PAULA J. FISH *v.* ANDREW J. FISH, JR.
(SC 17500)

Borden, Norcott, Katz, Palmer, Vertefeuille, Zarella and Sullivan, Js.*

Argued September 18, 2006—officially released January 15, 2008

Louis Kiefer, for the appellant (defendant).

Robert J. Kor, with whom was *Emily J. Moskowitz*, for the minor child.

Campbell D. Barrett, *Steven R. Dembo* and *Justine Rakich-Kelly* filed a brief for the Children's Law Center as amicus curiae.

Opinion

ZARELLA, J. In this postdissolution child custody proceeding, the issue before the court is whether a third party[1] must satisfy the jurisdictional pleading requirements and burden of persuasion articulated in *Roth* v. *Weston*, 259 Conn. 202, 234–35, 789 A.2d 431 (2002), when seeking the custody of a minor child over the objection of a fit parent.[2] The defendant, Andrew J. Fish, Jr., appeals from the judgment of the Appellate Court, which affirmed the order of the trial court modifying the original custody order[3] by awarding joint custody to the plaintiff, Paula J. Fish,[4] and the child's paternal aunt, intervenor Barbara Husaluk, and directing that the child's primary residence be with Husaluk in Aspen, Colorado. The defendant claims that the trial court lacked jurisdiction to grant Husaluk's motion to intervene and improperly awarded her custody because she failed to allege and prove by clear and convincing evidence the facts required by *Roth* for third party visitation. These facts include a relationship with the child akin to that of a parent and real and substantial emotional harm analogous to the harm required to prove that a child is "neglected, uncared-for or dependent" under the temporary custody and neglect statutes.[5] General Statutes § 46b-129; see also General Statutes § 46b-120; *Roth* v. *Weston*, supra, 234–35. We conclude that the pleading requirements and burden of proof that we articulated in *Roth* are not constitutionally mandated in third party custody proceedings, which present issues that are different from those raised in visitation proceedings. We also conclude, however, that the trial court improperly failed to apply a standard of harm more stringent than the "best interests of the child" when it granted Husaluk's motion to intervene and awarded her custody over the opposition of the defendant. Accordingly, we reverse in part[6] the judgment of the Appellate Court.

The following facts are set forth in the opinion of the Appellate Court. "The parties[7] were married on June 21, 1985, and a child was born of the marriage in 1989.[8] The marriage was dissolved on March 5, 1996, after which the parties shared joint custody of the child with an evenly divided parenting arrangement. There have been frequent contentious disputes with respect to the child's educational placement and the payment of tuition and child support. In June, 2001, a guardian ad litem was appointed for the child, and she continues to serve in that capacity as well as serving as the child's attorney since December, 2002.

"In May, 2002, [when the parties' daughter was thirteen years old] the defendant . . . [filed] a motion to modify custody in which he sought sole custody of the child with supervised visitation by the plaintiff. The court entered orders for a custody evaluation and ordered that the child live for the remainder of the

school year with her maternal aunt, Pamela Martinsen, who lives in Connecticut. The court also ordered that the child spend the summer of 2002 in Aspen, Colorado, with her paternal aunt, Husaluk. In early December, 2002, there was another flurry of activity involving custody and visitation. The court ordered the temporary placement of the child with Martinsen and unsupervised weekend visitation by the parties on rotating weekends. Four days later, following an emergency request by the guardian ad litem, the court modified the visitation order to reflect that the child could elect the extent and the circumstances of her visitation with the defendant.

"Trial in this matter began on December 13, 2002, and continued on March 3, April 21, May 12, 19 and 29, and July 8, 2003. During the course of the trial, the guardian ad litem recommended that custody and placement of the child with Husaluk in Aspen, Colorado, would be in the child's best interest. The plaintiff, who had had a double mastectomy and was undergoing chemotherapy to treat her breast cancer throughout the trial, agreed with the guardian ad litem's proposed orders. Both Husaluk and Martinsen filed motions to intervene during the course of the trial,[9] which the court granted. Following trial, the court ordered, inter alia, that Husaluk and the plaintiff share joint custody of the child, with the child's primary residence [to be] in Aspen, Colorado, with Husaluk during her high school years, which were about to commence. The court ordered visitation with each of the parties during school vacations . . . but specifically gave the child the choice of whether to spend overnight visits with the defendant. The court ordered that the guardian ad litem remain appointed to the child for four years 'should any issues arise . . . .'

"With respect to the custody of the child and its reasons for awarding joint custody to the plaintiff and Husaluk, the court made exhaustive findings of fact, which we excerpt and summarize from its August 1, 2003 memorandum of decision. Since the dissolution of the parties' marriage when the child was four years old, 'she has been the subject of an intense battle between the two parents over their ownership rights in her. She has, by her own account, constantly been "put in the middle," has been incessantly grilled by each parent after time spent with the other and has been bombarded by what she calls "guilt bombs" from each parent.'

"The court found that both parties had put their own interests before the child's well-being. In addition, the court found that the defendant had failed to provide a clean and appropriate home for the child, demonstrated inappropriate behavior of a sexual nature in the child's presence, kept a dangerous dog in his home and, in sum, had emotionally neglected the child. The court stated: 'In the plaintiff's home, [the child] has had to

endure her mother's attempts to make her feel guilty over the time spent at the defendant's home. In the defendant's home, she has had to deal with her father's incessant attempts to get her to his side. At his house, she also has been exposed to a filthy and unkempt environment, with multiple cats, cat feces and urine odors throughout the home.'

"The court also found that there was a history of conflict between the child and the defendant, and a history of inappropriate behavior by the defendant toward the child. For example, the court credited the child's testimony that the defendant walked around the house with an open bathrobe exposing his genitals in her presence and that he joked about going to a nudist colony with her. The defendant also made other inappropriate and suggestive comments, including once suggesting at a mall that she wear a 'see-through outfit.' The child also testified that the defendant, when angered, lost control of himself entirely, striking himself and running up and down stairs. She also testified that the defendant drank wine almost every day and that alcohol rendered his moods unpredictable. The child was adamant in her desire not to stay at the defendant's house overnight and expressed no desire to live with him.

"The court also found that after living with Martinsen and, later, Husaluk, the child had been away from her parents' battles and had seen how other people live in relative peace and in a supportive and nurturing environment. Those experiences increased the child's yearning for stability and calm in her family life, which she never had enjoyed with her parents. The court noted that, '[m]ost compelling, at one point during her testimony, the child asked the court to please emancipate her.' The child's aunts, Martinsen and Husaluk, impressed the court as loving and nurturing women who have helped the child 'develop a voice for herself,' which she had lacked while in her parents' care. Martinsen, Husaluk, the plaintiff, the child and the guardian ad litem agreed that it was in the child's best interest that she live with Husaluk in Aspen. While in Aspen the previous summer, the child thrived, working at the Husaluk family business, participating in sports and making new friends. The defendant, in contrast to the child's aunts, refused to pay for the child's airplane ticket for her trip home because the child had refused to stay overnight at his house. Husaluk paid for the ticket.

"The court credited the testimony of John Herd, a teacher and administrator at the child's school in Connecticut, who testified that after returning from Aspen, the child's emotional state and the quality of her work in school improved. James Black, a child and adolescent psychiatrist who conducted an evaluation of the child and the parties, also recommended that the child return to Aspen to reside with Husaluk. Black testified that

moving to Aspen would be the only thing that could insulate the child from the conflict that the parties have continued to wage and that, in all of his years of practice, he never had recommended sending a child away from her parents. Black recommended that it would be better for the child's development for her to stay with Husaluk with joint custody with the plaintiff than for her to attend a boarding school or to enter foster care, each of which the defendant had suggested.

"The court concluded that '[i]t is clear . . . that there exists a deep antagonism between the two parents that has little to do with [the child], which has caused them to place their own needs ahead of their daughter's. However, since the start of this case, the plaintiff's relationship with her daughter has improved considerably. She has come to realize that her daughter's placement with [Husaluk] in Colorado for the next four years of high school is in the child's best interest. Unfortunately, the same cannot be said of the defendant. He is a controlling individual who believes that he is the only one qualified to decide what is in [the child's] best interest. . . . [H]e is incapable of working with the [plaintiff] or either of the aunts, including his own sister [Husaluk], to promote the child's best interest. . . . It is clear to this court that this child has been emotionally neglected by the defendant. He has had many opportunities and ample time to improve the condition of his home and has chosen not to. . . . The defendant does not hear his daughter and gives little credence to her opinions, ideas and needs. The court is persuaded that this fourteen year old is quite capable of making an intelligent, well thought out decision with respect to her living situation.' " *Fish* v. *Fish*, 90 Conn. App. 744, 747–52, 881 A.2d 342 (2005). The trial court thus concluded that it would be in the child's best interests to award joint custody to the plaintiff and Husaluk.

In its subsequent orders, the court directed that the plaintiff and Husaluk consult with the defendant regarding "all major events affecting the child's life," with Husaluk having final decision-making authority. The court also directed that the child return to Connecticut for school vacations and for one month during the summer. The court further ordered: "It is . . . expected that when the child visits Connecticut, she shall be encouraged to spend equal time with each of her parents . . . . However, [due to] . . . concerns about the physical condition of the defendant's home and the dog, it shall be the child's decision whether she chooses to spend overnights with her father." The court ordered the plaintiff and the defendant to share the cost of transporting the child to and from Connecticut and stated that "[t]here shall be reasonable telephone and e-mail contact between the child and her parents. It is hoped that both parents shall continue to have a full and active role in providing a sound ethical, economic, and educational environment for the child when she is

in their care. . . . The parents shall exert their best efforts to work cooperatively with [Husaluk] to develop future plans for the child consistent with the best interests of the child and to amicably resolve such disputes as may arise from time to time."

On appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court lacked jurisdiction over Husaluk's motion to intervene and improperly awarded her custody because she had failed to satisfy the heightened pleading requirements and burden of persuasion set forth in *Roth*. *Fish* v. *Fish*, supra, 90 Conn. App. 752. The defendant argued that the *Roth* standard should apply to third party intervention petitions and custody awards because custody intrudes on the rights of a fit parent at least as much as visitation. See id., 756. The Appellate Court disagreed on the ground that the visitation standard was intended to impose additional requirements so as to avoid invalidating the overly broad visitation statute[10] on constitutional grounds, whereas the defendant in the present case had not challenged the relevant custody statutes, in particular, General Statutes § 46b-56b,[11] as unconstitutional. See id. The court further noted that the paramount concern in *Roth* was the right of a fit parent to raise a child free from interference by others; id., 756; but that the principal concern in custody cases is the "best interest of the child." (Internal quotation marks omitted.) Id., 757. The court thus concluded that, although "the defendant enjoys the rights of a parent recognized in *Roth* and other cases, the jurisdictional pleading requirements and heightened burden of persuasion of *Roth*, which are specific to cases involving third party petitions for visitation over the objection of a fit parent, are inapposite to this contested custody case . . . ." Id., 752. The Appellate Court finally observed that the trial court had determined that it was in the child's best interest to award joint custody to the plaintiff and Husaluk pursuant to the governing custody statutes, namely, General Statutes §§ 46b-57,[12] 46b-56[13] and 46b-56b. The Appellate Court thus concluded that the trial court properly had declined to apply the standard articulated in *Roth*. Id., 757.

