme Court has even upheld the right of a court to consider a non-parent as a puta-
between parents happens to be pending in superior court, a non-parent may intervene and initiate a removal case by asking the court for custody. If there is no custody action already pending in which to intervene, the non-parent who seeks to wrest a child away from a parent is limited to filing a guardianship case in probate court or contacting the Department of Children and Families ("DCF").

2. Juvenile Matters

The Juvenile Matters Division of the superior court has the authority to hear those cases defined as "juvenile matters." Several types of these cases require a judge to decide whether there is cause to remove a child from her home and place her with a non-parent and, thus, bear resemblance to a third-party custody case.

All juvenile matters are subject to the statutorily expressed public policy of this state:

To protect children whose health and welfare may be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse, investigation of such reports by a social agency, and provision of services, where needed, to such child and family.

Any state intervention, whether custody or the ultimate action of termination, interferes with a compelling interest on the part of the
tive custodian even if she has not formally intervened. Cappetta v. Cappetta, 490 A.2d 996, 998 (Conn. 1985).

47. One or the other parent could have initiated the action pursuant to either CONN. GEN. STAT. §§ 46b-56 or 46b-61 (1995), depending on whether the parents are married and, if so, whether they wish to divorce. Presumably, the intervention statute would apply if yet a second non-parent sought custody and joined an ongoing action brought pursuant to a habeas petition by a parent against a non-parent.

48. CONN. GEN. STAT. § 46b-121 (1995) states:

Juvenile matters include all proceedings concerning uncared-for, neglected or dependent children and youth and delinquent children within this state, termination of parental rights of children committed to a state agency, matters concerning families with service needs and contested termination of parental rights transferred from the probate court, but does not include matters of guardianship and adoption or matters affecting property rights of any child or youth over which the probate court has jurisdiction.

Id.

Since the enactment of 1993 Conn. Acts 344 (Reg. Sess.), contested guardianship cases transferred from probate court are also juvenile matters.

parent and the child to stay together.\textsuperscript{50} Thus, the statutes must be narrowly drawn and must reflect the policy that a child should be kept in her home whenever possible, even if the home is only marginal.\textsuperscript{51} Accordingly, the legislature and the courts have prescribed in detail the procedure by which a juvenile matters case is to be presented and adjudicated. It is an action initiated by a representative of the DCF.\textsuperscript{52} In the first\textsuperscript{53} “adjudicatory” stage, the court is to determine whether the child is “uncared for, neglected or dependent.”\textsuperscript{54} The state must prove the child’s status by a preponderance of the evidence.\textsuperscript{55} If the court finds that the child is either uncared-for, neglected, or dependent, the judge has three “disposition” options: committing the child to the commissioner of DCF for a pe-

\textsuperscript{50} In re Juvenile Appeal (83-CD), 455 A.2d 1313, 1318 (Conn. 1983).
\textsuperscript{51} Id. at 1320.
\textsuperscript{52} In contrast, a private party usually initiates a guardianship case. Third-party custody cases also involve private parties competing for custody. A juvenile matters case can result from a complaint filed with DCF by a private person, who is immune from suit. § 17a-103. Additionally referral may be made by a professional who is required to report cases of suspected abuse or neglect. § 17a-101(b).
\textsuperscript{53} There are emergency provisions that may actually precede the adjudicatory stage. For example, a physician who suspects that a child has been abused may keep the child in the hospital without a parent’s consent for up to ninety-six hours. § 17a-101(d). Other provisions allow the court to remove a child and grant temporary custody to the commissioner of DCF if there is probable cause to believe the child was seriously injured or is in immediate danger of suffering serious injury. §§ 46b-129(b)(2), §17a-101(e).
\textsuperscript{54} Section 46b-129(d) establishes as the standard for removal a finding that a child is “uncared-for, neglected or dependent.” Section 46b-120 defines these terms as follows:

[A] child or youth may be found “dependent” whose home is a suitable one for him, save for the financial inability of his parents, parent, guardian or other person maintaining such home, to provide the specialized care his condition requires; . . . a child or youth may be found “neglected” who (i) has been abandoned or (ii) is being denied proper care and attention, physically, educationally, emotionally or morally or (iii) is being permitted to live under conditions, circumstances or associations injurious to his well-being or (iv) has been abused; a child or youth may be found “uncared-for” who is homeless or whose home cannot provide the specialized care which his physical, emotional or mental condition requires.

\textit{Id.}

The term “abused” means that a child or youth:

(a) has had physical injury or injuries inflicted upon him other than by accidental means, or (b) has injuries which are at variance with the history given of them, or (c) is in a condition which is the result of maltreatment such as, but not limited to, malnutrition, sexual molestation, deprivation of necessities, emotional maltreatment or cruel punishment.

\textit{Id.}

\textsuperscript{55} In re Juvenile Appeal, 471 A.2d 1380, 1385 (Conn. 1984).
period of up to eighteen months, and placing the child in foster care;\textsuperscript{56} vesting the child's care and custody to a third person or agency;\textsuperscript{57} or permitting the parent to retain custody, with or without protective supervision.\textsuperscript{58} If the child is committed for eighteen months, the state (through DCF) must provide a whole panoply of services to the family and offer the parents assistance in rehabilitating themselves and remaining in contact with the child.\textsuperscript{59} During the time that the child is committed, the parent has the right to move to revoke the commitment.\textsuperscript{60} The parent has the burden to prove the cause for the commitment no longer exists, and if successful, the state has the burden to prove by a preponderance of the evidence that the revocation would be detrimental to the child.\textsuperscript{61} At the end of the eighteen months,\textsuperscript{62} the state may seek to continue that placement, to return the child home, or to move for termination of the parent's rights.\textsuperscript{63} Termination, which severs permanently the legal

\textsuperscript{56} § 46b-129(d). During the commitment period, the commissioner of DCF is the child's legal guardian. § 17a-98. Prior to 1979, there was no time limit on the length of a commitment. The purpose of the time period is to expedite permanency planning for the child. \textit{In re Juvenile Appeal (85-BC)}, 488 A.2d 790, 798 (Conn. 1985).

\textsuperscript{57} § 46b-129(d). The courts appear to use this disposition option very rarely. According to the Supreme Court, such a placement has no eighteen month time limit. \textit{In re Juvenile Appeal}, 488 A.2d at 797. At least one court has called this arrangement a guardianship, \textit{In re Jessica S.}, 1994 Conn. Super. Ct. LEXIS 2177, (August 24, 1994), making this option virtually indistinguishable from guardianship ordered by a probate court, or for that matter, a third-party custody case.

\textsuperscript{58} § 46b-129(d). \textit{See In re Juvenile Appeal (85-BC)}, 488 A.2d 790 (Conn. 1985), for a discussion of the three options.

\textsuperscript{59} The state has a duty to provide services to the parents of a child adjudicated as uncared-for, neglected or dependent, for the purpose of aiding in rehabilitation and reunification. \textit{In re Jessica M.}, 586 A.2d 597, 603 (Conn. 1990).

\textsuperscript{60} § 46b-129(g).

\textsuperscript{61} \textit{In re Juvenile Appeal (Anonymous)}, 420 A.2d 875, 881 (Conn. 1979). The Connecticut Supreme Court identified four factors for the courts to consider when determining whether revoking a commitment would be detrimental to the child: (1) the length of the child's stay in foster care; (2) the nature of the child's relationship with the foster parents; (3) the degree of contact that the parent has maintained with the child; and (4) the nature of the child's relationship with her parent. \textit{Id.} at 882-83. \textit{Id. See also In re Juvenile Appeal}, 485 A.2d 1355 (Conn. App. Ct. 1985).

\textsuperscript{62} The statutes do allow the state to bring coterminous petitions for the adjudication of neglect and the termination of parental rights, rather than waiting for eighteen months.

\textsuperscript{63} Section 17a-112 mandates the criteria for terminating parental rights. There are four statutory bases, written in the disjunctive with the result that proof of one is sufficient. § 17a-112(b). The court must also make a finding that termination is in the child's best interests and must consider seven statutory factors. § 117a-112(d); \textit{In re Michael M.}, 614 A.2d 832 (1992); \textit{In re Emmanuel M.}, 648 A.2d 904 (Conn. Super. Ct. 1993).
ties between parent and child,\textsuperscript{64} carries with it the requirement that
the state prove its case by clear and convincing evidence.\textsuperscript{65}

While there are many procedural differences between third­
party custody cases and juvenile neglect proceedings, the basic simi­
larity remains: the court is faced with deciding whether cause exists
to separate, or continue to separate, a parent and child in their day­
to-day existence.

\section*{B. Probate Court}

The original broad authority of the probate courts narrowed as
the legislature expanded the reach of the superior court, but pro­
bate courts do retain significant subject matter jurisdiction in cer­
tain matters involving children. Probate courts have jurisdiction in
guardianship cases,\textsuperscript{66} adoption, and the termination of the rights of
parents whose children are not committed to a state agency such as
DCF.\textsuperscript{67}

A guardian has the right of care and control of the child.\textsuperscript{68}
Parents are automatically considered joint guardians of their chil­
dren unless one or both are removed from that capacity by a pro­
bate judge.\textsuperscript{69} Any adult relative of the child may petition the

\begin{quote}
\textsuperscript{64} Termination is:
the complete severance by court order of the legal relationship, with all its
rights and responsibilities, between the child and his parent or parents so that
the child is free for adoption, except it shall not affect the right of inheritance
of such child or the religious affiliation of such child.
\end{quote}
\begin{footnotesize}
\begin{itemize}
\item $\textsection$ 17a-93(e). \textit{See also} $\textsection$ 45a-707(g).
\item The standard of proof is prescribed by statute, but is also mandated by the
\item $\textsection$ 45a-603 to 54a-622. Even though the probate court has jurisdiction over
these cases, contested guardianship cases now can be transferred upon motion to the
\item Contested termination of parental rights cases may
also be transferred to the juvenile matters division of superior court. $\textsection$ 45a-715(g). The
defined standards for termination of parental rights in probate court and superior court
are the same. \textit{Compare} $\textsection$ 45a-717 \textit{with} $\textsection$ 17a-112. The Connecticut Supreme Court has
determined that both sets of statutes must be construed in a similar manner. \textit{In re}
Jessica M., 586 A.2d 597, 602 n.6 (Conn. 1990).
\item Section 45a-604(5) defines "guardianship" of a minor as: "(A) The obligation
of care and control; and (B) the authority to make major decisions affecting the minor's
welfare, including, but not limited to, consent determinations regarding marriage, en¬
listment in the armed forces and major medical, psychiatric or surgical treatments." \textit{Id.}
\item $\textsection$ 45a-606 states:
The father and mother of every minor child are joint guardians of the person
of the minor, and the powers, rights and duties of the father and the mother in
regard to the minor shall be equal. If either father or mother dies or is re-
probate court to remove a parent as guardian.\textsuperscript{70} The guardianship statutes\textsuperscript{71} set forth in detail the stringent circumstances under which the court may remove the parent as guardian,\textsuperscript{72} and when reinstated as guardian, the other parent of the minor child shall become the sole guardian of the person of the minor.

\textit{Id.}

\textsuperscript{70} § 45a-614. The court on its own motion, or counsel for the child, may also petition to remove the parent as guardian.

\textsuperscript{71} There is some confusion about whether § 46b-56b applies to guardianship cases that are appealed or transferred to superior court from probate court. An aggrieved party may appeal a probate decision to superior court. § 45a-186. Under § 46b-1, an appeal of a guardianship case is considered a family relations matter and therefore within superior court jurisdiction. Pursuant to a relatively new law, a party may also transfer a contested guardianship case to superior court. See 1993 Conn. Acts 344 (Reg. Sess.), adopted July 2, 1993. The new rules of court assign those cases now to the juvenile matters division of superior court. Rule 8, Probate Rules.

It is unlikely that either appeal or transfer of a guardianship case would render § 46b-56b suddenly applicable to it. Although appeals are \textit{de novo} proceedings, the superior court is to decide the case as if sitting as a probate court, applying its controlling statutes and having only the powers of a probate court. Appeal of Stevens, 255 A.2d 632 (Conn. 1969). Therefore, a superior court judge would apply the guardian statutes on an appeal, as would a juvenile matters judge after transfer.

In two recent guardianship appeal cases, however, the superior court judges cited § 46b-56b, and in at least one of these cases, the probate judge had apparently also applied the statute. In Hawes v. Probate Court, 1994 Conn. Super. Ct. LEXIS 869, (Apr. 8, 1994), the judge overturned a probate judge's decision denying a father's application for reinstatement as guardian. Judge Harrigan cited habeas case law and § 46b-56b as support for his conclusion that the grandmother had not overcome the presumption in favor of the father. In Regish v. Gray, 1994 Conn. Super. Ct. LEXIS 1653, (June 29, 1994), the judge affirmed a probate court ruling reinstating a mother as guardian. The probate court had found, and the superior court agreed, that the mother had overcome the factors that had resulted in her removal as guardian and that the grandparents had not rebutted the presumption.

\textsuperscript{72} Section 45a-610 requires clear and convincing evidence of one of the following:

(1) The parent consents to his or her removal as guardian; or
(2) the minor child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility for the minor's welfare; or
(3) the minor child has been denied the care, guidance or control necessary for his or her physical, educational, moral or emotional well-being, as a result of acts of parental commission or omission . . . ; or
(4) the minor child has had physical injury or injuries inflicted upon him by a person responsible for such child's health, welfare or care, or by a person given access to such child by such responsible person, other than by accidental means, or has injuries which are at variance with the history given of them or is in a condition which is the result of maltreatment such as, but not limited to, malnutrition, sexual molestation, deprivation of necessities, emotional maltreatment or cruel punishment.

\textit{Id.}

Section 45a-607 sets forth a very high standard for temporary custody while the application for removal is pending, such as a finding of "imminent physical danger." \textit{Id.}
DETERMINING DETRIMENT TO THE CHILD

ment of the parent's guardianship is appropriate. The burden of proof in a guardianship matter is always on the non-parent, and he must prove his case by clear and convincing evidence.

There are significant similarities between "custody" and "guardianship." The term "custody" is sometimes used by courts to mean different things, but it is fair to conclude that custody applies to less than all the rights and duties of a parent. A guardian has the broadest range of the rights and duties of caring for a child, but the right to custody of the child is certainly the principal attribute of guardianship of the person. Although the statute conferring joint guardianship on both parents is qualified by the power of the superior court to grant custody to one or the other of the parents, the loss of physical and legal custody in a divorce or other custody action in superior court technically does not divest the non-custodial parent of his guardianship rights.

For practical purposes, however, guardianship and custody are very similar concepts. Both carry with them the privileges and obligations of decision-making and the daily care of the child; the custody decision and the guardianship decision both determine the primary residence of the child. A superior court order granting custody to a third-party in lieu of a parent has, therefore, substantially the same effect as a probate court order removing a parent as guardian of his child and appointing a non-parent in his stead.

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73. § 45a-611.
75. Paul Sayre, Awarding Custody of Children, 9 U. CHI. L. REV. 672 (1942). For example, a noncustodial parent has not lost his right to visit, and he still has the duty to support the child.
77. Freund v. Burns, 40 A.2d 754 (Conn. 1944).
78. Pursuant to § 45a-608, a person granted temporary custody of a minor while an application to remove a parent as a guardian is pending has the following rights and duties: "(1) the obligation of care and control; (2) the authority to make decisions regarding routine medical treatment or school counseling and emergency medical, psychological, psychiatric or surgical treatment." Id.

These rights and duties are very similar to those of § 45a-604(5), except for the language limiting the decisions making power of temporary custodians to "routine" and "emergency" decisions rather than "major" decisions.
III. THIRD-PARTY CUSTODY DISPUTES IN CONNECTICUT: PAST AND PRESENT

A. Pre-statutory Caselaw

1. Habeas Corpus Cases

The older Connecticut third-party custody cases were reunification cases brought by writ of habeas corpus.79 No reported decisions discuss the differences between removal and reunification cases or recognize that the equities might vary depending on which kind of case is involved. This is not surprising. Because third-party removal cases could not reach superior court until the intervention statute was enacted in 1973, the distinction was unnecessary.80

Prior to 1985, there was no statute defining the standard deciding third-party cases; the standard was judicially created. The Connecticut Supreme Court repeatedly held that in parent-versus-nonparent cases, the court must give "paramount consideration to the welfare of the child"81 and that "the legal rights of no one, including a parent, are allowed to militate against this."82 Because these cases were reunification cases, the courts were perhaps predisposed to view biology as an impediment to maintaining the existing positive environment for the child. It is not surprising, then, that the Connecticut Supreme Court chose strong words to direct the trial courts' focus to the child.

In a more recent habeas case, however, the Connecticut Supreme Court reemphasized the primacy of parental status. In Hao Thi Popp v. Lucas,83 also a reunification case, the court acknowledged that a trial court should decide custody according to

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79. See, e.g., Baram v. Schwartz, 197 A.2d 334 (Conn. 1964); Claffey v. Claffey, 64 A.2d 540 (Conn. 1949).
80. Even after the intervention statute gave the superior court subject matter jurisdiction, cases decided in superior court fail to differentiate between removal and reunification cases.
81. Dunham v. Dunham, 117 A.2d 504 (Conn. 1922), overruled by Freund v. Burns, 40 A.2d 754 (Conn. 1944) (purporting to establish the same test for parent versus parent and parent versus stranger cases).
83. 438 A.2d 755 (Conn. 1980). The facts of this case are compelling. The natural mother had given up her children in 1975 in the final, chaotic days of the Viet Nam War to assure their safe transport to the United States. She was able to follow them a short time later and in 1976 immediately began trying to undo the adoption to which she had consented in desperation. Of course, the rule the supreme court announced was not limited to facts as extremely sympathetic as these.
the child's best interests, but held that the parent should have a "strong initial advantage, to be lost only where it is shown that the child’s welfare plainly requires custody to be placed in the stranger."84 Indeed, the court even called its rule a “presumption” and specifically overruled several older habeas cases that, in stressing the interests of the child, failed to give sufficient weight to the parent as against the third-party.85

2. The McGaffin Decision

The presumption standard announced in Hao Thi Popp was the state of the law when the case of McGaffin v. Roberts86 reached the Connecticut Supreme Court. A classic reunification case, McGaffin was a habeas corpus action brought by a natural father for custody of his four year old daughter who lived with her maternal grandmother after the death of her mother. The trial court had granted custody to the grandmother in spite of the statute giving sole guardianship to the surviving parent.87 In affirming the trial court’s decision, the Connecticut Supreme Court noted that “the relationship between parent and child is constitutionally protected”88 but went on to adopt an expansive definition of a parent. The court approached the issue functionally and rejected a status argument based on genetics.89 The court dismissed the joint guardian statute as nothing more substantive than “an expression of the natural importance of parenthood,” simply one of the many factors in determining the best interests of the child.90 The court concluded by expressly adopting a best interests test for parent-versus-non-parent cases.

The “best interests of the child” test focuses solely on the interests of the child and treats the legal status of the putative custodians as largely irrelevant. A best interests test defines the relative bene-

84. Id. at 758 (quoting In re Juvenile Appeal (Anonymous), 420 A.2d 875, 881 (Conn. 1979)). Significantly, the court used as its authority a termination of parental rights case.
87. Section 45-43 is now codified at § 45a-606, and provides that parents are joint guardians. If either parent dies or is removed as guardian, the other parent “shall become the sole guardian of the person of the minor.” Id.
88. McGaffin, 479 A.2d at 180 (citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978)).
89. Id.
90. Id. at 183.
fits to the child of being with one or the other party.\textsuperscript{91} It requires the court to compare the total package of attributes of the two potential custodians: their homes, their larger environments, and their relationships with the child.\textsuperscript{92} The two adults start on a level playing field. Any one factor, even a small one, can tip the scale in either direction.

By the time the Connecticut Supreme Court decided \textit{McGaffin}, the intervention statute had existed for over ten years and, thus, the superior courts had subject-matter jurisdiction over both reunification \textit{and} removal cases. The Connecticut Supreme Court, however, did not discuss in \textit{McGaffin} the possible range of cases to which this rule would apply, nor did the language of the decision limit the use of the best interests test to reunification cases. Rather, the decision allowed judges to decide third-party removal cases using the same criteria as in parent-versus-parent custody disputes.

The supreme court could easily have upheld the trial court on a much narrower basis, the special facts of the case. The existing close bond between the child and the grandmother was clearly an important factor for both the trial judge and the supreme court. Rather than changing the test for deciding all third-party custody cases, the court could have followed existing precedent, used the \textit{Hao Thi Popp} presumption test, and found that the particularly close bond between this child and her grandmother was sufficient to prove that her welfare "plainly required"\textsuperscript{93} she remain with the grandmother. Instead, the court adopted a broad best interests rule that, even if arguably appropriate in a reunification case,\textsuperscript{94} would


\textsuperscript{92} In Connecticut, § 46b-56 does not enunciate the factors to consider. Some states do have best interests statutes enumerating specific factors. \textit{See, e.g.}, Col. Rev. Stat. § 14-10-124 (1989) and Va. Code Ann. § 20-124.3 (Michie 1990). The \textit{Uniform Dissolution of Marriage Act} identifies the following factors as relevant to the consideration of what is in the child's best interests:

(1) the wishes of the child's parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
(4) the child's adjustment to his home, school, and community; and
(5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.


\textsuperscript{93} Hao Thi Popp v. Lucas, 438 A.2d 755, 758 (Conn. 1980).