In his appeal to this court, the defendant renews his claim that the trial court improperly failed to apply the visitation standard to Husaluk's motion to intervene and to the modified award of custody. We agree with the defendant that third party custody decisions require the application of a standard more demanding than the "best interests of the child." We nonetheless conclude that the judicial gloss we placed on the visitation statute in *Roth* should not be applied to the relevant third party custody statutes because it is not constitutionally necessary to protect the liberty interests of the parents. The *Roth* standard also gives insufficient weight to the countervailing interests of the child, who may not be in actual physical danger but may be destined to endure

continued harmful treatment by the parent if the trial court lacks adequate flexibility and discretion to tailor orders of custody to the unique facts of each case. Finally, it contravenes the intent of the legislature, which did not contemplate a standard of harm or burden of proof for third party custody proceedings as demanding as the standard articulated in *Roth*.

I

The trial court's determination of the proper legal standard in any given case is a question of law subject to our plenary review. See, e.g., *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 96–97, 801 A.2d 759 (2002).

We begin our analysis by examining the reasoning in *Roth*, in which the trial court granted the petitioners, the maternal grandmother and maternal aunt, visitation with the defendant's two minor children following their mother's death. See *Roth* v. *Weston*, supra, 259 Conn. 204. In his appeal to this court, the defendant in *Roth* argued that, in light of the United States Supreme Court's decision in *Troxel* v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the Connecticut visitation statute, which provides that the court may grant the right of visitation "with respect to any minor child or children to any person, upon an application of such person . . . according to the court's best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable"; General Statutes § 46b-59; was either facially unconstitutional or unconstitutional as applied to the facts of the case. *Roth* v. *Weston*, supra, 205. We agreed that this state's visitation statute, like the Washington visitation statute at issue in *Troxel*,[14] "[did] not adequately acknowledge the status of parents' interest in the care, custody and control of their children, as perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." (Internal quotation marks omitted.) Id., 216, quoting *Troxel* v. *Granville*, supra, 65. Nevertheless, rather than invalidating the statute, we searched for a construction that would accomplish the legislature's purpose and declared that a court could exercise jurisdiction over a petition for third party visitation against the wishes of a fit parent only if the petition contains "specific, good faith allegations that the petitioner has a relationship with the child that is similar in nature to a parent-child relationship. The petition must also contain specific, good faith allegations that denial of the visitation will cause real and significant [emotional] harm to the child. As we have stated, that degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by §§ 46b-120 and 46b-129,[15] namely, that the child is 'neglected, uncared-for or dependent.'[16] The degree of specificity of the allegations

must be sufficient to justify requiring the fit parent to subject his or her parental judgment to unwanted litigation. Only if these specific, good faith allegations are made will a court have jurisdiction over the petition.

"Second, once these high jurisdictional hurdles have been overcome, the petitioner must prove these allegations by clear and convincing evidence. Only if that enhanced burden of persuasion has been met may the court enter an order of visitation. These requirements thus serve as the constitutionally mandated safeguards against unwarranted intrusions into a parent's authority." *Roth* v. *Weston*, supra, 259 Conn. 234–35.

The defendant's claim that the trial court should have applied the heightened standard in *Roth* to Husaluk's motion to intervene and to its custody award implies that the custody statutes are facially unconstitutional and that any lesser standard is insufficient to protect the defendant's constitutional rights. Accordingly, although he did not frame his claim in constitutional language, it is essentially constitutional in nature. We therefore examine the relevant custody statutes to determine whether they provide fit parents who oppose third party custody petitions with sufficient protection to survive a constitutional challenge and, if not, whether § 46b-56b, in particular, should be subject to the same judicial gloss that we placed on the visitation statute at issue in *Roth*.

II

In discussing the constitutional basis for the protection of parental rights, the United States Supreme Court observed in *Troxel* that "[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this [c]ourt. More than [seventy-five] years ago, in *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 401 [43 S. Ct. 625, 67 L. Ed. 1042] (1923), we held that the liberty protected by the [d]ue [p]rocess [c]lause includes the right of parents to establish a home and bring up children and to control the education of their own. Two years later, in *Pierce* v. *Society of Sisters*, 268 U.S. 510, [534–35, 45 S. Ct. 751, 69 L. Ed. 1070] (1925), we again held that the liberty of parents and guardians includes the right to direct the upbringing and education of children under their control. . . . We returned to the subject in *Prince* v. *Massachusetts*, 321 U.S. 158 [64 S. Ct. 438, 88 L. Ed. 645] (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. It is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Id., [166]." (Citation omitted; internal quotation marks omitted.) *Troxel* v. *Granville*, supra, 530 U.S. 65–66. "In light of this extensive precedent, it cannot now be doubted

that the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Id., 66.

Connecticut courts likewise have recognized the constitutionally protected right of parents to raise and care for their children. See, e.g., *Denardo* v. *Bergamo*, 272 Conn. 500, 511, 863 A.2d 686 (2005); *Crockett* v. *Pastore*, 259 Conn. 240, 246, 789 A.2d 453 (2002); *Roth* v. *Weston*, supra, 259 Conn. 216; *In re Baby Girl B.*, 224 Conn. 263, 279–80, 618 A.2d 1 (1992). When legislation affects a fundamental constitutional right, it must be strictly scrutinized. See, e.g., *Roth* v. *Weston*, supra, 218; *Castagno* v. *Wholean*, 239 Conn. 336, 344, 684 A.2d 1181 (1996), overruled on other grounds by *Roth* v. *Weston*, supra, 202. We therefore study the pertinent custody statutes to determine whether they are narrowly tailored to achieve a compelling state interest. See *Roth* v. *Weston*, supra, 218; see also *Keogh* v. *Bridgeport*, 187 Conn. 53, 66, 444 A.2d 225 (1982) ("[w]hen a statutory classification . . . affects a fundamental personal right, the statute is subject to strict scrutiny and is justified only by a compelling state interest"). This requires consideration of standing, the standard of harm that the trial court must apply in deciding third party intervention petitions and custody awards, and the proper burden of proof.

III

We repeatedly have recognized that when "fundamental rights are implicated . . . standing serves a function beyond a mere jurisdictional prerequisite. It also ensures that the statutory scheme is narrowly tailored so that a person's personal affairs are not needlessly intruded upon and interrupted by the trauma of litigation."[17] *Roth* v. *Weston*, supra, 259 Conn. 219. Accordingly, a strict scrutiny analysis requires that the statutory scheme be narrowly drawn with respect to the class of persons who may seek to intervene in a custody proceeding or to whom custody may be awarded by the court.[18] See id.

Three statutes govern third party custody determinations. General Statutes § 46b-56 (a) provides that, in making or modifying an order of custody, the court may award custody to "either parent or to a third party . . . ." Additionally, General Statutes § 46b-57 provides that the trial court "may allow any interested third party or parties to intervene upon motion" in any existing custody proceeding and "may award full or partial custody . . . of such child to any such third party . . . ." Finally, General Statutes § 46b-56b provides that, in disputes regarding "the custody of a minor child involving a parent and a nonparent," there shall be a rebuttable presumption that it is in the best interest of the child for the parent to retain custody unless such custody is shown to be "detrimental" to the child.

The term "third party" is not defined in the foregoing statutes or in any other related statutes. The legislative history of the statutes sheds no additional light on the matter. As we stated in *Castagno*, "courts are bound to assume that the legislature intended, in enacting a particular law, to achieve its purpose in a manner which is both effective and constitutional. . . . [T]his presumption of constitutionality imposes upon the trial court, as well as this court, the duty to construe statutes, whenever possible, in a manner that comports with constitutional safeguards of liberty." (Citation omitted; internal quotation marks omitted.) *Castagno* v. *Wholean*, supra, 239 Conn. 344–45.

When construing similarly broad language concerning third party visitation in *Roth*, we noted that the 1983 amendment to the visitation statute extending standing to "any person";[19] Public Acts 1983, No. 83-95; reflected "the legislature's recognition that persons other than parents may have substantial relationships with children that warrant preservation." *Roth* v. *Weston*, supra, 259 Conn. 220. We also recognized that, "in many households, grandparents, as well as people who have no biological relationship with a child, undertake duties of a parental nature and that states have sought to ensure the welfare of children by protecting those relationships. Some states have done this expressly . . . while others have done so by judicial gloss. . . .

"Therefore, we acknowledge that a person other than a blood relation may have established a more significant connection with a child than the one established with a grandparent or some other relative. Conversely, we recognize that being a blood relation of a child does not always translate into that relative having significant emotional ties with that child. Indeed, as § 46b-59 implicitly recognizes, it is not necessarily the biological aspect of the relationship that provides the basis for a legally cognizable interest. Rather, it is the nature of the relationship that determines standing." (Citations omitted.) Id., 220–21.

We thus concluded in *Roth* that, "in light of the presumption of parental fitness under *Troxel*, parents should not be faced with unjustified intrusions into their decision-making in the absence of . . . proof of a [parent-like] relationship . . . . The extension of statutory rights to persons other than a child's parents comes with an obvious cost. *Troxel* v. *Granville*, supra, 530 U.S. 64. Proof of the nature of a parent-like relationship between a person seeking visitation and the child would provide the jurisdictional safeguard necessary to prevent families from having to defend against unjustified petitions for visitation. Accordingly, any third party . . . seeking visitation must allege and establish a parent-like relationship as a jurisdictional threshold in order both to pass constitutional muster and to be consistent with the legislative intent." (Cita-

tion omitted.) *Roth* v. *Weston*, supra, 259 Conn. 221–22.

The relevant statutes concerning visitation and custody are overly broad in exactly the same fashion; they fail to define with particularity those persons who may seek visitation and custody other than parents. For this reason, as in the case of visitation, a literal application of the custody statutes could place them in "constitutional jeopardy." *Castagno* v. *Wholean*, supra, 239 Conn. 345. Accordingly, we conclude that, to avoid constitutional infirmity, the standing requirement that a third party allege a parent-like relationship with the child should be applied for all of the reasons described in *Roth* to third party custody awards and to third parties seeking intervention in existing custody proceedings.

IV

A

We next consider the harm that a third party must allege and prove to intervene in a custody proceeding or that the trial court must find to justify a third party custody award over the objection of a fit parent. We first note that third party custody disputes differ from those in which both parents seek custody because, in the latter case, each party possesses a constitutionally protected parental right. See *McDermott* v. *Dougherty*, 385 Md. 320, 353, 869 A.2d 751 (2005). In cases in which both parents seek custody, "[n]either parent has a superior claim to the exercise of [the] right to provide care, custody, and control of the children. . . . Effectively, then, each fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the *sole standard* to apply to these types of custody decisions. Thus, in evaluating each parent's request for custody, the parents commence as presumptive equals and a trial court undertakes a balancing of each parent's relative merits to serve as the primary custodial parent; the child's best interests [tip] the scale in favor of an award of custody to one parent or the other.

"Where the dispute is between a fit parent and a private third party, however, both parties do not begin on equal footing in respect to rights to care, custody, and control of the children.[20] The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of others. Generally, absent a constitutional statute, the non-governmental third party has no rights, constitutional or otherwise, to raise someone else's child." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id.