\textsuperscript{94} There is authority that limits the use of the best interests test in third-party
also apply to a removal case. This rule created the possibility that a parent could lose custody of his child to a non-parent for even insignificant reasons, including those that would never constitute a sufficient basis for a probate judge to remove a parent as guardian or justify commitment and placement in a foster home by a juvenile matters judge.

This lack of uniform standards between the courts created an opportunity for a non-parent to forum shop. A potential litigant had the choice of intervening in a pending superior court family matters action, filing a guardianship case in probate court, or pursuing a matter through a report to DCF. Depending on which court the non-parent chose, the dispute would be decided under different standards and quite possibly would result in different custodial outcomes.

3. The Dissent in McGaffin

Justice Parskey dissented in McGaffin, advocating an approach more reminiscent of the Hao Thi Popp case. Arguing that the majority had not adequately balanced the welfare of the child and the constitutionally-protected interests of the parent, he wrote that the joint guardianship statute created a true presumption that a surviving parent is entitled to custody. Thus, the burden should be on the non-parent to disprove the parent’s priority. Justice Parskey concluded that, to meet this “heavy” burden, the non-parent must “prove that it would be detrimental to the best interests of the child to live with the parent.” He further articulated that neither a better standard of living nor proof that the move would be painful was sufficiently “detrimental” to rebut the presumption.

custody disputes to cases where the child is not living with the parent. Under the U.M.D.A., a non-parent has no standing to bring a third-party custody case unless the child is not living with the parent. U.M.D.A. § 401(d)(2), 9A U.L.A. 550 (1991). If the non-parent has standing because the child is not with the parent, then the case is decided under the same best interests test applied in parent versus parent cases. Comment, U.M.D.A. §401 at 550.

96. Id. at 186.
97. Id.
98. Id.
99. Id.

100. Id. Justice Parskey did express a reservation about a test that would focus on the effect a move would have on the child. He feared a divorce would effectively sever the caretaking relationship between the child and her noncustodial parent and thus make it difficult for him to prevail in a later custody dispute. Courts might con-
Like the majority, Justice Parskey did not expressly differentiate between reunification and removal cases, but his examples show he was contemplating the existence of both types. Furthermore, although he did not specifically discuss the need for uniform standards in all the courts, he proposed an approach that would require the superior court to decide a removal case in a manner consistent with a guardianship removal case and a reunification case with an approach similar to a guardianship reinstatement case.

B. The Presumption Statute

Justice Parskey's dissent resonated within the legal community. In the following year, 1985, the Connecticut legislature considered legislation to change the standard for parent versus non-parent custody disputes. Members of both the House and Senate acknowledged openly that the move behind House Bill 5122 was to overturn the majority opinion in McGaffin and to adopt Justice Parskey's dissent. The law would also make more consistent the standards in superior and probate courts. The Judiciary Committee heard testimony that the proposed standard was "key[ed] to the guardian statutes.""103

The first version of the bill called for a simple statement that "[p]arents have a joint superior right to custody." The Judiciary Committee reported favorably on the bill but recommended amending the language to create a presumption in favor of par-

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103. Conn. Standing Comm. Hearings, Judiciary, on H.B. 5122, 1985 Sess. 219 (Feb. 20, 1985) (Statement of Raphael Podolsky of Connecticut Legal Services). Courts usually restrict analysis of legislative histories to the comments of legislators made during the debates on the floor of the House of Representatives or the Senate. However, when committee testimony illustrates the purpose of the legislation, and serves as the basis for subsequent legislative action, Connecticut courts do consider such testimony. In re Jessica M., 586 A.2d 597, 603 n.10 (Conn. 1990).
105. The effect of a presumption is confused by the imprecise treatment of the term by both courts and legislatures. John W. Strong, McCormick on Evidence, § 344, 586 (4th ed. 1992). According to McCormick, the best definition of a presumption is a rule that "require[s] the party denying the existence of the presumed fact [to]
ents and require a showing of detriment by clear and convincing
evidence to overcome the presumption.106 The House passed this
version of the Bill,107 but it was defeated in the Senate.108 The Sen­
ate debate included references to the conflict between parents’
rights and children’s rights109 and concern about the need to protect
children.110 Although one senator described the legislation as sim­
ply trying to “harmoniz[e] . . . the best interests of the child stan­
dard, with a policy declaration relative to the rights of a parent,”111
the sentiment that the bill might weaken the court’s ability to save
endangered children from bad parents seemed to carry the day.

The proponents of the bill did their homework, evidently con­
sulting with some of the senators who had opposed the bill.112 They
amended the bill to remove the “clear and convincing” standard
and the language concerning detriment. The change was consid­
ered a “compromise”113 by senators, resulting in a bill that did “not
give as much to the natural parent by any stretch of the imagination
that the original bill would have.”114 The plan worked, however,
and the amended bill passed the Senate.115

The House also passed the amended bill.116 The original pro­
ponents agreed that the bill was weaker than they had planned but

assume the burden of persuasion.” Id. § 342, at 578. The presumption is a method
for assigning the burden of persuasion on the basis of an explicit substantive policy consid­
eration. Id. § 344, at 586-89.

106. The House of Representatives amended H.B. No. 5122 on April 17, 1985. 28
H.R. PROC., Pt. 8, 1985 Sess. 2615. Substitute House Bill 5122 read:

In any dispute as to the custody of minor children involving a parent and a
non-parent, there shall be a presumption that it is in the best interest of the
child to be in the custody of the parent, unless it is show [sic], by clear and
convincing evidence, that it would be detrimental to the child to permit the
parent to have custody.

Id.

107. 28 H.R. PROC., Pt. 8, 1985 Sess. 2618 (Apr. 17, 1985). The vote was 143 in
favor, 4 opposed.

108. 28 S. PROC., Pt. 5, 1985 Sess. 1763 (Apr. 30, 1985). The vote was 15 in favor,
21 opposed.

Streeter, Avallone, Zinsser, and Consoli).

110. Id. at 1757 (statement of Sen. Miller).

111. Id. at 1757 (statement of Sen. Johnston).


113. Id. at 2242 (comments of Sen. Avallone). Senator Avallone had previously
voted against the bill but was now endorsing it after the amendments.

114. Id.

115. Id. at 2243. The vote was 32 in favor, 3 opposed.

116. 28 H.R. PROC., Pt. 16, 1985 Sess. 5811 (May 14, 1985). The vote was 130 in
favor and 17 opposed. Public Act 85-244 Section 2 read as follows: “In any dispute as to
the custody of minor children involving a parent and a non-parent, there shall be a
observed that it still overturned *McGaffin* and adopted the Parskey dissent.117

Compromise and last-minute language changes may get a bill passed, but they may also wreak havoc on the ability to decipher a legislative history and with the ability of practitioners and trial court judges to apply the law consistently. The 1985 Act gave no hint of what proof was necessary to rebut the presumption in favor of parents. The next year, the House added language clarifying that the presumption was rebuttable and reinserted the requirement that, to rebut it, the court must find that “it would be detrimental to the child to permit the parent to have custody.”118 The bill’s proponents did not attempt to add a requirement that the showing had to be proven by “clear and convincing evidence.” The bill passed,119 although once again amid debate about the need to protect families as an intact unit versus the need on occasion to protect children from these very families.120 The statutory language has remained untouched since 1986 and provides:

In any dispute as to the custody of a minor child involving a parent and a nonparent, there shall be a presumption that it is in the best interest of the child to be in the custody of the parent, which presumption may be rebutted by showing that it would be detrimental to the child to permit the parent to have custody.121

Section 46b-56b unquestionably overrules the basic approach of *McGaffin*. It represents a substantive statement of policy by the legislature that third-party custody cases are not simply a comparison of all the attributes of the potential custodians. No minor factor is to determine what is in the child’s best interests, tipping the

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118. Substitute H.B. No. 5607, 1986 Sess. Testimony before the Judiciary Committee revealed that this bill was proposed to fix mistakes made in 1985. That is the language that was actually in the Bill at one point last year, and got lopped off in a dispute over whether the standard of proof should be clear and convincing evidence or a preponderance of the evidence. The legislature ultimately opted for preponderance of the evidence, but in doing so, it took off half the Bill and this part should never have been removed from the Bill. Hearings on H.B. 5607 Before the Conn Standing Comm., Judiciary, 1986 Sess. 549 (March 3, 1986) (remarks of Raphael Podolsky).
scale away from the parent. The legislature left no doubt that the constitutionally protected parent-child relationship is not to be disrupted so easily.

What is not immediately clear from the legislative history is the type and quantity of evidence required to constitute detriment sufficient to overcome the presumption. The law, by virtue of its applicability to all third-party custody cases in superior court, sets the standard in both removal and reunification cases. Any construction of section 46b-56b must be broad enough to address the menu of diverse factual patterns that give rise to these cases. The construction must enable the courts to balance the parents’ and children’s needs, whether or not the custodial relationship between parent and child is intact at the time the court is faced with the decision.

It is unfortunate that the legislators did not discuss the ramifications of the fact that they were passing a law applicable to such a wide array of cases. There was no detailed discussion on the floor of the House or Senate of the kinds of cases to which this law would apply and no clear distinction drawn between reunification or removal scenarios. Nor did some of the legislators seem to understand how this law would fit into the existing framework of child protection laws. Because the debate centered needlessly and superfluously on the obvious proposition that “sometimes courts have to remove children from dangerous homes,” the legislators missed an important opportunity to examine closely the similarity of fact patterns and policy concerns behind guardianship and third-party custody cases. In doing so, they lost a chance to create a consistent standard for probate court and the family and juvenile matters divisions of superior court.

Section 46b-56b goes a long way towards harmonizing the

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122. For example, changing the third-party custody standard in superior court did not affect the authority of juvenile matters judges to intervene in families to protect children at risk of abuse and neglect. The law also did not alter the ability of probate court judges to remove parents as guardians when the need arises. Some of the legislators appeared to believe that they were fixing some flaw in the child removal statutory schemes by removing the “clear and convincing” evidence language in the third-party custody bill, when all they were really doing is creating inconsistency across the courts.

123. It would be overstating the legislative history to explain the final bill as a result of an overemphasis on a reunification case scenario, which is, after all, the kind of case McGaffin was. There is no evidence that the legislators were creating a rule limited to reunification cases.

124. At other times, the legislature has been clear that its intent was to create consistent standards. Public Act 83-478, for example, was passed “to standardize the criteria applied for termination of parental rights by the Probate and Superior Courts.” In re Jessica M., 586 A.2d 597, 603 n.9 (Conn. 1990).
third-party custody standard with those of the guardianship and juvenile matters cases, but it does not quite reach the mark. The political process of compromise diluted the original version of section 46b-56b by removing the clear and convincing standard of proof and leaving unanswered the question of which party has the burden of proof. The persuasiveness of the guardianship and juvenile matters statutes and caselaw is uncertain. Furthermore, as long as the possibility exists that the courts will interpret section 46b-56b as setting a standard different than the other child removal statutes, the potential for forum-shopping by non-parents remains obvious.

Despite these problems, the passage of the current version of section 46b-56b was a significant event. Connecticut's creation of a presumption in favor of parents means it joined the majority of jurisdictions in rejecting the use of the same standard in parent-versus-parent and parent-versus-non-parent custody cases. By explicitly overruling McGaffin, the legislature put its stamp of approval on the reasoning and language of Justice Parskey's dissent. To achieve the legislature's intended result, the courts must construe the phrase "detrimental to the child" as more than just any harm. The presumption is not rebutted unless the harm to the child is substantial.

C. Connecticut Decisions Applying Section 46b-56b

1. Appellate Cases

There are only a few appellate cases involving third-party custody disputes decided since the legislature passed the presumption law. In 1989, the Connecticut Supreme Court had its first opportunity to construe section 46b-56b. In Perez v. Perez, a mother...
sought to regain custody of her son from his paternal grandparents. In a procedurally complicated reunification case, the supreme court upheld the trial court's decision to return the child to her mother, but also affirmed the trial court's holding that the mother, as the moving party, had the burden of proving that it was in the child's best interests to be in her custody. The supreme court, in its decision, emphasized that section 46b-56b does not "affect[] the trial court's obligation to award custody upon the basis of the child's best interests" and cited the majority decision in McGaffin for support of its conclusion that the best interests standard is still the "ultimate basis" of the custody decision. The court never acknowledged that the legislature enacted the statute to overrule the majority opinion in McGaffin and adopt the dissent. Instead, the court described the statute as more of an evidentiary procedural device than a substantive statement of policy and accepted the trial court's limited description of the effect of the presumption as an aid to the parent by providing that "'[i]f the opposing party's evidence fails to prove the rebutting facts ... [the] presumption must be accepted as true.'"

The appellate court has also limited the impact of the enactment of section 46b-56b. In Busa v. Busa, a reunification case decided in 1991, the appellate court reviewed a trial court decision granting custody to a grandparent over a parent. The trial court had ignored section 46b-56b, five years after its enactment, and had

126. 561 A.2d 907 (Conn. 1989).
127. Plaintiff mother filed a motion to modify a foreign state child custody de­
cree. The dissolution had been granted by the Connecticut Superior Court, but a Puerto Rico court had ruled on the custody issue under the UCCJA. The court held that, as the movant seeking a modification, the plaintiff had the burden of proof just as in any post-judgment divorce case. Id. at 915.
128. Id.
129. Id. at 916.
130. Id.
131. In a footnote, the court admitted only that "McGaffin was decided before the enactment of General Statutes § 46b-56b." Id. at 915 n.13. The court never men­tioned the legislative history of the statute.
132. Id. This is an unnecessarily limited and mechanical view of the effect of a presumption, criticized by STRONG, supra note 105, and others.
applied a best interests test. The appellate court did find error and remanded the case but did so in the gentlest of ways. Stating that the best interests test "remains the ultimate basis of a court's custody decision," the court, citing Perez, simply held that section 46b-56b and Connecticut Practice Book § 4059, read together, require a trial court to articulate whether the presumption was properly rebutted. The court remanded the case for an articulation of this holding, but did not seem to entertain the possibility that applying the proper statutory standard might very well change the result.

These cases reveal a resistance on the parts of the Connecticut Supreme and Appellate Courts to implement fully the intent of the legislature. The courts seem reluctant to leave behind the best interests test and tend to minimize the law's impact as only a procedural or semantic change, not a substantive change. The appeals courts have yet to define comprehensively what detriment means and do not acknowledge that the statute forbids a court from engaging in a comparison of the characteristics of the two competing custodians and deciding custody based on what each may have to offer to a child.

The decisions do not discuss the differences between removal and reunification cases or the different factual issues that are relevant to each of these two kinds of cases. Only Perez contains any description at all of what detriment means in a reunification case. In that case, the supreme court held that the child's unavoidable pain upon separation from the third-party custodian was not sufficient to constitute detriment to the child. Faced with a poor relationship between the child and her mother, the court also determined that, when a parent-child relationship would improve if nurtured, the opportunity to nurture that relationship must be

134. Id. at 371. Significantly, in a case decided two weeks earlier, Bristol v. Brundage, 589 A.2d 1 (Conn. App. Ct. 1991) (citing Perez v. Perez, 561 A.2d 907 (Conn. 1989)), the appellate court stated in dicta that the presumption of § 46b-56b was not a best interests test. That case involved the effect of a parent's testamentary appointment of a guardian for a minor child. The court, faced with a choice between the guardian designated by the parent and a third party, drew an analogy to § 46b-56b and chose to create a judicial presumption in favor of the parent's choice for guardian. The court found that the third-party had failed to rebut the presumption by showing it would be detrimental for the child to be with the guardian named in the parent's will. Id. at 2-3.

135. CONNECTICUT PRACTICE BOOK § 4059 states in relevant part that "the court shall include in its decision its conclusion as to each claim of law raised by the parties." Id.

136. Busa, 589 A.2d at 371.

137. Perez, 561 A.2d at 915-16.
Finally, neither the Connecticut Supreme nor Appellate Court have used its power of statutory interpretation to address the problematic lack of consistent standards in the various lower courts. The decisions contain no evaluation of how similar, in terms of policy and in practice, the third-party custody, guardianship, and juvenile matters cases can be. Thus, the courts offer little guidance on the applicability of the case precedent from the other statutory schemes to the third-party custody situation.

2. Trial Courts

Several superior court trial judges have decided cases since 1985 that required them to choose between a natural parent and a non-parent. These included both removal and reunification cases. Once again, no judges drew a distinction between the two kinds of cases or attempted to define their task in terms of this analysis. The opinions fall all over the spectrum in reasoning and result, sometimes functioning as nothing more than a best interests test. None of these opinions contains a clear definition of detriment.

There are significantly more reunification cases than removal cases among the reported trial court decisions. Busa v. Busa, 138. Id. at 916. These comments echo Justice Parskey's dissenting opinion in McGaffin, where he observed that neither a better standard of living nor proof that a move would be painful to the child should be sufficiently detrimental to rebut the parental preference. McGaffin v. Roberts, 479 A.2d 176 (Conn. 1984).

139. There are no statistics available regarding how often in the last decade Connecticut judges have decided third-party custody cases. A LEXIS search of the statute number for section 46b-56b yields fourteen cases. One is a miscitation and five are cases where the judge refers to the statute as an analogy. See supra notes 71 and 134, and infra note 159. However, this is not the entire universe of § 46b-56b cases. There is at least one other trial court decision from 1990 not reported on LEXIS and there may be more. Search of LEXIS State library, Conn. file (Jan. 16, 1995). See infra note 209, for a discussion of one unreported case.

140. This case type distribution, skewed in the direction of reunification cases, is bound to continue so long as the current habeas corpus standing rules remain. As discussed supra notes 43-47 and accompanying text, a removal case is only possible if there is a pending custody action between the parents in which the non-parent may intervene. The guardianship case in probate court will most likely continue to be the predominant procedural vehicle used by a non-parent challenging the parent's custody. For example, a LEXIS search locates only two removal cases decided pursuant to § 46b-56b, search of LEXIS, State library, Conn. file (Jan. 16, 1995), while there are approximately 800 guardianship cases filed each year in Connecticut. Hearings on S.B. 644 Before the Conn. Standing Comm. on the Judiciary, 1993 Sess. 1896 (March 19, 1993) (remarks of Probate Judge Robert Killian) (speaking in opposition to the proposed law to allow litigants to transfer contested guardianship cases to superior court, passed as Public Act 93-344.)
is one such reunification case. In *Busa*, the children had been in the custody of their paternal grandparents for approximately five years when the mother filed a motion to modify custody. On remand, the trial court cited section 46b-56b and concluded that it would be detrimental to remove them from the care of their grandparents. The court did not address the present capability of the mother to care for her sons, stressing instead the positive attributes of the grandparents. The judge’s opinion concluded in essence that because the boys were fine where they were, the court should not move them. He assumed, without detailed analysis, that to move children, even to a parent they knew well and with whom they had spent significant time, would be too difficult for them.

*Sherman v. Sherman* involved a custody dispute between a father and his children’s maternal grandparents. At the time the court ruled, the children were nine and seven years old and had been living with the grandparents for nine months.

The judge examined several types of factors in his ruling. He cited approvingly the Family Relations Officer’s conclusion that


142. The natural mother and father had originally agreed to the children being in the custody of the grandparents when the mother apparently chose to move to Massachusetts to attend school. The custody agreement was in writing and filed in the court in the dissolution action file. However, the grandparents did not intervene formally until the mother challenged their custody in 1989. *Id.*

143. The opinion contains harsh opinions about the mother, focusing on her past selfishness and misjudgments. The judge found the mother to be a selfish woman because she had refused to take her children back after the grandfather had been seriously injured and had required round-the-clock care. The court concluded that, in the past, she “was interested only in having a good time for herself.” *Busa*, 1991 Conn. Super. Ct. LEXIS 1351 at *9.

144. The mother was remarried to a nuclear engineer in the Navy.

145. The judge cited and apparently relied on the Family Relations Officer’s opinion that “a change could cause unnecessary adjustment problems for these two brothers.” *Busa*, 1991 Conn. Super. Ct. LEXIS 1351 at *9. According to the court’s opinion, the mother visited her sons weekly when she lived in Massachusetts and, after moving to South Carolina, they visited her for the summers in 1986 and 1987 and for one month in 1988. *Id.*

146. FA 90-0269208, 1991 Conn. Super. Ct. LEXIS 2353 (July 29, 1992). The mother had custody of the children after the divorce. The father later sought custody. For some reason not reported in the decision, the mother arranged for the children to live with her parents. The maternal grandparents then moved to intervene in the pending case, and the dispute crystallized between the father and grandparents.

147. This is a reunification case, even though the children had been living with the grandparents for only a short time. They had been living apart from their father for much longer due to their parents’ divorce and their custodial relationship with the father had already been disrupted.
"the move alone" would be substantially detrimental to the children. Then the court's focus turned to the father's characteristics. The court questioned his parenting skills and found that the father's rented room was not suitable for children, contrasting it to the spacious suburban home in a residential neighborhood in which the grandparents lived. Finally, the court recited the father's past convictions for child molestation and weapons possession and his history of violence toward the mother.

The judge stated at the outset of his ruling that he took section 46b-56b into consideration but did not explain further what evidence rebutted the presumption. Nor did the judge specifically state which of these facts constituted detriment. He simply concluded by finding that "it is in the best interests of the children" to be in the custody of the grandparents. Perhaps, after making so many factual findings negative to the father, he thought it would be obvious, but the opinion leaves questions about how the judge defined the standard and how close the standard is to a best interests test.