Mindful of the parent's constitutional rights, we concluded in *Roth* that Connecticut's third party visitation statute, without a judicial gloss, was unconstitutional and interfered with the fundamental right of parents to raise and care for their children because it was too

broadly written and provided no standard to guide the court in making a visitation decision, other than the best interests of the child. *Roth* v. *Weston*, supra, 259 Conn. 222–23. We specifically noted that the visitation statute, *on its face*, both "ignore[d] the presumption that parents act in the best interests of their children" *and* "allow[ed] parental rights to be invaded by judges based solely [on] the judge's determination that the child's best interests would be better served if the parent exercised his parental authority differently." Id. Section 46b-56b does not suffer from either of these deficiencies. Inclusion in the statute of a rebuttable presumption[21] in favor of parental custody addresses the constitutional flaw that contributed to the defeat of the Washington visitation statute at issue in *Troxel* and that prompted this court, in part, to place a judicial gloss on § 46b-59. See *Troxel* v. *Granville*, supra, 530 U.S. 72–73; *Roth* v. *Weston*, supra, 232–35. General Statutes § 46b-56b also provides that the presumption may be rebutted only by demonstrating that parental custody would be "detrimental to the child . . . ." The rebuttable presumption and the standard of harm articulated in the third party custody statute thus protect parental rights because they preclude the court from awarding custody on the basis of a purely subjective determination of the child's best interests or the judge's personal or lifestyle preferences. As a result, we conclude that the statute is facially constitutional.

The defendant nonetheless argues that the standard of harm articulated in *Roth* should apply in third party custody proceedings because *Roth* declared that "[v]isitation is a limited form of custody during the time the visitation rights are being exercised . . . ." (Internal quotation marks omitted.) *Roth* v. *Weston*, supra, 259 Conn. 229 n.13. This comparison is overly simplistic, however, because it improperly focuses on the time that the child is away from the parent and does not consider that third party visitation and custody intrude on the parental liberty interest in entirely different ways. Specifically, visitation petitions challenge the decision of a fit parent who is presumed to be acting in the child's best interest to deny or limit the petitioner's request for visitation. See *Troxel* v. *Granville*, supra, 530 U.S. 72–73. The harm alleged in a visitation petition results from the child's lack of access to the petitioner rather than from the parent-child relationship, which is deemed to be beneficial. See *In re Juvenile Appeal (84-AB)*, 192 Conn. 254, 263, 471 A.2d 1380 (1984). In contrast, the harm alleged in a third party custody petition arises from the fundamental nature of the parent-child relationship, which may be emotionally, psychologically or physically damaging to the child. Consequently, in light of the fact that a third party custody petition *directly challenges* the overall competence of the parent to care for the child, the standard employed to protect the liberty interest of the parent

must be more flexible and responsive to the child's welfare than the standard applied in visitation cases, in which the underlying parent-child relationship is not contested.[22] See *In re Juvenile Appeal (83-CD)*, 189 Conn. 276, 287, 455 A.2d 1313 (1983) (when "the child's interest no longer coincides with that of the parent . . . the magnitude of the parent's right to family integrity" is diminished). These considerations weigh against the application of the *Roth* standard of harm in third party custody proceedings because the requirements articulated in *Roth* provide insufficient room for the judicial discretion necessary to formulate solutions that take into account the unique facts and circumstances of each particular case.

In addition, when this court had the opportunity to interpret the meaning of detriment to the child in a related context, it did not adopt a construction as restrictive as the standard of harm set forth in *Roth*. In *In re Joshua S.*, 260 Conn. 182, 184, 796 A.2d 1141 (2002), the rights of the named testamentary guardians of a neglected child were challenged by the department of children and families (department) and by the child's foster parents following the death of the child's natural parents. On appeal, we considered whether the department and the foster parents, to whom the trial court had awarded custody, had rebutted the presumption that appointment of the testamentary guardians would be in the child's best interest, which required a finding that it would be "detrimental" to the child to grant custody to the testamentary guardians. See id., 199. Noting that the standard of detriment employed in testamentary guardianship cases had been *imported directly from § 46b-56b*; see id., 201–202, citing *Bristol* v. *Brundage*, 24 Conn. App. 402, 406, 589 A.2d 1 (1991); we ultimately determined that "detriment may be shown, not just by demonstrating unfitness of the testamentary guardian . . . but by demonstrating conditions that would be damaging, injurious or harmful to the child." *In re Joshua S.*, supra, 207.

Other jurisdictions that utilize the detriment to the child standard in deciding third party custody petitions also rely on a less restrictive interpretation of the concept so as to give the court sufficient flexibility and discretion to address the unique and complicated circumstances that distinguish such cases. See *Turner* v. *Pannick*, 540 P.2d 1051, 1054 (Alaska 1975) ("the nonparent must show that it clearly would be detrimental to the child to permit the parent to have custody"); *In re Guardianship of D.A.McW.*, 460 So. 2d 368, 370 (Fla. 1984) ("custody should be denied to the natural parent only when such an award will, in fact, be detrimental to the welfare of the child"); *Bateman* v. *Johnson*, 818 So. 2d 569, 571 (Fla. App. 2002) ("[t]o deny a parent custody of his child based on a finding of detriment, the change in custody would have to be likely to produce mental, physical, or emotional harm of a lasting nature"

[internal quotation marks omitted]); *McDermott* v. *Dougherty*, supra, 385 Md. 325 ("the trial court must first find . . . that extraordinary circumstances exist which are significantly detrimental to the child remaining in the custody of the parent or parents, before a trial court should consider the 'best interests of the child' standard as a means of deciding the dispute"). In *In re Marriage of Allen*, 28 Wash. App. 637, 645–46, 626 P.2d 16 (1981), the Washington Court of Appeals observed that a balancing test more stringent than the "best interests of the child" was required to justify an award of custody to a nonparent. The court specifically concluded that, although great deference must be accorded to the constitutionally protected rights of parents; id., 646; those rights are not absolute and must yield to the fundamental rights of the child or important interests of the state in certain situations, as when "circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent . . . ." Id., 647. The court further declared: "In extraordinary circumstances, [in which] placing the child with an otherwise fit parent would be detrimental to the child, the parent's right to custody is outweighed by the [s]tate's interest in the child's welfare. There must be a showing of actual detriment to the child, something greater than the comparative and balancing analyses of the 'best interests of the child' test. Precisely what might outweigh parental rights must be determined on a case-by-case basis. But unfitness of the parent need not be shown." Id., 649.

A Louisiana appeals court construing former article 146 (B) of the Louisiana Civil Code, which provided that the court must find that parental custody would be detrimental to the child before awarding custody to a third party without parental consent, likewise declared that it was reasonable to assume that the legislature intended the standard to place greater emphasis on the welfare of the child and that the term detriment had been construed by other Louisiana courts as requiring a finding that that the child would experience "substantial harm" if returned to the parent. (Internal quotation marks omitted.) *Pittman* v. *Jones*, 559 So. 2d 990, 993 (La. App.), cert. denied, 565 So. 2d 451 (La. 1990). The court also observed that the concept of detriment in Louisiana was intended to embrace a wide range of situations so as to give the court sufficient freedom to craft an appropriate solution. See id.

When the California legislature enacted a similar statute providing that the court must "make a finding that an award of custody to a parent would be detrimental to the child"; (internal quotation marks omitted) *In re B. G.*, 11 Cal. 3d 679, 697, 523 P.2d 244, 114 Cal. Rptr. 444 (1974); the judiciary committee explained that, "[w]hat is detrimental has not been set forth with particularity. It is a nearly impossible task to devise detailed standards which will leave the courts sufficient flexibil-

ity to make the proper judgment in all circumstances . . . . *The important point is that the intent of the* [*l*]*egislature is that the court consider parental custody to be highly preferable. Parental custody must be clearly detrimental to the child before custody can be awarded to a nonparent.*" (Emphasis in original.) Id., 698.

Many of the same jurisdictions have cautioned, however, that third party custody awards should be granted only sparingly. In its subsequent interpretation of the statute, the California Supreme Court emphasized that, although the legislature had changed the parental preference doctrine from its former focus on parental unfitness to its present focus on detriment to the child, the legislature had not intended to change the judicial practice of awarding custody to a nonparent "only in unusual and extreme cases." Id. The court stated that custody would be awarded "to a nonparent against the claim of a parent only upon a clear showing that such [an] award is essential to avert harm to the child. A finding that such an award will promote the 'best interests' or the 'welfare' of the child will not suffice." Id., 699.

None of the foregoing jurisdictions has attempted to define detriment to the child more precisely, because to do so would limit a court's ability to weigh and balance the numerous factors that a court ordinarily must consider in making a finding of harm. See, e.g., id., 698. Nevertheless, most jurisdictions that employ a broader standard have observed that third party custody awards should be exceptional in nature and that the concept of detriment involves a type of analysis qualitatively different from that involving the "best interests of the child," a conclusion with which we agree. See, e.g., *Evans* v. *McTaggart*, 88 P.3d 1078, 1079, 1085 (Alaska 2004); *Murphy* v. *Markham-Crawford*, 665 So. 2d 1093, 1094 (Fla. App. 1995), review denied, 675 So. 2d 928 (1996); *Clark* v. *Wade*, 273 Ga. 587, 598–99, 544 S.E.2d 99 (2001); *Stockwell* v. *Stockwell*, 116 Idaho 297, 299–300, 775 P.2d 611 (1989); *Watkins* v. *Nelson*, 163 N.J. 235, 252–54, 748 A.2d 558 (2000); *Bailes* v. *Sours*, 231 Va. 96, 100, 340 S.E.2d 824 (1986); *In re Custody of Shields*, 157 Wash. 2d 126, 144–45, 136 P.3d 117 (2006).

The legislative history of § 46b-56b also reveals that the General Assembly rejected the more explicit standard of harm required for removal of the parent as guardian, which is similar to the type of harm that must be demonstrated under the temporary custody and neglect statutes, so that the court may give more weight to the child's welfare in determining whether a petitioner has rebutted the presumption in favor of parental custody.[23] In fact, the House amended the original third party custody bill for the express purpose of eliminating all references to the standard of harm and

the burden of proof required to rebut the presumption in favor of parental custody. See 28 S. Proc., Pt. 7, 1985 Sess., p. 2231, remarks of Senator Richard B. Johnston. In summarizing the amended bill, Senator Anthony V. Avallone stated that there was "a very, very large gap between what the original bill called for and what . . . the bill as amended would call for. We're still dealing with those magic words, the best interest of the child. . . . We are not talking about . . . an irrebuttable presumption [in favor of the parent]. We are talking about a rebuttable presumption. . . . *It does not give as much to the natural parent by any stretch of the imagination that the original bill would have.* . . . I think that this is a reasonable compromise." (Emphasis added.) Id., pp. 2241–42. When the bill was sent back to the House for final approval, Representative William L. Wollenberg stated that the best interests of the child would not be ignored and that the presumption in favor of parental custody would give "a little more weight" to the parent vis-á-vis the nonparent in a third party custody dispute. 28 H.R. Proc., Pt. 16, 1985 Sess., p. 5804. Representative Wollenberg also observed that, although the amended bill did not "go nearly as far" as the earlier version, it gave the parent "a leg up," so to speak, in a custody dispute with a third party. Id., p. 5800. The following year, the statute, which had been enacted without reference to any standard of harm, was amended with little debate to include the current language regarding detriment to the child. Public Acts 1986, No. 86-224. The legislative history therefore suggests that the legislature conceived the standard of harm to be applied in third party custody proceedings as broader and less restrictive than the standard employed in temporary custody and neglect proceedings because the latter standard had been eliminated from the original bill and various members of the legislature had expressed serious concerns regarding the welfare of the child during legislative debate on the matter.

In summary, we conclude that third party custody petitions challenge the liberty interest of a parent in a way that is fundamentally different from visitation petitions and that the judicial gloss we placed on the visitation statute in *Roth* should not be applied to § 46b-56b because it does not give adequate consideration to the welfare of the child, whose relationship with the parent is at issue in a custody proceeding because of its allegedly harmful effects. This is not the case in a visitation proceeding, in which the child's relationship with the parent has not been placed in issue. The constitutional question in a third party custody proceeding therefore must be framed and resolved in a manner that respects parental rights but that also takes the child's welfare more directly into account. Furthermore, the legislature, for all practical purposes, rejected the temporary custody and neglect standard that we adopted in *Roth* when it deleted language in the third

party custody bill that limited the definition of harm to the harm required for removal of a natural parent as guardian. Accordingly, we conclude that the statutory presumption in favor of parental custody may be rebutted only in exceptional circumstances and only upon a showing that it would be clearly damaging, injurious or harmful for the child to remain in the parent's custody. See *In re B. G.*, supra, 11 Cal. 3d 698. We add that this does not mean temporary harm of the kind resulting from the stress of the dissolution proceeding itself but significant harm arising from a pattern of dysfunctional behavior that has developed between the parent and the child over a period of time. Such a standard is not constitutionally infirm or susceptible to the criticism sometimes leveled against the "best interests of the child" test because it does not allow the court to apply its own "personal and essentially unreviewable lifestyle preferences . . . ." (Internal quotation marks omitted.) *Roth* v. *Weston*, supra, 259 Conn. 223. At the same time, the standard we adopt is narrowly tailored to limit the scope of intervention to those exceptional cases in which parental custody would result in significant harm to the child, thus serving the compelling state interest of protecting the liberty interests of the parents while remaining sensitive to the child's welfare.

B

The concurrence makes numerous arguments, beyond those made by the defendant, as to why the foregoing standard is insufficient to protect the constitutional rights of parents whose ability to care for their children is directly challenged in third party custody proceedings. These arguments may be grouped into two general categories. Arguments falling within the first category assert that, because custody intrudes to a far greater extent than visitation on the constitutionally protected right of parents to raise and care for their children, as well as on the reciprocal right of parents and children to family autonomy or family integrity, third party custody determinations should not be made pursuant to a standard less demanding than the standard we articulated in *Roth*. A corollary of this argument is that the child's right to protection does not rise to the level of a constitutional right equivalent to that of the parent unless the child's safety is endangered. Arguments falling within the second category assert that the standard we have adopted is too open-ended and ambiguous, thus providing trial courts with inadequate guidance and raising concerns relating to constitutional vagueness and the standard's arbitrary application. We disagree with these arguments.

1

The concurrence declares that the standard of harm we articulated in *Roth*—that the child be deemed neglected, uncared-for or dependent—should apply in third party custody proceedings because visitation is

merely a limited form of custody, and, therefore, both intrude on the liberty interest of the parent in essentially the same manner. See *Roth* v. *Weston*, supra, 259 Conn. 229 n.13 ("[v]isitation is a limited form of custody during the time the visitation rights are being exercised" [internal quotation marks omitted]). The concurrence also contends, however, that the more intrusive custody award has two additional consequences that further justify application of the visitation standard in *Roth*. The first is that, because third party custody removes a child from the parent for a longer period of time, it deprives the parent of the "quintessential rights of parenthood . . . ." These include the right to make medical, educational, religious and other decisions that affect the most fundamental aspects of the child's life during the custodial period. The second is that custody, unlike visitation, infringes on the broader but related right of family autonomy or family integrity, which encompasses the reciprocal right of parents and children in not being deprived of the intimacy of daily association.[24]

These observations, considered in isolation, are appealing. Considered in the context of real cases and controversies, however, they fail to recognize or address the ambiguity inherent in troubled family relationships and the variation that inevitably occurs when courts attempt to tailor orders of custody to the unique facts of each case. For example, although it is true that third party custody represents a greater infringement on parental rights than visitation, not all custody awards result in the complete elimination of parental control over the child's life for a significant period of time. Custody awards vary in the length of time that custody is vested in the third party, the amount of contact, if any, that the parent is allowed to retain and the nature and extent of the custodial rights granted. In the present case, the court ordered that joint custody reside with child's mother as well as with her paternal aunt, who also was assigned physical custody and ordered to consult with each parent before making major decisions affecting the child's welfare. Both parents therefore continued to participate in the child's life, albeit to varying degrees.[25]

More significantly, the concurrence fails to recognize the *qualitative* difference between visitation and custody that we discussed previously in this opinion, namely, that the parent-child relationship itself is at issue in a custody dispute, whereas it is not in a visitation dispute, in which the third party merely seeks the right to visit the child and the parents are presumed to be loving and caring. For this reason, the concurrence's observation that family autonomy or family integrity is undermined *as a result of* a third party custody award is unconvincing. Infringement of the right to family autonomy may be a key consideration in other family controversies, but the intimacy of daily association that

the concurrence seeks to protect by applying the more restrictive standard in *Roth* is also, ironically, the alleged *source of harm* that the court must examine to determine whether a third party custody award is justified. Thus, although family autonomy must be protected to the greatest possible extent, it simply is not logical to rely to any great degree on the right of family autonomy or family integrity as a reason for rejecting a third party custody award in favor of parental custody when the value of family autonomy is precisely what is placed in issue when a third party seeks custody.

The concurrence makes the related argument that the *Roth* standard of harm is necessary because, although a state may impose limitations on the constitutional right of a parent to raise his or her child, this right should not be abridged unless it has been demonstrated that the parent's constitutional interests are no longer paramount, as when the parent is deemed unfit or the child's safety will be jeopardized if the parent retains custody. To support this argument, the concurrence cites a number of statutes and cases from other jurisdictions that purportedly have adopted a more demanding standard that provides the proper degree of constitutional protection for the parental rights at stake.

This argument suffers from two defects. On the one hand, many of the statutes and cases cited by the concurrence describe standards of harm that are no more stringent than the standard articulated in the present case. See, e.g., La. Civ. Code Ann. art. 133 (1999) (parental custody would result in "substantial harm to the child"); Tex. Fam. Code Ann. § 102.004 (a) (1) (Vernon Sup. 2007) (parental custody "would significantly impair the child's physical health or emotional development"); *Evans* v. *McTaggart*, supra, 88 P.3d 1085 (parental custody would be "clearly detrimental" to welfare of child [internal quotation marks omitted]); *Murphy* v. *Markham-Crawford*, supra, 665 So. 2d 1094 (parental custody clearly would be "detrimental" to welfare of child); *Clark* v. *Wade*, supra, 273 Ga. 598 (parental custody would subject child to "physical harm or significant, long-term emotional harm"); *Stockwell* v. *Stockwell*, supra, 116 Idaho 300 (custody for appreciable period of time and best interests of child dictate that custody be with nonparent); *Watkins* v. *Nelson*, supra, 163 N.J. 246, 253 (third party award warranted when "extraordinary circumstances" affect welfare of child and denial of petition would cause serious psychological or other harm to child [internal quotation marks omitted]); *Bailes* v. *Sours*, supra, 231 Va. 100 (there exist "special facts and circumstances . . . constituting an extraordinary reason for taking child from [his or her] parent," such as effect on psychological health and emotional stability [internal quotation marks omitted]); *In re Custody of Shields*, supra, 157 Wash. 2d 144 (extraordinary circumstances demonstrating "actual detriment to child's growth and development").[26]

Furthermore, the standard of harm that we adopt is consistent with the constitutional protections discussed in *Troxel*. In that case, which required review of a trial court's order granting a third party visitation, the United States Supreme Court determined in a plurality opinion that the state statute involved was unconstitutional because of its "sweeping breadth . . . ." *Troxel* v. *Granville*, supra, 530 U.S. 73. The plurality did not consider the constitutional question of whether the due process clause required all third party visitation statutes to require a showing of actual or potential harm to a child as a condition precedent to granting visitation, declaring in dictum: "We do not, and need not, define . . . the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice [Anthony Kennedy's dissent] that *the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied* and that the constitutional protections in this area are best 'elaborated with care.' . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the [d]ue [p]rocess [c]lause as a per se matter." (Citation omitted; emphasis added.) Id. In Justice Kennedy's dissenting opinion, to which the plurality referred, he explained that constitutional protections must be elaborated with care because "[w]e must keep in mind that family courts in the [fifty] [s]tates confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise."[27] Id., 101 (Kennedy, J., dissenting).

The foregoing observations apply with equal force to third party custody awards and help explain why we articulate a standard of harm that is sufficiently flexible to allow family courts to grant third party custody awards when a child's actual safety may not be endangered but when the child nevertheless may be suffering from other types of significant harm deserving of the relief that an award of third party custody provides. In light of the fact that the third party custody statute at issue in the present case is not overly broad, unlike the Washington visitation statute in *Troxel*, we agree with the plurality in *Troxel* that any remaining constitutional question regarding the standard of harm most likely would arise in connection with the specific manner in which the standard is applied.

2

The concurrence further claims that the standard of harm we adopt is too broad to provide a sufficient constitutional safeguard, opening the door to claims of constitutional vagueness and the standard's arbitrary application. We disagree. We have not proposed a standard that would include "any degree of harm," as the concurrence suggests, thus transforming the standard

into a best interests test. As we previously stated, the standard is qualitatively different from a best interests test because it does *not* allow the court to rely on its own subjective lifestyle preferences but requires the court to focus on the level of harm that the child would suffer should the parent retain custody. The concurrence also fails to appreciate that we have excluded insubstantial or short-lived harm and contemplate only the type of significant harm that would justify an award of custody in exceptional circumstances. We reiterate that the reason we must allow courts some degree of flexibility in interpreting this standard is that it is impossible to anticipate the infinite types of significant harm to which a child may be exposed if he or she remains with the parent, not all of which may satisfy the standard articulated in the temporary custody and neglect statutes.[28] Accordingly, we do not agree that the standard of harm set forth in *Roth* is constitutionally required in the context of third party custody proceedings.[29]

V

We next consider the proper burden of proof, which must satisfy "the constitutional minimum of fundamental fairness." (Internal quotation marks omitted.) *Santosky* v. *Kramer*, 455 U.S. 745, 756 n.8, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The defendant claims that the standard required in third party custody cases should be clear and convincing evidence. In *Roth*, we determined that, although the clear and convincing standard is not constitutionally mandated in the visitation context, the "stricter standard of proof is sounder because of the ease with which a petitioning party could otherwise intrude upon parental prerogative. . . . The prospect of competent parents potentially getting caught up in the crossfire of lawsuits by relatives and other interested parties demanding visitation is too real a threat to be tolerated in the absence of protection afforded through a stricter burden of proof. Therefore, pursuant to this court's inherent supervisory powers," we concluded that a third party seeking visitation must prove the requisite relationship and harm by clear and convincing evidence. (Citations omitted.) *Roth* v. *Weston*, supra, 259 Conn. 232. These same considerations are not significant in third party custody cases. Moreover, other factors, including the legislature's express rejection of the clear and convincing standard of proof, weigh against the adoption of that standard in the present context. Finally, the clear and convincing standard is not constitutionally required under the test that the United States Supreme Court established in *Santosky* v. *Kramer*, supra, 756 n.8. We therefore conclude that the proper standard of proof is a fair preponderance of the evidence.