Other cases contain more discussion of how the court applied section 46b-56b to the facts. In the case of In re Jacqueline D., the judge had before him consolidated family and neglect cases. The custody action was between a father and the paternal grandparents. Although the two actions were distinct procedurally, the question before the court was the same: was the ten year old child to remain with her grandparents, as they and the Department of Children Services ("DCYS") sought, or to be reunited with her father for the first time in over eight years? The court was mindful of section 46b-56b and its presumption in favor of the father and also of the caselaw giving parents a "strong advantage" in cases brought by DCYS. The judge found that both the grandparents and

148. Sherman, 1991 Conn. Super Ct. LEXIS 2353 at *4. One can assume the judge was referring to the normal process of adjustment.

149. These facts reflect the father's past and are, therefore, not the type of evidence that necessarily demonstrates present detriment. The opinion contains no discussion of the correlation between the father's past problems and his current ability to care appropriately for his children.


151. Id. at *1. The court had committed the child in 1988 to the care of the commissioner of the Department of Children and Youth Services ("DCYS"), which was renamed in 1993 to DCF. DCYS had placed her in the home of her grandparents where she had remained for almost five years.

152. Id. at *5. The mother was not seeking custody.
DCYS had met their burdens, concluding it would be detrimental to the child to live with her father.

The judge's ruling was a mixture of an analysis of the father's parental skills and the effect on the child of moving. Using factors spelled out by the Connecticut Supreme Court for deciding whether to revoke the commitment of a child to the care of DCYS, the court looked at: (1) the length of the child's stay with her grandparents; (2) the nature of her close relationship with her grandparents; (3) the degree of contact with her father; and (4) the nature of her strained relationship with the father. The court then recited several facts relevant to these considerations. The father had been a primary caretaker of the child for less than a year more than eight years prior to the proceedings. The child expressed fear of her father and had a strong preference for staying with her grandparents. The court further found that the father could not provide a secure, violence-free home for the child. He had evaded a court-ordered home study and often had no housing. The father's plan for his daughter did not provide for continuation of the child's necessary counseling or her educational and social activities. In short, the court concluded that to award custody to the father would be detrimental to the child because it would "deprive her of the only secure and stable home she has had during the ten-and-a-half years of her life and plunge her into unchartered (sic) territory."

Most recently, the judge in Foster v. Devino, a removal case, gave a detailed analysis of his factual basis for awarding custody to a non-parent. The court applied section 46b-56b. Although the judge did not spend much time defining his terms, his approach revealed that he read its impact to be quite similar to that of a guardianship case or juvenile matters proceeding.

In Foster, the children, ages three and four and one half, had lived with their mother since birth. The mother initiated a custody action against her children's father to whom she had never been married. The paternal grandparents intervened and sought cus-

153. In re Juvenile Appeal (Anonymous), 420 A.2d 875 (Conn. 1979). However, neither the supreme court that identified the factors nor the trial court that applied them explained why these are the relevant considerations or defined what weight the court should give to each of them.
156. Id. at *9-11. This was the proper standard. The grandparents intervened in a custody action between the unmarried parents filed under § 46b-61.
factually, the court found that the mother's poor judgment and insight left her with limited ability to meet the physical and emotional needs of her two young children. The judge also catalogued numerous injuries the children had suffered and concluded that, at a minimum, the mother had done a poor job of supervising her children. She had refused parenting assistance from the DCF, had subverted visitation with the father and grandparents, and had failed to recognize the impact of her actions on her children. The court concluded that the mother's "traits impact negatively on the [mother's] desire and ability to instill, in the children, respect for truth and authority and therefore [the mother's traits] will work to their detriment." Although the court's final summation speaks in terms of it being in the "best interests" of the children to be with their grandparents, it is clear that the judge did not decide this case using a traditional best interests test. Rather, he reached this ultimate conclusion because he found that the grandparents had rebutted the presumption by proving it would be substantially detrimental to the children to remain with their mother.

These trial court decisions demonstrate the confusion that results from the lack of a clear definition of detriment and the failure to distinguish between reunification and removal cases. Some judges have begun to articulate the factors they found relevant, and at least one has adopted factors from a juvenile matters case, but there is yet to be a consensus among the courts. Without a well-

157. Id. at *2. The natural father lived with his parents but was never a candidate for custody.
158. Id. at *17-18.
159. There is one other reported trial court third-party custody matter not discussed in this article because it is on appeal and was scheduled to be argued on October 3, 1995. There are four other recent cases, that are not actually custody cases, where § 46b-56b is applicable, but the court has referred to the standard in each case, either mistakenly or by analogy. See note 71, supra, for a discussion of two guardianship cases where the superior court applied § 46b-56b on appeal. In the case of In re Aracelli G., 1993 Conn. Super. Ct. LEXIS 3242, (Dec. 9, 1993), the judge used § 46b-56b as analogous precedent for deciding a father's motion for custody, which he had filed in a neglect proceeding that the state had initiated against the child's mother. The juvenile matters judge originally had removed the child from her mother's care and had placed her with her maternal grandmother. The court granted the father's motion, concluding that, consistent with the policy behind § 46b-56b, the child should be with her father rather than her grandmother, and that in this case it would cause the child no detriment to order the change in custody. In Garrett v. Appeal from Probate, CV 93-0308807, 1994 Conn. Super. Ct. LEXIS 2308 (Sept. 8, 1994), Judge Levin again referred to § 46b-56b as evidence of the state's policy in favor of parents. Nonetheless, in this particular appeal from a probate court's decision, he agreed with the probate judge that the removal of the father as guardian was appropriate.
defined policy behind the presumption standard, a recognition that removal and reunification cases are fundamentally different, or a coherent framework of criteria, trial judges are left to decide for themselves what detriment means.

IV. HOW MUCH DETRIMENT SHOULD IT TAKE?

Black's Law Dictionary defines detriment as "any loss or harm suffered in person or property."160 A "plain language" or literal161 construction of the statutory provision suggests that a showing of any harm to the child that would be occasioned by awarding custody to the parent would establish "detriment" sufficient to rebut the parental presumption. But can it really be that easy? If detriment to the child means any harm, no matter how minimal or short-term, then the rebuttable presumption dissolves into a best interests test so that the effect of the presumption is illusory.162

To give the term "detriment" meaning in this context, one must look beyond the pages of the dictionary.163 Indeed, breathing life into the concept requires analysis of the policies at work in both removal and reunification cases.

A. Removal Cases

In a removal case, the court should examine only the parent's capability to meet the child's basic needs, and the non-parent

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161. A definition that reflects the way people use a word in common parlance is a "lexical" definition. IRVING M. COPI, INTRODUCTION TO LOGIC, 143-44 (7th ed. 1986). Lexical definitions often have the disadvantage of being ambiguous and uncertain.
162. For example, a court would be free to say it is "harmful" for a child not to have the best home or school or the most well-educated parent, regardless of whether the child is really in any danger at home, or whether the parent is incapable of caring adequately for the child.

Courts and commentators have advised against using a best interests test, especially in parent-grandparent disputes:

When a parent is young, the physical, financial and even emotional factors may often appear to favor the grandparents. One cannot expect young parents to compete on an equal level with their established older relatives. So the "best interest" standard cannot be the test. If it were we would be forced to conclude that only the more affluent in our society should raise children. To state the proposition is to demonstrate its absurdity.


163. This Article suggests that courts should move away from the imprecise lexical definition of detriment and instead adopt a stipulative definition, giving all parties notice of the governing definition. COPI, supra note 161, at 144-45.
should prove the parent’s incapability by clear and convincing evidence. This approach defers to the interests of family integrity, but provides a mechanism for assuring children are safe and cared-for. The standard implements the legislature’s intent with even greater facility than the legislature was able to achieve. This definition of detriment for removal cases also achieves harmony with the other child removal statutory provisions that already exist.

1. Defining Detriment

In a case where a non-parent is seeking to remove custody from a parent, the judge’s challenge is to decide at what point the court should interfere with and disrupt the daily parent-child relationship. Even without regard to the parent’s rights or needs, removal cases require the court to balance the conflicting needs of the child: those of safety and basic physical and emotional care with the child’s need for the continuity of the emotional attachment with the parent. The child has a strong interest in staying with the parent.164 The presumption that it is in the best interests of the child to be in the parent’s care embodies the recognition that there is an emotional bond between parent and child and that the child will suffer psychological harm if she is removed from the parent’s care.165 For this reason, it is never a benefit to the child to remove her from a marginal, yet adequate, home simply for the reason that the non-parent offers her a home with more physical comforts or a more skillful caretaker. Accepted wisdom holds that the pain of the separation far outweighs the material advantages the non-parent can provide.166

164. "So long as a child is a member of a functioning family, his paramount interest lies in the preservation of his family." GOLDSTEIN, ET AL. supra note 20, at 5.

165. Psychologists agree that separating a child from her parents creates harm for the child. Both psychoanalytic theory and developmental studies establish “the need of every child for unbroken continuity of affection and stimulating relationships with an adult.” GOLDSTEIN ET AL., supra note 20, at 6. Psychoanalytic theory suggests that once a child bonds with her psychological parent, separation is very damaging. Consequently, removal is only appropriate in extreme cases, where it is the “least detrimental available alternative for safeguarding the child’s growth and development.” Id. at 53. Attachment theory similarly stresses the importance of parent-child bonds but suggests that children can form multiple attachments and that other factors can mitigate the harm of separation. Everett Waters & Donna M. Noyes, Psychological Parenting vs. Attachment Theory: The Child’s Best Interests and the Risks in Doing the Right Things for the Wrong Reasons, XII REVIEW OF LAW & SOCIAL CHANGE 505, 512 (1983-84) (discussing the research and theories of Bowlby and Rutter). Nonetheless, psychologists supporting the attachment theory also advocate that courts and social agencies should be very cautious about removing children from their parents. Id. at 513.

166. See supra note 163.
Obviously, however, there are parents who are simply incapable of taking adequate care of their children. In those cases the child's minimum care needs do outweigh the confusion, upheaval, and hurt the child will suffer from being removed from the parent. The court's obligation to decide when to intervene in a family is not new, nor is it unique to third-party custody cases under section 46b-56b. Probate judges face the identical question when presented with a petition to remove a parent as a guardian.\textsuperscript{167} Juvenile matters judges do so as well when they rule on a petition to adjudicate a child as uncared-for, neglected or dependent.\textsuperscript{168} The Constitution and state statutes already require these courts to balance the need to protect children with the obligation to protect family autonomy.

There is no rational basis for creating a test for defeating a parent's custody different from those that already exist for guardianship cases and juvenile matters cases. The fundamental nature of the rights of the family at stake are the same. The Connecticut Supreme Court has already recognized that the public policy in favor of family integrity is the same in cases transferring guardianship to private parties and in those committing the child to the care of a state agency.\textsuperscript{169} Third-party custody removal cases raise the identical concern for family integrity. To the parent and the child, it matters little whether the case began because an Assistant Attorney General filed the case in juvenile court, or whether a family member filed a petition in probate court or intervened in an existing superior court case. To the parent, all these cases pose the same question: "Will the judge take my child away?" To the child, these cases pose an equally basic question: "Where will I live?"