Section 46b-56b is silent with respect to the burden of proof to be satisfied when a third party seeks the custody of a minor child against the wishes of a fit

parent. We therefore recapitulate, in part, the legislative history of the statute. The proposed bill, as originally written, directed that the third party establish, "by clear and convincing evidence . . . grounds which would authorize the removal of the natural parent as guardian under [General Statutes (Rev. to 1985) § 45-44c, now General Statutes § 45a-610]." Substitute House Bill No. 5122, 1985 Sess. An amendment to the bill changed the substantive standard but did not change the clear and convincing burden of proof. See 28 H.R. Proc., Pt. 8, 1985 Sess., p. 2615. When the amended bill reached the Senate, however, various members expressed concern that the burden of proof was too high. See 28 S. Proc., Pt. 5, 1985 Sess., pp. 1751–62. Thereafter, the bill was amended to eliminate the standard. See 28 S. Proc., Pt. 7, 1985 Sess., p. 2231, remarks of Senator Johnston. Senator Avallone expressly noted that the omission of the standard constituted a major revision of the bill and represented a "compromise" designed to ensure that the interests of the child would be protected adequately in light of the presumption of parental custody. Id., pp. 2241–42. When the bill, as amended by the Senate, was returned to the House for approval, Representative Wollenberg described it as greatly "weakened" but expressed his satisfaction with the outcome because the statute would now give the fit parent a decided edge over a third party seeking custody of the child, thus addressing the perceived defect in the logic of the majority opinion in *McGaffin* v. *Roberts*, 193 Conn. 393, 479 A.2d 176 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1747, 84 L. Ed. 2d 813 (1985). See 28 H.R. Proc., Pt. 16, 1985 Sess., pp. 5798, 5800, 5804.

The legislature's rejection of the clear and convincing standard is not inconsistent with the law of other jurisdictions, as there appears to be no uniform rule regarding the burden of proof necessary to rebut a presumption in favor of parental custody. After examining the law of other states, Maryland's highest court found that some "have, indeed, adopted a clear and convincing evidence standard in parent/third party custody cases (or in cases that the court found equivalent to a custody dispute). See *Murphy* v. *Markham-Crawford*, [supra, 665 So. 2d 1093]; *S.G.* v. *C.S.G.*, 726 So. 2d 806 (Fla. App. 1999); *Clark* v. *Wade*, [supra, 273 Ga. 587]; *In re Guardianship of B.H.*, 770 N.E.2d 283 (Ind. 2002); *Greer* v. *Alexander*, 248 Mich. App. 259, 639 N.W.2d 39 (2001). Other [s]tates have adopted [the clear and convincing] standard in cases that, under the law of those [s]tates, are treated more like [termination of parental rights] proceedings than pure custody disputes (*Guardianship of Stephen G.*, 40 Cal. App. 4th 1418, 1426, 47 Cal. Rptr. 2d 409 [1995]), or upon rationales that are inconsistent with [a standard requiring a finding of detriment]. See *Watkins* v. *Nelson*, [supra, 163 N.J. 235] (requiring the third party seeking custody to show circumstances that would justify terminating the par-

ent's parental rights and treating custody in the third party as effectively terminating those rights). A few [s]tates have expressly adopted a preponderance standard for parent/third party custody cases. See *Larkin* v. *Pridgett*, 241 Ark. 193, 407 S.W.2d 374 (1966); *Greening* v. *Newman*, 6 Ark. App. 261, 640 S.W.2d 463 (1982); *In re Perales*, 52 Ohio St. 89, 369 N.E.2d 1047 (1977). Some have articulated other tests—'satisfactory evidence' (*In re Dependency of Terry Klugman*, 257 Minn. 113, 97 N.W.2d 425 [1959]) or 'evidence evincing' (*In re Custody of N.A.K.*, 649 N.W.2d 166 [Minn. 2002]); 'showing clearly' (*Kees* v. *Fallen*, 207 So. 2d 92 [Miss. 1968]); 'clear and conclusive' (*McDonald* v. *Wrigley*, 870 P.2d 777 [Okla. 1994]); 'cogent and convincing' (*Bailes* v. *Sours*, [supra, 231 Va. 96]). Most [s]tates, it appears, have not defined any particular standard of proof but have sought to protect parental rights through the heavy substantive burden placed on the third party—to show unfitness, or 'compelling' or 'cogent' reasons (*In re Custody of Townsend*, [86 Ill. 2d 502, 427 N.E.2d 1231 (1981)], or 'convincing reasons' (see *Ellerbe* v. *Hooks*, 490 Pa. 363, 416 A.2d 512 [1980]; *Albright* v. *Commonwealth ex rel. Fetters*, 491 Pa. 320, 421 A.2d 157 [1980]) or, as in *Watkins* v. *Nelson*, supra, [235] circumstances that would justify termination of parental rights." *Shurupoff* v. *Vockroth*, 372 Md. 639, 655–66, 814 A.2d 543 (2003).

It is well established that, "[w]here no standard of proof is provided in a statute, due process requires that the court apply a standard which is appropriate to the issues involved." *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 296. "The function of a standard of proof, as that concept is embodied in the [d]ue [p]rocess [c]lause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. . . . [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

"Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a fair preponderance of the evidence standard indicates both society's minimal concern with the outcome, and a conclusion that the litigants should share the risk of error in roughly equal fashion.' . . . When the [s]tate brings a criminal action to deny a defendant liberty or life, however, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. . . . The stringency of the beyond a reasonable doubt standard bespeaks the weight and gravity

of the private interest affected . . . society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society impos[e] almost the entire risk of error upon itself. . . .

"[The United States Supreme] Court has mandated an intermediate standard of proof—clear and convincing evidence—when the individual interests at stake in a *state proceeding* are both particularly important and more substantial than mere loss of money. . . . Notwithstanding the state's civil labels and good intentions . . . this level of certainty [is] necessary to preserve fundamental fairness in a variety of *government-initiated proceedings* that threaten the individual involved with a significant deprivation of liberty or stigma." (Citations omitted; emphasis added; internal quotation marks omitted.) *Santosky* v. *Kramer*, supra, 455 U.S. 754–56.

In *Santosky*, the United States Supreme Court held that, "in a hearing on a petition to terminate parental rights, due process require[s] that the state prove statutory termination criteria by a 'clear and convincing evidence' standard rather than by a 'fair preponderance of the evidence' standard. . . .

"The three factors considered in *Santosky* to determine whether a particular standard of proof in a particular proceeding satisfies due process are: (1) the private interests affected by the proceeding; (2) the risk of error created by the chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure." *Cookson* v. *Cookson*, 201 Conn. 229, 234–35, 514 A.2d 323 (1986).

We conclude that the fair preponderance standard is permissible in the present context not only because it is consistent with the legislature's express rejection of the clear and convincing standard, but, more significantly, because it comports with due process and the requirement of "fundamental fairness" described in *Santosky* v. *Kramer*, supra, 455 U.S. 756.

A

Turning first to the private interests affected, we distinguish two important differences between the termination of parental rights and third party custody proceedings. In a termination proceeding,[30] the sole issue is the fitness of the parent, whereas three interests are at stake in a third party custody proceeding: the parents' liberty interest in the care and custody of the child; the child's shared interest with the parent in family autonomy or family integrity; and the state's and the child's countervailing interests in the child's welfare. Cf. *Lehrer* v. *Davis*, 214 Conn. 232, 236–38, 571 A.2d 691 (1990); *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 297–300. Section 46b-56b specifically directs the court to consider whether the rebuttable presumption in favor of parental custody is overcome by facts show-

ing that such custody would be detrimental to the child. The primary focus of the proceeding is therefore on detriment to the child rather than parental fitness. Second, an award of custody to a third party is subject to modification upon a showing of changed circumstances; see General Statutes § 46b-56 (a) (court may modify any proper order regarding custody); and may allow for continued visitation and communication between the noncustodial parent and the child, as in the present case. An award of third party custody thus represents a lesser intrusion into familial relationships than does the termination of parental rights because it does not result in a final and irrevocable severance of parental rights or "a unique kind of deprivation" that forces parents to confront the state in a termination proceeding. (Internal quotation marks omitted.) *Santosky* v. *Kramer*, supra, 455 U.S. 759. Parental rights are further protected by the standing requirement, the fact that third parties cannot initiate custody proceedings, unlike third parties who are permitted to initiate proceedings in visitation cases; compare General Statutes § 46b-57 with General Statutes § 46b-59; and the substantive standard of harm that requires a third party seeking custody to allege and prove detriment to the child should the parent retain custody. This significant burden should discourage third parties without close relationships to the child from engaging in frivolous attempts to obtain custody and thus preclude repeated and unnecessary litigation. Accordingly, consideration of the private interests affected does not suggest the need for a standard more demanding than a fair preponderance of the evidence.

The concurrence disagrees with the preceding analysis for the following reasons. First, the significant constitutional interest at stake, that is, the right to family autonomy, is insufficiently protected by the lower standard. Second, even a temporary deprivation of the parent's fundamental right to care for his or her child is an irreparable loss that may require a heightened burden of proof to assure the correctness of the judgment. Third, this court has stated that the child's interests coincide with those of the parent unless the child is subject to the threat of serious physical harm or danger. Fourth, the equipoise in a neglect proceeding does not apply because a court adjudicating neglect has available a range of disposition options that correlate directly to the risk to the child and the parent's ability to meet the child's needs, including allowing the child to remain in the parent's custody. Fifth, in a case in which there is proof by a preponderance of the evidence, but not by clear and convincing evidence, that denial of third party custody would result in real and substantial harm to the child, the court still would have authority to protect the child by bringing the department of children and families (department) into the action, ordering supervised custody or committing the child to the depart-

ment.[31] We address each of these arguments in turn.

With respect to the first two points, we note that the preservation of family autonomy or family integrity, having been placed in issue by the parents of the child in the custody proceeding itself, provides little justification for adopting a heightened burden of proof in this context. See part IV B 1 of this opinion. Moreover, this court determined more than two decades ago that the fair preponderance standard is constitutionally permissible in temporary custody and neglect proceedings because the child's welfare and safety represents a strong countervailing interest in relative equipoise with the liberty interest of the parent. See *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 287 (when child's interest no longer coincides with that of parent, magnitude of parent's right to family integrity is diminished); see also *In re Juvenile Appeal (84-AB)*, 192 Conn. 254, 263–64, 471 A.2d 1380 (1984). Accordingly, although we agree with the concurrence that the interest of the parent is extremely significant and may require additional protection by imposing a heightened standard of proof in other circumstances, there is well established precedent for applying the fair preponderance standard in third party custody proceedings.

Insofar as the concurrence concludes that the child's interests coincide with those of the parent unless the child is threatened with immediate harm, we disagree. As we previously stated, this court has determined that the interests of a child who is adjudicated neglected, uncared for or dependent, but who is not necessarily threatened with immediate harm, differ from those of the parent. See *In re Juvenile Appeal (84-AB)*, supra, 192 Conn. 263–64. Accordingly, the child's interests in temporary custody and neglect proceedings are in relative equipoise with the shared interest of the parent and child in family autonomy.

The concurrence's view that the relative equipoise in a neglect proceeding exists *only* because the court has available to it a range of disposition options that correlate directly to the risk to the child and the parent's ability to meet the child's needs, including the option of allowing the child to remain with the parent, is incorrect. The concept of equipoise first was considered in *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 276, in which this court stated that the controlling considerations in a constitutional analysis of the appropriate standard of proof in temporary custody proceedings are "the nature of the private interest threatened and the permanency of the threatened loss." (Internal quotation marks omitted.) Id., 297. With respect to the first factor, the court explained that, although the child's safety is the primary concern in a temporary custody hearing, the parent has a competing interest in family integrity. Id., 298. The child also shares the parent's interest in family integrity. Id. The state, as parens patriae, has

a corresponding interest in the child's safety. Id. In attempting to balance the state's interest in the child's safety against the combined interests of the parent and child in family integrity, we concluded that "[a]n elevated standard of proof cannot protect the child's interests . . . because some interest of the child is adversely affected whether the state or the parent prevails. The child's interests are best protected not by an elevated standard of proof, but by the 'risk of harm' standards . . . .

"*Where two important interests affected by a proceeding are in relative equipoise*, as they are in [a temporary custody proceeding], *a higher standard of proof would necessarily indicate a preference for protection of one interest over the other*. . . . We see no reason to make such a value determination . . . and find that the various interests in a temporary custody hearing are best served by applying the normal civil standard of proof which is a fair preponderance of the evidence." (Citation omitted; emphasis added.) Id., 298–99.

We also observed that an award of temporary custody is neither final nor irrevocable because it can be reviewed during the hearings on the neglect petition under § 46b-129 (a) and upon the filing of a petition by the parent or the state for revocation of custody under § 46b-129. Id., 299. We therefore determined that deprivation of the parent's right to exercise custody over his or her children is far less serious than in a termination of parental rights proceeding, in which the clear and convincing standard is constitutionally required because of the finality of the termination order. Id., 299–300.

Shortly thereafter, we addressed the same issue in the context of a neglect proceeding and again concluded that the proper standard of proof is a fair preponderance of the evidence. See *In re Juvenile Appeal (84-AB)*, supra, 192 Conn. 265. Although the petitioner in a neglect proceeding need not prove that the child is subject to an imminent threat of harm, we concluded that an adjudication of neglect that results in the removal of the child from parental custody is temporary and reviewable and that the two important private interests involved, namely, the safety of the child and the combined family integrity interests of the parent and the child, are in relative equipoise. Id., 264–65. Accordingly, a higher standard necessarily would indicate a preference for the protection of one interest over the other, a choice we did not wish to make. See id.

Even if we accept the concurrence's view that the equipoise between the interests of the child and the parent is due to the multiplicity of disposition options available in a neglect proceeding, it would appear that most children adjudicated neglected under the fair preponderance standard are removed from parental cus-

tody, at least for a limited period of time. This is reflected in the language of § 46b-129 (j),[32] which provides the state with a lengthy list of disposition options when removal is deemed warranted but makes only one brief reference to the alternative option of permitting the parent to retain supervised custody of the child. Correspondingly, the concurrence fails to acknowledge that third party custody awards do not necessarily prevent parents from exercising control over their children's lives. General Statutes § 46b-57 provides that the court may avoid complete separation of the child from the parent by awarding *partial* custody to the third party "upon such conditions and limitations as it deems equitable."

Finally, the concurrence's assertion that the court has authority to take certain steps to protect a child when there is proof by a fair preponderance of the evidence, but not by clear and convincing evidence, that denial of the third party custody petition will be harmful to the child assumes that the court will take the necessary steps to mitigate further harm. There is no guarantee, however, that the court in any given case will bring the child's situation to the attention of the department and ultimately order relief, as the concurrence suggests.[33] Indeed, the more likely outcome is that the child will continue to live with the parent and continue to suffer the harm that otherwise might have been avoided had the fair preponderance standard been applied. Moreover, the reasoning of the concurrence creates a bizarre incongruity in the law in that a third party who is able to prove by a fair preponderance of the evidence, but not by clear and convincing evidence, that a child is neglected, uncared for or dependent in a third party custody proceeding would not be able to obtain custody of the child, whereas the court in a neglect proceeding could grant custody of a child to a third party in similar circumstances pursuant to § 46b-129 (j) following an adjudication of neglect by a fair preponderance of the evidence. See General Statutes § 46b-129 (j) (court may vest custody of child with "suitable and worthy" person following adjudication of neglect). The concurrence therefore fails to provide any convincing reason why the fair preponderance standard is not constitutionally permissible under the first *Santosky* factor.

B

A weighing of the second *Santosky* factor also supports the conclusion that the fair preponderance standard of proof is appropriate in third party custody proceedings. Although there may be differences in the ability of a parent and a third party in any given case to participate in the litigation, we are aware of no evidence of a disparity between the abilities and resources of parents and third parties generally that is equivalent in nature to the disparity between the parent and the

state in a termination proceeding.[34] As the court indicated in *Santosky*, the state's ability to bring a termination case against the parents "dwarfs the parents' ability to mount a defense"; *Santosky* v. *Kramer*, supra, 455 U.S. 763; which is not true in third party custody proceedings that involve two private parties. Accordingly, there can be no significant prospect of improper third party custody awards merely because third parties are likely to have more resources than the child's parents. Furthermore, the consequences to the parent of an erroneous third party custody award are not as severe as in a termination proceeding in light of the parent's ability to regain custody by seeking to modify the award upon a showing of error or changed circumstances; see General Statutes § 46b-56; and in light of the court's ability to grant the parent continued visitation and communication with the child as a condition of the third party custody award. The child, in turn, is protected from an erroneous award by the fact that the third party may not seek or obtain custody unless he or she has a relationship with the child akin to that of a parent and by the potential for modification of the award if the parent is able to demonstrate error. It is thus unlikely that the child will suffer serious consequences from an erroneous award of custody under the fair preponderance standard.

The concurrence asserts, pursuant to the second *Santosky* factor, that application of the fair preponderance standard will result in a high risk of erroneous deprivation because (1) the standard of harm that the majority adopts leaves the court's decision open to improper influence by the subjective values of the judge, (2) a reduced standard of proof would increase the possibility of an erroneous decision on the basis of a few instances of misconduct, (3) the court has no obligation similar to that in a neglect proceeding to delineate the specific deficiencies that the parent must remedy to regain custody, (4) there is nothing to prevent a third party from repeatedly relitigating the custody issue, (5) third party custody does not provide the parent with the procedural protections that are available to parents in neglect proceedings, and (6) the petitioner in the parallel proceeding of removing the natural parent as guardian must prove harm akin to that in a neglect proceeding by clear and convincing evidence. None of these reasons withstands close examination.

In considering the risk of erroneous deprivation, the concurrence declares that, even if the standard of harm is high, imposition of the fair preponderance standard of proof improperly will allow the subjective values of the judge to affect the decision or will result in an award of custody without adequate evidence of misconduct. All custodial decisions, however, by their very nature, involve the exercise of judicial discretion because of the infinite variation that exists in the human condition generally and family relationships in particular. The

important consideration is whether the court has been provided with sufficient guidance to focus on the proper facts. In the present case, we believe that it has because, to the extent that this court has placed a judicial gloss on the standard of harm set forth in § 46b-56b, courts will have clear notice that third party custody awards may not be based on a few instances of misconduct, that such awards are justified only in exceptional circumstances and that the petitioner must allege and prove, at the very least, that continued parental custody will be clearly damaging, injurious or harmful to the child. This is a heavy burden under either standard of proof. See *McGaffin* v. *Roberts*, supra, 193 Conn. 412 (*Parskey*, *J.*, dissenting) (burden on nonparent to disprove presumption in favor of parental custody is "a heavy one").

With respect to whether the fair preponderance standard will encourage repeated litigation, the potential for repeated litigation will be severely curtailed, if not eliminated entirely, by the fact that § 46b-57, unlike the visitation statute, permits third party intervention only in an existing controversy before the court. Furthermore, the requirement that a petitioner must allege and establish proof of a relationship with the child akin to that of a parent in order to be granted standing is an extremely difficult standard to satisfy. Finally, because third party custody, unlike visitation, requires an extraordinary level of personal, emotional and financial commitment to the child over a lengthy period of time, very few individuals are likely to petition the court for third party custody even one time in any given case, much less repeatedly.

As for the procedural protections available in a neglect proceeding, many of the due process protections in chapters 32a and 35a of the Practice Book afforded the parents of a child in a neglect or termination proceeding, including the right to a hearing, are provided in a custody proceeding. See generally Practice Book c. 25. Although there is no exact counterpart in a third party custody proceeding to the specific steps that a parent may be ordered to take in a neglect proceeding, which are intended to notify the parent of deficiencies that must be remedied to regain custody, Practice Book § 25-60 provides the court in a custody proceeding with authority to conduct a custody evaluation and study. The report filed upon completion of the study may be examined by the parties and introduced into evidence if the author is available for cross-examination. Id. In addition, the trial court typically makes findings of fact that describe the child's troubled relationship with the parent and the specific problems that led the court to deprive the parent of custody, as the trial court did in the present case. General Statutes § 46b-57 also directs the court to award third party custody "upon such conditions and limitations as it deems equitable," which might include steps that the

parent must take to regain custody of the child. General Statutes § 46b-56 (i), for example, provides that, "[a]s part of a decision concerning custody . . . the court may order either parent or both of the parents and any child of such parents to participate in counseling and drug or alcohol screening . . . ." The custody evaluation report, the trial court's often exhaustive findings in a custody proceeding and the conditions attached to a third party custody award, although not the same as the specific steps ordered in a neglect proceeding, may nonetheless serve a function similar to that of the specific steps of providing the parent with notice of the deficiencies that must be remedied and actions that must be taken to regain full custody of the child.

In addition, the concurrence's assertion that the court's decision to remove a child from parental custody in a neglect proceeding is subject to periodic judicial review, unlike third party custody decisions, is simply not true for all children who are adjudicated as neglected. General Statutes § 46b-129 (j) provides in relevant part that, upon an adjudication of neglect, the "court may *vest* [*the*] *child's or youth's care and personal custody in any private or public agency that is permitted by law to care for neglected, uncared-for or dependent children or youths or with any person or persons found to be suitable and worthy of such responsibility . . .* [*and*] *upon such vesting of the care of such child or youth, such other public or private agency or individual shall be the guardian of such child or youth . . . .*" (Emphasis added.) The periodic judicial review described in § 46b-129 applies only if the child is committed to the custody of the department. "*The legislature . . . did not contemplate mandatory, periodic judicial review of cases in which custody*, rather than ordered as a commitment of the child to [the department, *has*] *been vested by the court in an appropriate third party* in accordance with § 46b-129 . . . ." (Emphasis added.) *In re Juvenile Appeal (85-BC)*, 195 Conn. 344, 361, 488 A.2d 790 (1985). Moreover, we have declared, in the context of a neglect proceeding, that when custody of the child is vested in a third party, the custody order is "subject to modification by [the] court if such is in the best interests of the [child]. . . . [A]n adjudication of neglect that results in custody by [the department] is neither final nor irrevocable. . . . We perceive no reason, nor did the legislature express one, to insulate such a vesting under § 46b-129 . . . to a third party from subsequent modification or revocation. . . . [T]he natural mother may petition the court any time prior to the child's eighteenth birthday for revocation of the commitment to the [third party]. A judicial hearing would then provide to the natural mother the opportunity of showing that no cause for commitment exists." (Citation omitted; internal quotation marks omitted.) Id., 367. Accordingly, we have determined that the custody of children who are adjudicated as

neglected and whose custody and guardianship are vested in an appropriate third party is *not* required to undergo periodic judicial review but may be modified or revoked at a subsequent judicial hearing initiated by the natural parent.[35] This is similar to the procedures that apply in third party custody proceedings, in which the natural parent is free to seek a subsequent order of modification to regain custody of the child. See General Statutes § 46b-56. Thus, insofar as periodic judicial review is concerned, neglect proceedings in which the court ultimately vests custody of the child in a third party do not necessarily provide parents with procedural protections any greater than the protections available to parents in third party custody proceedings.