The statutory predicate for removal of guardianship rights and for adjudication of a child as uncared-for, neglected, or dependent focuses on the parent: the ability to keep the child safe from physical injury and to provide the child with basic care. Neither standard allows removal for the simple fact that some other person is better able to raise the child or provide more for the child. In a contested guardianship case, Probate Judge Kurmay articulated the standard by which probate judges are to apply the guardianship statutes:

\[\text{T}h\text{e issue involved in this case is not whether the maternal aunt and uncle are better caretakers of J. than the natural mother. By}\]
the same token, the issue is not whether J. will perform better in the guardian’s home rather than that of the mother. The only issue has been and remains whether the conduct has been so detrimental to the needs of the child as to warrant her removal pursuant to the specific standards in the previously cited Section of the Connecticut General Statutes. The focus, by legislative decision and by court interpretation, is on the conduct of the parent and not on the needs of the child. It is assumed by the State Legislature that a minimally-functioning parent is the appropriate caretaker of that parent’s child, even over another individual whose abilities are far superior to those of that parent.  

This approach describes exactly how superior court judges should decide third-party custody removal cases. In a removal case, then, the court’s inquiry must focus solely on the parent’s present characteristics, but only insofar as those characteristics have an impact on the child’s well-being. Only when the parent’s present capability to provide the child with the basic needs falls below an adequate level is it detrimental to the child to stay in the parent’s care.

In deciding the question of whether to remove the child, the court should not consider the potential third-party custodian in any way. The attributes and parenting capabilities of the non-parent are completely irrelevant to the determination of whether the parent can care for his child. It is also inappropriate for the court to consider the type and nature of the relationship between the child and the non-parent.

Most removal cases involve claims by non-parents who are

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170. In re Guardianship of J., Probate Court, District of Stratford, Sept. 4, 1990, (Kurmay, P.J.) slip op. at 3-4. As a result of abuse allegations against the mother and stepfather, Judge Kurmay had removed the mother as the child’s guardian in 1987 when the child was seven years old, appointing the maternal aunt and uncle as guardians in the mother’s stead. After laying down, in prior rulings, strict conditions for visitation and individual and family counseling, the court eventually reinstated the mother as guardian three years after her removal. The court found that the mother had “benefited immensely” from counseling and was “far better able to cope with the responsibility of raising J. than she ever was before.” Id. at 4. Applying the standard to these facts, the court reinstated the mother with orders for the mother to continue in counseling.

171. It is detrimental for a child to remain in the care of a parent who cannot fulfill the child’s basic needs, regardless of why the parent cannot do so. Whether a parent is incapable because of mental illness, mental disability, lack of awareness, or substance abuse is irrelevant to the basic question of whether the parent can care for the child, although it may be very relevant to whether the parent can ever gain or regain the capacity to care for the child. Similarly, the guardianship statutes also require the court to measure a parent’s ability and to ignore the origin of the parent’s problem. § 45a-610(3).
members of the child's extended family and whom the child knows and often loves. It is tempting, therefore, to decide removal cases on a "sliding scale" basis: the closer the emotional ties between the child and the non-parent, the less cause the court must find before it can remove the child. This approach is a dangerous dilution of the family's need for autonomy. The decision when to intervene in a family must remain a rigidly separate consideration from the question of where the child would live if the court removed her. Nor does the presence of extended family members as alternative caretakers make removal a trouble-free solution to a nuclear family's problems. Placing the child with family members or friends will not lessen the child's pain of separation from the parent. It also invites family meddling and intergenerational conflicts, and underestimates the emotional investment the non-parent may have in sabotaging the parent-child relationship. Because of the difficulties inherent in later returning children home, a court should not lightly enter into a removal case, and thereby invite, for some future time, the more complex conflicts of a reunification case.

When evaluating the parent's present capabilities to care for the child, the superior court judge should adopt the same cautious level of scrutiny that probate and juvenile matters judges bring to their tasks. The court should look freely to the analogous precede-

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172. The non-parent was a relative in all the reported third-party custody cases in Connecticut decided since the § 46b-56b was enacted and in most of the older habeas corpus cases as well.

173. These decisions are distinguishable in other contexts, too. In guardianship cases, the court is only to examine the existence of a relationship between the child and prospective guardian when appointing a guardian after removal of the parent. § 45a-617. Similarly, the case of In re Juvenile Appeal (Anonymous), 420 A.2d 875 (Conn. 1979), requires a court to examine the grounds for terminating a parent's rights without considering the attributes of the prospective adoptive parents. See Sharon I. Farquharson, Comment, The "Two-Pronged" Inquiry — The Best Alternative for the Conflicting Rights Involved in Proceedings for Termination of Parental Rights, 13 Conn. L. Rev. 709 (1981).

174. Richards, supra note 162, at 734.

175. Often intra-familial custody disputes end up being battles over other family grievances with the child as the battleground. Some of the ugliest stories arise when the parent is engaged in a custody battle with his or her own parents. See, for example, In re Jacqueline D., No. N.87-128, No. 82341, 1992 Conn. Super. Ct. LEXIS 1037 (Apr. 15, 1992). Although DCF can place a committed child with "persons related by blood," § 46b-129(d), there is literature warning child placement workers about the difficult dynamics involved in such placements. Joseph R. Carrieri, Child Abuse, Neglect, and the Foster Care System, Practicing Law Institute (1993).

176. The test for removal in abuse and neglect proceedings has been described as a determination of "whether the child can be protected from the specific harm(s) justi-
dent of the guardianship and the abuse and neglect statutes and cases. The court will then have the necessary framework from which to evaluate the specific facts of the case in order to answer the only question relevant to a removal case: does this parent presently have the necessary emotional commitment and capability to fulfill his or her child’s minimum needs? Only if the court finds that the non-parent has proven that the parent is incapable of providing this minimum level of care do grounds exist for removal of the child from the parent.177

One Connecticut judge has already gravitated to this type of inquiry in removal cases. In *Foster v. Devino*,178 Judge West employed exactly this examination of the parent’s characteristics when he focussed on the capability of the mother to care for her children’s physical and emotional needs as a basis for determining what would be detrimental for the children.179

2. Burden and Level of Proof

In order to be consistent with the guardianship and juvenile matters cases, the court should always assign the burden of proof to the non-parent seeking removal.180 The quantum of proof by which

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177. The focus is on the parent’s present capability. As is the usual case, past behavior including past abuse may be relevant but only to the extent it illuminates a parent’s present characteristics. Past conduct is not an automatic indicator of current conduct.


179. There is also persuasive authority in other states supporting this approach with removal cases. In Texas, the presumption is rebutted by showing that granting custody to the parent “would significantly impair the child’s physical health or emotional development.” TEX. FAM. CODE ANN. § 14.01(b)(1) (1994). In *Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990), the Supreme Court of Texas construed the statute as one requiring it to decide how dysfunctional the mother must be to be deemed to cause significant harm to her child. The court concluded that it would not impair the child to live with a mother who was unemployed, had periods of psychiatric treatment, and was a victim of spousal abuse. *Id.* at 167. There are also cases in other states where the non-parent has prevailed under this type of test. For example, in *Hunt v. Whalen*, 565 N.E.2d. 1109 (Ind. Ct. App. 1991), the Indiana Court of Appeals upheld the finding that the grandparents had rebutted the parental presumption with clear and convincing evidence by showing that the mother was unable to provide adequate nutrition for the child, had failed to follow specific medical advice for treating the child, and had no source of income, *id.* at 1111, all of which are, arguably, indicators of the parent’s inability to meet the child’s basic needs.

180. The legislature was silent when it enacted § 46b-56b regarding which party
the non-parent should prove his or her case is less clear. As the statute currently stands, rebutting the presumption takes proof of detriment by a preponderance of the evidence.181 This is the same standard as in the juvenile matters adjudication phase and in temporary custody decisions but is a less demanding standard than the clear and convincing evidence rule utilized in guardianship cases. It is, therefore, impossible to recommend a rule that would be completely consistent with both of the other types of cases.

It is better policy, and more logical, to adopt a clear and convincing evidence rule for removal cases.182 In many ways, third-party custody cases are more like guardianship cases than juvenile matters cases. Both third-party custody and guardianship cases are initiated by private parties,183 and the time frame of the non-parent's custody or guardianship is open-ended.184 In a juvenile matters case, the court's adjudication of a child as uncared-for, neglected, or dependent does not necessarily result in her removal from her parent.185 The neglect finding often becomes the mere predicate for the provision of free services, and DCF supervision is sufficient to keep the child safe and well cared-for. In contrast, the fundamental issue in both guardianship and third-party custody cases is the child's residence. There are no options short of a change in the child's home. Furthermore, neither the guardianship

bears the burden of persuasion. In Perez v. Perez, 561 A.2d 907 (Conn. 1989), the court assigned the parent the burden of proof because she had initiated the case through a modification motion. However, the court should not assign the burden of proof based on the accident of procedural posture. The burden of proof should always be assigned to the non-parent as a function of the substantive preference for the parent, in accordance with the recommendation of STRONG, supra 105, that a presumption is a rule that assigns the burden of persuasion. The Connecticut Supreme Court has recognized in other contexts, where a fundamental constitutional right is involved, that the burden of proof is always on the party seeking to interfere with that right. In re Jessica M., 586 A.2d 597, 605 (Conn. 1990). In order to assign the burden of proof to the non-parent in every instance, it would take action by the Connecticut Supreme Court to alter that part of the holding in Perez or a legislative amendment to the statute.

181. The legislature adopted the usual civil standard of preponderance of the evidence when it rejected the use of the clear and convincing standard.

182. Adopting this standard of clear and convincing evidence for removal cases would require legislative change.

183. In both, neither the court nor the DCF closely supervise the non-parent’s ongoing custody of the child.

184. The parent who has lost his child in a guardianship or third-party custody case must initiate a proceeding to be reunited with his child. Juvenile commitments are usually limited to eighteen months. § 46b-129(d).

185. In re Juvenile Appeal, 471 A.2d 1380, 1384-85 (Conn. 1984). Indeed, it was precisely the fact that removal is not the automatic result of an adjudication that persuaded the court to adopt a preponderance standard in neglect cases. Id.
decision in probate court nor the third-party custody decision in superior court will automatically trigger the family's access to the supportive services of DCF. As a consequence, a judge deciding a third-party custody case may feel removal is the only available method to assure the child's safety.