The concurrence finally asserts that the clear and convincing standard should apply in third party custody proceedings because the custody statute is substantially similar to the removal of parent as guardian (removal of guardianship) statute; see General Statutes § 45a-610; which requires allegations and proof of harm similar to that in a neglect proceeding but employs the clear and convincing standard of proof. The concurrence asserts that a comparison of the two statutes is appropriate because neither provides the parent with significant procedural protections, which is not the case under the neglect statutes. As we noted previously in this opinion, however, third party custody proceedings provide the parent with procedural protections similar to those in a neglect proceeding. In fact, parents in third party custody proceedings will hereinafter receive one extremely significant protection that parents in removal of guardianship, temporary custody and neglect proceedings do not, namely, the requirement that the petitioner demonstrate a relationship with the child akin to that of a parent. In removal of guardianship and neglect cases, the state, the court and a number of other designated parties and entities that have no relationship or significant personal bond with the child are permitted to initiate proceedings that may result in the removal of the child from parental custody. See General Statutes § 45a-614 (any adult relative by blood or marriage, court on own motion and counsel for minor may apply for removal of parent as guardian); General Statutes § 46b-129 (a) (''[a]ny selectman, town manager, town, city or borough welfare department, any probation officer, or the Commissioner of Social Services, the Commissioner of Children and Families or any child-caring institution or agency approved by the Commissioner of Children and Families, a child or such child's representative or attorney or foster parent of a child . . . may file with the Superior Court . . . a verified petition plainly stating such facts as bring the child or youth within the jurisdiction of the court as neglected, uncared-for or dependent''). In contrast, it is highly unlikely that there would be more than one person other than a parent in the life of a child who would be able to satisfy the

heightened standing requirement of a relationship akin to that of a parent. Application of the fair preponderance standard in a third party custody proceeding thus should not result in any greater risk of erroneous deprivation than the risk inherent in a neglect or removal of guardianship proceeding.

C

With respect to the third *Santosky* factor, although the state has no direct interest in a custody proceeding that involves two private parties, it has a clear interest in protecting both the constitutional rights of the parent and the welfare of the child by ensuring that the proceeding is conducted fairly and at a reasonable cost.[36] The fair preponderance standard is compatible with this goal because the court is guided by clearly articulated rules regarding standing and detriment to the child that protect parental rights as well as the child's interests. Moreover, Connecticut courts are familiar with the fair preponderance standard in the family law context because the same standard is applied in other custody proceedings, including custody disputes between parents; see, e.g., *Cookson* v. *Cookson*, supra, 201 Conn. 237 (preponderance standard is applicable because "the private interests involved in a custody dispute between parents and the effect on those interests wrought by a judicial transfer of custody are not such that the constitution requires the use of a 'clear and convincing' standard of proof"); temporary custody hearings; see *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 297 (clear and convincing standard not required in temporary custody hearing because, unlike termination of parental rights hearing, "[1] the nature of the private interests concerned in the two kinds of hearings differs, and [2] the deprivation of rights in a temporary custody adjudication is neither final nor irrevocable"); and hearings regarding the appointment of testamentary guardians. See *In re Joshua S.*, supra, 260 Conn. 206 (preponderance standard required to rebut presumption in favor of testamentary guardian); see also *South Windsor* v. *South Windsor Police Union Local 1480, Council 15, AFSCME, AFL-CIO*, 255 Conn. 800, 825, 770 A.2d 14 (2001) (in civil litigation, normal burden of persuasion is preponderance of evidence). Although we recognize that the clear and convincing standard also is applied in the family law context, including cases involving the termination of parental rights; see General Statutes §§ 17a-111b (b), 17a-112 (i) and (j), and 45a-717 (f) and (g); and the removal of a parent as guardian; see General Statutes § 45a-610; we cannot conclude that the third *Santosky* factor weighs against application of the fair preponderance of the evidence standard in third party custody disputes.

The fair preponderance standard also is consistent with our declaration in *Roth* that "the heightened standard of clear and convincing evidence is not constitu-

tionally mandated" in visitation cases. *Roth* v. *Weston*, supra, 259 Conn. 231. As we stated in *Lehrer*, "even when the contemplated state intrusion is most severe, as in an action for termination of parental rights, the state is required only to provide an appropriately demanding standard of proof so as to guarantee fundamentally fair *procedures*. . . . *Santosky* v. *Kramer*, supra, [455 U.S.] 754. *Lesser intrusions*, *such as custody orders*, *represent a difference in kind and not in degree* . . . *from termination proceedings*, *and thus permit intervention on a lesser standard of proof*. The constitutional requirement of procedural due process thus invokes a balancing process . . . ." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Lehrer* v. *Davis*, supra, 214 Conn. 238.

The only other jurisdiction that has conducted a detailed and thoughtful analysis of the standard of proof under *Santosky* has concluded that the clear and convincing standard is neither constitutionally required nor appropriate in third party custody cases. *Shurupoff* v. *Vockroth*, supra, 372 Md. 660. In *Shurupoff*, the Court of Appeals of Maryland initially noted that, aside from the fact that a third party custody award is a temporary, modifiable order, custody orders are varied in nature, and the parent does not always lose complete legal and physical custody of the child. Id., 653. Even when a third party is awarded both legal and physical custody, the parent does not necessarily lose the right to visit and communicate with the child, keep abreast of the child's activities, influence the child's development or leave the child an inheritance, all of which would be lost if parental rights were terminated. Id., 653–54. The court further observed that the issue in a third party custody case may be, and often is, the immediate safety and short-term welfare of the child, and that third party custody awards that preserve the parental relationship are granted in many cases for a limited period of time until the parent can prove changed circumstances to regain custody. Id., 657–58. The court concluded that, if the standard of proof is too high, "it may well be the child who will suffer." Id., 658.

To summarize, in cases in which a third party seeks to intervene in a custody proceeding brought pursuant to § 46b-56 (a), the party must prove by a fair preponderance of the evidence facts demonstrating that he or she has a relationship with the child akin to that of a parent, that parental custody clearly would be detrimental to the child and, upon a finding of detriment, that third party custody would be in the child's best interest. In cases in which the trial court considers awarding custody to a third party who has not intervened pursuant to § 46b-57, the court may award custody to the third party provided that the record contains proof of the foregoing facts by a fair preponderance of the evidence.

In the present case, the trial court failed to apply the correct standard when it granted Husaluk's motion to intervene and awarded her custody solely on the basis of the best interest of the child. Thereafter, the Appellate Court properly rejected the defendant's claim that the trial court should have awarded custody on the basis of the standard articulated in *Roth* but improperly affirmed the award of custody to Husaluk on the ground that it was in the best interest of the child.[37]

The judgment of the Appellate Court is affirmed insofar as it reverses the trial court's judgment as to the allocation of tax dependency exemptions;[38] the judgment of the Appellate Court is reversed in all other respects and the case is remanded to that court with direction to reverse the trial court's judgment and to remand the case to the trial court for further proceedings according to law.

In this opinion NORCOTT, VERTEFEUILLE and SULLIVAN, Js., concurred.

* The listing of justices reflects their seniority status as of the date of oral argument.

This case originally was argued before a panel of this court consisting of Justices Norcott, Katz, Palmer, Vertefeuille and Zarella. Thereafter, the court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the case be considered en banc. Accordingly, Justices Borden and Sullivan were added to the panel, and they have read the record, briefs and transcript of oral argument.

[1] The term "third party" refers to any private individual other than a parent of the child, as distinguished from the state. We do not address situations in which the state seeks temporary custody of the child; see General Statutes § 46b-129; or removal of the child from the custody of the child's parents. See General Statutes § 45a-610.

[2] We granted the defendant's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly conclude that the trial court was not required to apply a heightened jurisdictional pleading requirement and burden of persuasion as required under *Roth* v. *Weston*, [supra, 259 Conn. 234–35]?" *Fish* v. *Fish*, 275 Conn. 924, 883 A.2d 1243 (2005).

[3] In its original order, the trial court awarded joint custody to the plaintiff and the defendant.

[4] The plaintiff is now known as Paula J. Pierce. The plaintiff did not submit a brief to this court. The guardian ad litem-attorney for the minor child submitted the only brief contesting the defendant's claim.

[5] We note that *Roth* relied on the temporary custody and neglect statutes to define the level of *emotional* harm that the child would suffer should visitation with the petitioner be denied. See *Roth* v. *Weston*, supra, 259 Conn. 235. The *Roth* standard is therefore inadequate to evaluate the harm alleged in a third party custody proceeding because it does not contemplate the physical or psychological harm that also may form the basis of a third party custody award. Nevertheless, we assume, for purposes of this discussion, that the defendant and the concurrence refer to the physical, psychological and emotional harm described in the temporary custody and neglect statutes when they contend that the *Roth* standard should apply in third party custody proceedings.

[6] The Appellate Court concluded that the trial court had abused its discretion in ordering the allocation of tax dependency exemptions and, therefore, reversed the trial court's judgment only with respect to that order. *Fish* v. *Fish*, 90 Conn. App. 744, 764–65, 766, 881 A.2d 342 (2005). On appeal to this court, neither party has challenged the Appellate Court's determination of that issue. We therefore affirm that part of the Appellate Court's judgment.

[7] Throughout this opinion, we refer to the plaintiff and defendant collectively as the "parties" or as the "parents."

[8] Although the parties' daughter turned eighteen on April 28, 2007, we agree with the defendant that his appeal would not be rendered moot by that fact in view of his unchallenged representation to this court that he

may be entitled to favorable tax and other financial consequences should he prevail.

[9] In her motion to intervene, Husaluk stated: "I am the paternal aunt of the minor child . . . . By order of the court, [the child] resided with me during the summer of 2002. . . . I have maintained contact with [the child] throughout this school year. . . . [The child] spent her spring vacation with me, as ordered by the court. . . . I provide a safe and loving environment . . . for [the child]. . . . It is [the child's desire] to reside with me through her high school year[s]. Wherefore, I ask that the court grant me permission to intervene."

[10] General Statutes § 46b-59 provides in relevant part: "The Superior Court may grant the right of visitation with respect to any minor child or children *to any person*, upon an application of such person. Such order shall be according to the court's best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable . . . . In making, modifying or terminating such an order, the court shall be guided by the best interest of the child, giving consideration to the wishes of such child if he is of sufficient age and capable of forming an intelligent opinion. . . ." (Emphasis added.)

[11] General Statutes § 46b-56b 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."

[12] General Statutes § 46b-57 provides: "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 815p, 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 such 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 the child is of sufficient age and capable of forming an intelligent preference."

[13] General Statutes § 46b-56 provides in relevant part: "(a) In any controversy before the Superior Court as to the custody or care of minor children, and at any time after the return day of any complaint under section 46b-45, the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children if it has jurisdiction under the provisions of chapter 815p. Subject to the provisions of section 46b-56a, the court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent or to a third party, according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. The court may also make any order granting the right of visitation of any child to a third party to the action, including, but not limited to, grandparents.

"(b) In making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. Such orders may include, but shall not be limited to: (1) Approval of a parental responsibility plan agreed to by the parents . . . (2) the award of joint parental responsibility of a minor child to both parents, which shall include (A) provisions for residential arrangements with each parent in accordance with the needs of the child and the parents, and (B) provisions for consultation between the parents and for the making of major decisions regarding the child's health, education and religious upbringing; (3) the award of sole custody to one parent with appropriate parenting time for the noncustodial parent where sole custody is in the best interests of the child; or (4) any other custody arrangements as the court may determine to be in the best interests of the child.