B. Reunification Cases

Reunification cases arise in a variety of ways. Some are the second stage to a removal case after the parent has rehabilitated himself and has returned to the court that ordered the removal. Others may result from the actions of a parent trying to undo a voluntary private placement. Reunification cases also can involve parents who have never lacked the capability to care for their children nor have they been "at fault" for the separation. A prime example of this latter kind of case arises after a divorce, when a custodial parent and child live with a third-party such as a stepparent or a grandparent. If the custodial parent dies or leaves the child for any other reason, the noncustodial parent may be drawn into a dispute with the third-party with whom the child has been living.

186. The court could always refer the family to DCF and can order the parent to cooperate with the workers as Judge West did in Foster v. Devino, FA 94-0110479, 1994 Conn. Super. LEXIS 1161 at *2 (May 5, 1994). None of these actions are automatic, however, and DCF is free to define its role with the family in accordance with its own regulations, since the Commissioner is not a party to a guardianship or third-party case.

187. There may well be a correlation between a parent's socioeconomic status and his tendency to use voluntary placements during a crisis. Professor Guggenheim posits that children from poor and minority families are more apt to be seized by the state if the parent has a problem, while a middle or upper class-parent will have the family resources to assist them or the financial resources to hire help, so that the state will never know about the family crisis. He suggests that once the state has intervened in a family, the child is less likely to return home. Martin Guggenheim, The Political and Legal Implications of the Psychological Parenting Theory, 12 N.Y.U. REV. L. & SOC. CHANGE 549, 549-50 (1983-84). While there are undoubtedly many cases where this is true, there also may be cases where the opposite is true. Although state intervention is carried out in an imperfect system, there are at least statutorily mandated safeguards for the parent and an explicit policy in favor of family reunification. Unless third-party custody cases are construed similarly, a voluntary placement arrangement gone awry will give the parent fewer safeguards and, thus, less certainty that his child will ever come home again.

188. The noncustodial parent does not have to be unfit or lacking as a parent to lose custody to an ex-spouse. Nor does he have to consent to his child living with the non-parent, who the custodial parent chose unilaterally.

Even a case where the parent and child have actually never lived together may present a reunification case. In these cases, the term "reunification" may technically be a misnomer, but the issues and the analysis are the same. If the child's parents never lived together with the child, the noncustodial parent seeking custody from the non-parent may never have had anything more than a visiting parent relationship. This fact
In a reunification case, the court should focus solely on the psychological impact that a change in custody will have on the child. This approach allows a court to give priority to the goal of bringing families back together while permitting it to identify those cases where it is simply too late to reunite the family.\textsuperscript{189} Defining detriment this way in a reunification case furthers the objectives of the Connecticut legislature, and achieves consistency with the guardianship and juvenile matters standards.

1. Defining Detriment

In the context of a reunification case, the court’s task is to decide whether it is appropriate to disrupt the bond between the child should not automatically exclude the noncustodial parent from consideration, although it will weaken the likelihood that the parent will prevail.

In some jurisdictions, a “rescinded adoption” case would fall within this sub-category. For example, the Michigan courts ultimately decided “Baby Jessica’s” fate under the Michigan third-party custody rules. \textit{In re Clausen}, 502 N.W.2d 649 (Mich. 1993), \textit{stays denied}, 114 S. Ct. 1 (1993). In Connecticut, the supreme court decided a similar rescinded adoption case, \textit{In re Baby Girl B.}, 618 A.2d 1 (Conn. 1992), pursuant to a different standard in juvenile court and not as a third-party custody case. The Connecticut decision upheld the trial court’s decision to reopen a judgment terminating parental rights and its finding that the state had not proven the grounds for termination. After those determinations, the return of the child to her biological mother was automatic. Commentators have criticized this practice, recommending instead that courts decide with whom the child will live as a third-party custody case, separate from the termination and adoption decision. \textit{See}, \textit{e.g.}, Kirsten Korn, \textit{Comment, The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties}, 72 N.C.L. Rev. 1279, 1330 (1994). While Connecticut has not expressly followed this approach, the legislature has adopted a new law that no longer allows a court to return a child automatically if an adoption fails. 1993 Conn. Acts 170 (Reg. Sess.). If the child’s adoption is not yet final, the court is now required to reopen the termination only if it is in the child’s best interests. For the purpose of this Act only, the best interests of the child include consideration of the following:

- the age of the child,
- the nature of the relationship of the child with the caretaker of the child,
- the length of time the child has been in the custody of the caretaker,
- the nature of the relationship of the child with the birth parent,
- the length of time the child has been in the custody of the birth parent,
- any relationship that may exist between the child and siblings or other children in the caretaker’s household,
- and the psychological and medical needs of the child.

The determination of the best interest of the child shall not be based on a consideration of the socio-economic status of the birth parent or the caretaker. \textit{Id.}

\textsuperscript{189} It may be too late for the child to live with her parent no matter how “blameless” the parent is. Consider the case where the custodial parent has died and the child is living with her stepparent. Even if the visiting parent has maintained a close relationship with his child, the parent may nonetheless lose his bid for custody against the stepparent if the child has half-siblings. While this result may seem unfair to the parent, it is more important to consider how it affects the child. Moreover, the parent is really no worse off than he was when his ex-spouse was still alive.
and the non-parent. The legislature, by adopting this presumption, has mandated that the court must start with the premise that the child should return to the parent and has determined that the dividing line is substantial detriment to the child. The presumption translates into an affirmative policy that a capable parent can be reunited with his child under certain circumstances, even if the non-parent has taken superb care of the child. Therefore, the presumption in favor of the parent requires the court to reject a comparison approach, as it does in a removal case. The court is not to select the better caretaker nor to decide the case on the simple basis that the status quo is fine because the child is performing well where she is.

Just as with removal cases, the task before the superior court in a reunification case is not a unique one. Probate judges must decide when, if ever, to reinstate removed parents as guardians. Juvenile matters judges face a similar question when parents file petitions to revoke the commitment of their children to the state or simply at the expiration of an eighteen month commitment. Once again, it makes no sense to create a new test to use only in third-party custody cases. The presumption in favor of the parent is, quite simply, another way to state the policy in favor of reuniting families and enhancing parental capacity. It is appropriate, then, to look to the probate court precedent and juvenile matters decisions for guidance in third-party custody reunification cases.

Both guardianship reinstatement and revocation of commitment cases require the court to determine as a first step whether the original cause for the child's removal still exists. Resolving a reunification custody case will also often require the court to engage in a two-step process. The court's threshold consideration

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190. Indeed, this factor can have an ironic effect. The better the level of care has been by the caretaker, the more likely that the child will have the emotional strength to adjust to yet another move. See Waters and Noyes, supra note 165, at 512.


192. § 46b-129(g).

193. § 17a-101(a).

194. § 46b-129(f) (1995); In re Juvenile Appeal (Anonymous), 420 A.2d 875, 887 (Conn. 1979); In re Guardianship of J., slip op. (Probate Dist. of Stratford, July 18, 1989 and Sept. 4, 1990) (Kurmay P.J.).

195. Especially when the court previously has removed the child from the parent's custody, the court will have to find first that the cause for the removal no longer exists. But even in cases where the court never found the parent to be incapable of caring for his child, the non-parent may raise the issue, as a matter of good-faith or just as a tactical maneuver. Either way, it is inevitable that a court will first have to determine whether or not the parent is capable of meeting the child's minimum needs.
must be whether the parent is capable of having custody. Only a capable parent is entitled to the benefit of the presumption of section 46b-56b.196

Assuming the court finds the parent meets the minimum standard of parental capability, the court must then wrestle with the second and often tougher question in a reunification case: even though the parent is fully capable of caring for his child, should the child nonetheless remain living with the non-parent? The court must compare the child's interest in reuniting her biological family with her interest in preserving the family unit of which she is now a part.197 It is at this point that the child's needs are more likely to be in conflict with those of her parent.

The only evidence sufficient to rebut the presumption in favor of a capable parent is proof that the move itself will be substantially detrimental to the child. The sole relevant factor is the degree of psychological impact that the change in custody will have on the child. Here the court is faced with trying to look into the future and draw the line between an ordinary readjustment process and psychological harm of a long-term nature.

In a revocation of commitment case in Connecticut, it is the state's burden to prove that "revocation would not be in the child's best interests."198 This is a high burden that the Connecticut Supreme Court has expressed in terms of whether the shift of custody back to the parent would be "detrimental" to the child.199 The court has determined that for revocation cases, the trial courts must assess the following factors: (1) the length of the child's stay in foster care; (2) the nature of the child's relationship with the foster parents; (3) the degree of contact maintained with the natural parent; and (4) the nature of the child's relationship to the natural parent.200 These factors are wholly applicable to reunification cases.201

196. This inquiry is the same analysis of the parent's present capabilities as that required by the removal cases.
197. With respect to reunification cases, the psychological parent theory and the attachment theory are in less agreement than on the removal issue. Under Goldstein, Freud, and Solnit's theory, once the child is removed and forms a new bond, the courts should safeguard that relationship just as jealously as the original parent-child bond. GOLDSTEIN ET AL., supra note 20 at 53. In contrast, attachment theory supports a view that family ties are usually enduring so that children often can go home again without severe upset. See Waters & Noyes, supra note 165, at 512-13.
199. Id.
200. Id. at 882-83. In this case, the parent had been in a mental hospital in Maine and had very limited contact with her child. The Connecticut Supreme Court upheld
In essence, they focus the court’s attention on the question of how difficult it will be for the child to move back to the parent’s home. 202

Unlike a removal case, this prong of a reunification case does require a “sliding scale” analysis: the closer the bond between the parent and the child, the less likely a court will find that a move will cause the child substantial harm. The corollary is also true. The closer the bond between the non-parent and the child, the more likely it will be that the court will find that a move will cause emotional trauma to the child.

The “impact on the child” approach incorporates the guidance that Justice Parskey offered in the McGaffin dissent 203 and is consistent with the court’s statement in Perez. 204 Both opinions endorsed the concept that it takes something more than normal adjustment difficulties to rebut the presumption in favor of a parent. It is also quite close to the one Judge Teller used in the case of In re Jacqueline D. 205 when he considered how long the child had been separated from her father, how fully engaged she was in her life with her grandparents, and how unlikely it was that the father would be capable of assisting his daughter’s readjustment. 206

The distinction between “normal” adjustment difficulties and long-term harm is one that some of the other trial judges in Connecticut have failed to make. In Busa v. Busa 207 and Sherman v. Sherman, 208 for example, the judges recognized that the effect of the move was a relevant factor, but undercut the presumption by assuming any move was sufficiently difficult on the child to justify leaving the child with the non-parent. 209 The judges identified the

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201. Indeed, the Connecticut Supreme Court even called its rule for revocation of commitment cases a “presumption” in favor of allowing the child to return home and cited as its authority a leading third-party custody case from New York, In re Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976).

202. These factors are very similar to those enunciated in a new Connecticut law that established the standard for courts to consider when asked to reopen or set aside a termination of parental rights judgment. See 1993 Conn. Acts 170 (Reg. Sess.).


206. Id. Although he did not use these precise words, the judge clearly believed that Jacqueline would suffer long-term emotional harm if her father had custody. Id.


209. There is one unreported reunification case in Connecticut where the judge
correct factor but set too low a threshold for it properly to constitute detriment.\footnote{210}

2. Burden and Level of Proof

In guardianship and juvenile matters cases, the burden of proof is on the parent to prove his rehabilitation.\footnote{211} It makes sense to adopt this rule from those analogous cases for reunification cases that are the second stage of a case where a court has previously removed the child. The parent who had lost custody by court order in a third-party custody removal case must demonstrate his new parental capability by a preponderance of the evidence when seeking to restore custodial rights.

For reunification cases that are fresh judicial determinations of custody between the parent and the non-parent,\footnote{212} there is no basis appears to have correctly applied the impact factor. In Yeargan v. Merrick, FA 90-0271030, Judicial District of Fairfield at Bridgeport, Nov. 27, 1990 (Hauser, J.), the judge returned two young sons to their mother, who had previously placed her sons with distant family members after a difficult separation from her abusive husband and the sudden death of her father. At the time of the court’s decision, the boys had been in Pennsylvania for almost two years, having had only sporadic contact with their mother. The non-parents had taught the children to call them “Mom and Dad” and had changed the boys’ first and last names. After the court determined that the mother was a fit parent, the court ordered the return of the boys, even though they surely faced a challenging adjustment period. To assist them, the court had already increased visitation, and, in his final order, he also ordered the mother to continue in counseling for at least two years and to include her sons in the therapy.

\footnote{210} There is significant caselaw in other jurisdictions supporting the “impact on the child” definition of detriment in reunification cases. The Supreme Court of Colorado held that the presumption in favor of the parent is rebutted if removing a child from a non-parent and awarding custody to the parent “would be extremely detrimental to the child and would likely result in permanent damage to her personality and development.” Root v. Allen, 377 P.2d 117, 121 (Colo. 1962). Similarly, Virginia measures whether returning custody to a parent would have a “significant harmful long term impact” on the child. Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986). In Florida, as in Connecticut, a court may award custody to a non-parent if awarding custody to a parent would cause detriment to the child. \textit{In re} Guardianship of D.A. McW, 460 So. 2d 368, 370 (Fla. 1984). The Florida courts have defined detriment as: circumstances that produce or are likely to produce lasting mental physical or emotional harm. . . . [It is] more than the normal trauma caused to a child by uprooting him from familiar surroundings such as often occurs by reason of divorce, death of a parent or adoption. It contemplates a longer term adverse effect that transcends the normal adjustment period in such cases. \textit{In re} Guardianship of Matzen, 600 So. 2d 487, 490, (Fla. Dist. Ct. App. 1992).

In Minnesota, proof that an emotionally-delayed child would suffer “severe emotional and behavioral regression” if she were moved again was sufficient to overcome the presumption. Durkin v. Hinich, 442 N.W.2d 148, 153 (Minn. 1989).

\footnote{211} \textit{In re} Juvenile Appeal (Anonymous), 420 A.2d 875, 881 (Conn. 1979).

\footnote{212} A reunification scenario where there has been no prior court-ordered re-
to place the burden of proof on the parent.\textsuperscript{213} If the non-parent raises the issue of the parent's fitness, he or she should have the burden of proving the parent's incapacity, preferably by clear and convincing evidence,\textsuperscript{214} exactly as he or she would be required to do in a removal case.\textsuperscript{215}

Once the parent's capability is established, the court must determine the degree and type of impact that a move would have on the child. It should be the non-parent's burden\textsuperscript{216} to prove by a preponderance of the evidence that the move will cause a serious impact on the child. This allocation of the burden makes the approach consistent with the cases in the probate courts and juvenile matters division.

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\textsuperscript{213} This would be true even for cases where the parent placed his child voluntarily with the non-parent. The rationale for "preferring" this parent by not requiring him to prove his capability is to reward him for recognizing his own limitations and choosing to safeguard his child's needs.

\textsuperscript{214} See supra notes 182-186 and accompanying text.

\textsuperscript{215} Once again, any clear and convincing standard would require legislative amendment to the third-party custody statute. For the first prong of a reunification case, it is appropriate to require the non-parent to prove the same type of evidence by the same quantum of evidence as in a removal case. Requiring the non-parent to prove the parent's incapacity guarantees consistent standards for all initial judicial decisions that relate to a parent's fitness to care for the child. It is possible that a parent, by placing the child voluntarily, has drawn the line for acceptable parenting at a level that is higher than where a court would have set the limit in a contested proceeding. The parent should not be penalized for wanting to make sure the child received more than he could provide.

\textsuperscript{216} Because of the Connecticut Supreme Court's decision in Perez v. Perez, 561 A.2d 907 (Conn. 1989), the burden of proof now may be on the parent in a reunification case if he files the case as a modification rather than as a habeas corpus case. The presumption, because it is a substantive policy statement, requires a method for deciding these cases more enduring than that adopted in Perez. Professor McCormick recognizes that, although courts usually assign the burden of persuasion to the party seeking to change the current state of affairs, this is not always true if special policy considerations are relevant. Strong, supra note 105, § 337 at 570-71.
C. The Court’s Obligation to Protect the Parent’s Chance for Reunification

The presumption in favor of a parent requires a judge to consider more than just whom he or she will choose as the custodian. The presumption states a policy in favor of family preservation that also places a responsibility on the superior court judges to actively protect the bonds between parent and child. Yet again, this policy is no different than that which guides the probate judges and juvenile matters judges.217

When Probate Judge Kurmay removed a mother as guardian,218 he retained jurisdiction over the matter, ordered liberal but structured visitation, and ordered the parent and child to undergo counseling, both individually and jointly. The court monitored the case closely. Three years later, the mother achieved the necessary level of capability that enabled the court to reinstate her guardianship rights. It was not too late to do so, in part because the judge did everything in his power to protect the relationship between mother and daughter.

It is this kind of approach that the superior court judges must take in third-party custody cases. If removal is necessary, then the court must clearly articulate its basis for finding the parent lacked the capability to care for the child. The decision should state exactly what the parent must do in order to regain custody. The court should also order the parties, including the child, to participate in counseling whenever it is even arguably appropriate.219 Finally, the court should order the maximum amount of appropriate visitation between parent and child, including overnight visits, so that the child will maintain a sense of the parent’s house as “home.”220

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217. The Connecticut Supreme Court has recognized that the private parties seeking guardianship of a child do not have the same affirmative obligation to provide services to the parents that the state does in abuse and neglect commitment cases. In re Jessica M., 586 A.2d 597, 602-03 (Conn. 1991). This truism, however, does not relieve the judges from using the full breadth of their authority and range of remedies to assist parents in enhancing their parental capacity for good child care.


219. While the court is not in a position to transport forcibly people to their counseling sessions, it is still useful to issue counseling orders. If a parent does not follow through with counseling, that failure may form the basis for the court’s subsequent refusal to reunite the parent and child. The court can also adjudicate the custodial non-parent in contempt in an extreme case where the non-parent is obstructing the child’s counseling.

220. The court should recognize that a non-parent who wishes to retain custody permanently has a vested interest in undermining the relationship between parent and
Judge West took just this approach in *Foster v. Devino*. He wrote that he believed that the grandparents' custody should continue for only so long as is absolutely necessary. The opinion lays out a blueprint for the mother: if she follows it, the judge will most likely be able to send her children back home; if not, the children will remain with their grandparents until it is too late for them to go back.

Judges deciding reunification cases should consider whether ordering a structured period of transition would be an appropriate step. If the sole consideration is the impact of the move on the child, then the judge sometimes holds the key to the successful readjustment. Rather than denying custody to a parent because there is a rupture in the parent-child relationship, the court should take an active role in attempting to repair that bond. Especially where the relationship has been weakened by distance or visitation disputes with the non-parent, a period of gradual transition may be entirely appropriate. As the Connecticut Supreme Court said in *Perez*, the court must give a parent a reasonable opportunity to nurture a poor relationship between parent and child.

**Conclusion**

This article identifies several goals that establish the framework for deciding how best to resolve third-party custody cases. The first is that the standard must acknowledge the constitutionally protected rights of families to stay together whenever feasible.
Courts must decide when a child's interests diverge from those of the parent and then must find a way to balance these conflicting rights fairly. Second, courts must implement the legislatively mandated policy when the standard is pronounced by statute, as it is in Connecticut. Legislative intent is the touchstone for construction. When the legislature does not articulate every aspect of its policy exhaustively, then the courts must fill in any gaps in order to further the task the legislature started, not frustrate it. Finally, when other statutory schemes exist, and there is a significant similarity and overlap in the cases that reach each of the courts, the courts must strive towards consistency, looking beyond the quirks of jurisdiction and the procedural posture of cases.

Achieving these goals requires the initial recognition that, in a parental presumption jurisdiction such as Connecticut, the court's job in every third-party custody case is to consider whether there will be substantial emotional or physical harm to the child if she remains in or returns to the parent's custody. The court may not define its task as a comparison of the two environments in the search for the most benefits to the child or the better caretaker. Since the type of harm and how to measure it varies considerably with whether the case is a removal or a reunification case, the second step requires recognition that the definition of detriment and method of rebuttal of the presumption will also vary.

In a removal case, the court should only award custody to the non-parent if he or she has proven that the parent is incapable of meeting the child's basic, minimum needs. In determining the efficacy of removal, it is only "detrimental to the child" to be in the care of a parent who cannot care for her adequately. If the judge concludes that removal is necessary, the opinion should state clearly the grounds for removal and should fashion visitation and counseling orders that will foster an on-going, and hopefully improved, parent-child relationship.

When a parent seeks to be reunited with the child, the court must first distinguish between those cases where the removal was by a prior court order based on a finding of parental incapability and those where the separation was the result of some voluntary action by the parent. This distinction dictates whether the parent must first prove his capability by a preponderance of the evidence. Assuming that the court finds that the parent meets the minimum standard of parental capability, the sole remaining issue is an evaluation of the psychological impact that the move back to the parent would have on the child. The non-parent has the burden of proving
by a preponderance of the evidence that the change in custody would have a negative effect on the child of a magnitude in excess of usual adjustment difficulties. It is "detrimental to the child" to be reunited with her parent only if the move would cause substantial long-term psychological harm to the child.

Third-party custody cases require trial courts to decide precisely when to separate parent and child and when to refuse to reunite them. The judges are often barraged with information and opinions from the competing custodians, the child, their counsel, and expert witnesses. With only the ambiguous concept of detriment as guidance, it has proven to be a difficult task for the court to find, amidst all that noise, the few truly relevant factors in a third-party custody case. This Article provides the policy and evidentiary considerations and specific definitions for deciding these cases fairly for the adults, while protecting the child caught in the middle.