"(c) In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and

meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers. . . ."

Although § 46b-56 was amended in 2005; see Public Acts 2005, No. 05-258, § 3; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 46b-56 throughout this opinion.

[14] In *Troxel*, the United States Supreme Court concluded that the Washington visitation statute was unconstitutional as applied in that case because it was overly broad and accorded no special deference to the custodial parent's decision that the requested visitation was not in her daughter's best interests. See *Troxel* v. *Granville*, supra, 530 U.S. 67.

[15] General Statutes § 46b-129 (a) provides that children who are deemed "neglected, uncared-for or dependent" may be removed temporarily from their parents' custody and committed to the temporary care and custody of some other suitable agency or person.

[16] We explained in *Roth* that such a situation would occur in the visitation context when "a person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, [such] that [the] child could suffer serious harm should contact with that person be denied or so limited as to seriously disrupt that relationship." *Roth* v. *Weston*, supra, 259 Conn. 225–26.

[17] We note that third party custody petitions may be filed only when there is an existing controversy before the Superior Court. See General Statutes §§ 46b-56 (a) and 46b-57. Thus, they do not create additional litigation to which the parents must respond. Visitation petitions, on the other hand, may be filed at any time by a person who has a parent-like relationship with the child. *Roth* v. *Weston*, supra, 259 Conn. 221–22; see General Statutes § 46b-59.

[18] Section 46b-57 authorizes the formal intervention of an interested third party whose interest may not already be before the court in an existing controversy, thus serving as a procedural supplement to § 46b-56, which does *not* require a third party to intervene in order for the court to award custody to that party. See *Doe* v. *Doe*, 244 Conn. 403, 441, 710 A.2d 1297 (1998); see also *Cappetta* v. *Cappetta*, 196 Conn. 10, 14–15, 490 A.2d 996 (1985) (although "orderly adjudication of the custody claims of nontraditional parties is best managed by having such claimants become party intervenors at the earliest possible appropriate time," statutory scheme permits award of custody to nonparty "if, even without formal intervention, that person's potential custodial status was properly before the court"). Accordingly, when a third party seeks to intervene in a custody proceeding, he or she must allege the same facts that the court must find when awarding custody to a third party who has not intervened in the proceeding but whose interest has been brought before the court in some other manner.

[19] General Statutes § 46b-59 provides in relevant part: "The Superior Court

may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person. . . ."

[20] In the present case, the trial court assigned joint custody to the mother and the paternal aunt. The analysis that follows, however, applies to all situations in which third parties seek custody of a minor child, regardless of the custodial arrangement that the court ultimately orders.

[21] "A rebuttable presumption is equivalent to prima facie proof of a fact and can be rebutted only by the opposing party's production of sufficient and persuasive contradictory evidence that disproves the fact that is the subject of the presumption. . . . A presumption requires that a particular fact be deemed true until such time as the proponent of the invalidity of the fact has, by the particular quantum of proof required by the case, shown by sufficient contradictory evidence, that the presumption has been rebutted." (Citation omitted.) *Schult* v. *Schult*, 40 Conn. App. 675, 684, 672 A.2d 959 (1996), aff'd, 241 Conn. 767, 699 A.2d 134 (1997).

[22] The concurrence notes that, because *Roth* requires proof of a level of emotional harm akin to that contemplated under the temporary custody and neglect statutes, namely, harm that would arise because the child is neglected, uncared-for or dependent; General Statutes §§ 46b-120 and 46b-129; "one reasonably cannot say that the parent's competency is not at issue in visitation petitions." We disagree. The competence of the parent to make a visitation decision does not directly implicate the parent's underlying relationship with the child. Cf. *Roth* v. *Weston*, supra, 259 Conn. 206 (plaintiffs alleged visitation was in best interests of children but did not allege defendant was unfit parent). Consequently, the concurrence's suggestion that third party visitation and custody petitions raise similar questions regarding parental competency reflects a fundamental misunderstanding of the different interests at stake in visitation and custody proceedings.

[23] Although the legislative history of § 46b-56b has no bearing on the constitutional issue, it provides useful guidance in determining the legislature's intent regarding the standard of harm that it wished to impose in third party custody disputes. The proposed legislation originally was presented to the House in Substitute House Bill No. 5122. That bill provided in relevant part: "In a dispute between a natural parent and non-parent, the court shall recognize a superior right to custody in the natural parent, unless the non-parent, by clear and convincing evidence, establishes grounds which would authorize the removal of the natural parent as guardian under [General Statutes (Rev. to 1985) § 45-44c, now General Statutes § 45a-610]." Substitute House Bill No. 5122, 1985 Sess. The bill thus required a nonparent to prove the same facts required for removal of a parent as guardian when the parent does not consent, namely: (1) abandonment of the child in the sense that the parent has failed to maintain a reasonable degree of concern or responsibility for the child's welfare; (2) evidence of child abuse or unexplained injuries; or (3) lack of parental care, guidance or control necessary for the child's physical, emotional, educational or moral well-being, either because the parent is physically or mentally incapable or because of habit, misconduct or neglect, thereby indicating that the parent either cannot, or in the child's best interest should not, be permitted to be a parent at that time. See General Statutes (Rev. to 1985) § 45-44c.

After the bill was introduced in the House, the language was revised to emphasize the best interests of the child. The House also replaced the language referring to the standard for removal of a parent as guardian with less restrictive language referring to detriment to the child. The revised bill provided: "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 shown, by clear and convincing evidence, that it would be detrimental to the child to permit the parent to have custody."

During the Senate's consideration of the revised bill, discussion initially centered on whether the best interests of the child would be adequately protected if a presumption was created in favor of the parent. See 28 S. Proc., Pt. 5, 1985 Sess., pp. 1751–60. Those opposing the bill were concerned that such a presumption would be difficult to rebut. Id., pp. 1760, 1762. The bill failed to gain sufficient support and was defeated; id., p. 1763; but a motion for reconsideration was passed the following day. 28 S. Proc., Pt. 6, 1985 Sess., p. 1774. Upon reconsideration, the Senate adopted an amendment removing all language pertaining to the standard required to rebut the presumption and the burden of proof. See 28 S. Proc., Pt. 7, 1985 Sess., p. 2231, remarks of Senator Richard B. Johnston. The bill then provided: "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."

In the debate that followed as to what would be required to overcome this presumption, Senator Anthony V. Avallone summarized the position of the bill's proponents, stating: "The original bill and the amendment are really quite different. The original bill indicated that there would be a presumption that the non-parent would have the burden of establishing by clear and convincing evidence that there was a detriment or there was not a detriment to the child by staying or going with the natural parent. What this bill does is merely say that the natural parent would have a presumption that [it] is in the best interest of the child to be with the natural parent. That is a very, very large gap between what the original bill called for and what . . . the bill as amended would call for. We're still dealing with those magic words, the best interest of the child. . . . We are not talking about . . . an irrebuttable presumption. We are talking about a rebuttable presumption. . . . It does not give as much to the natural parent by any stretch of the imagination that the original bill would have. . . . I think that this is a reasonable compromise." 28 S. Proc., Pt. 7, 1985 Sess., pp. 2241–42. Shortly thereafter, the Senate adopted the bill, as amended. Id., p. 2243.

When the bill returned to the House for approval, Representative William L. Wollenberg noted that it had been weakened by the Senate amendment. 28 H.R. Proc., Pt. 16, 1985 Sess., p. 5798. Representative Wollenberg stated, however, that he was satisfied with the outcome because, although the amended bill did not "go nearly as far" as the earlier version, it gave the parent "a leg up," so to speak, in a custody dispute with a third party. Id., p. 5800. Several representatives also remarked that the amended bill, in effect, counteracted the majority holding in *McGaffin* v. *Roberts*, 193 Conn. 393, 479 A.2d 176 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1747, 84 L. Ed. 2d 813 (1985), and incorporated the ideas expressed in Justice Leo Parskey's dissent in that case. 28 H.R. Proc., supra, pp. 5801–5802, 5806, 5808, remarks of Representatives Robert F. Frankel, Richard D. Tulisano and Wollenberg; see *McGaffin* v. *Roberts*, supra, 405–407; id., 410–14 (*Parskey*, *J.*, dissenting). In *McGaffin*, this court held that General Statutes (Rev. to 1983) § 45-43, now General Statutes § 45a-606, did not create a presumption that a surviving biological parent was entitled to preference in a custody dispute. *McGaffin* v. *Roberts*, supra, 405–407. Although the court acknowledged the "natural importance of parenthood"; id., 406; it had explained that "the constitutional concerns are not entirely parental because the preservation of family integrity encompasses the reciprocal rights of both parent[s] and children." (Internal quotation marks omitted.) Id., 407. Representative Wollenberg declared, in assuring doubters that the best interests of the child would not be ignored, that the presumption in favor of parental custody merely would give "a little more weight" to the parent in a third party custody dispute. 28 H.R. Proc., supra, p. 5804. The House ultimately adopted the bill as amended by the Senate; id., p. 5811; and the bill was passed and signed into law. See Public Acts 1985, No. 85-244, § 2.

The following year, the legislature amended the statute to clarify that the presumption favoring parental custody in a dispute between a parent and a third party could be rebutted by showing that an award of custody to the parent would be detrimental to the child. Public Acts 1986, No. 86-224. The new language reflected the understanding of House and Senate members, articulated when debating the merits of the bill one year earlier, that the statute was consistent with the principles set forth in Justice Parskey's dissent in *McGaffin*. Office of Legislative Research, Bill Analysis for Public Acts 1986, No. 86-224; see *McGaffin* v. *Roberts*, supra, 193 Conn. 410–14 (*Parskey*, *J.*, dissenting). The legislature added no new language pertaining to the burden of proof.

[24] The concurrence declares that the majority "misconstrues" the relationship it has drawn between visitation and custody. It states that this court "implicitly recognized in *Roth* that the stringent standard of harm that we adopted in that case clearly would be justified" in third party custody proceedings, and that "the lesser intrusion resulting from visitation was sufficiently similar in kind, albeit not degree, to justify the heightened standard." Footnote 4 of the concurring opinion. This court did *not* conclude in *Roth*, however, either implicitly or otherwise, that the visitation standard would be justified in third party custody proceedings. It simply observed that visitation is similar to custody because the person to whom visitation is awarded may be required to make decisions regarding the child's care during the visitation period. No broader conclusions regarding third party custody may be drawn from the comparison because the issue of third party custody

never was raised or addressed in *Roth*.

The concurrence also fails to acknowledge that *Roth* relied on a California visitation case, *In re Marriage of Gayden*, 229 Cal. App. 3d 1510, 1517, 280 Cal. Rptr. 862 (1991), when it noted that visitation "is a limited form of custody during the time the visitation rights are being exercised . . . ." (Internal quotation marks omitted.) *Roth* v. *Weston*, supra, 259 Conn. 229 n.13. The California Court of Appeal had compared visitation to custody and determined that an award of custody to a nonparent required a finding that parental custody "would be detrimental to the child"; *In re Marriage of Gayden*, supra, 1516; the same standard that we adopt for third party custody awards *and* that the California court ultimately adopted for visitation awards. Id., 1516–17. Consequently, the concurrence cannot cite *Roth*, and by implication, *In re Marriage of Gayden*, for the proposition that third party custody proceedings require application of the visitation standard.

Finally, to the extent that the concurrence declares that the majority misconstrues its discussion regarding the effect of visitation and custody on the "quintessential rights of parenthood," it again is mistaken. The majority makes no representation that the concurrence believes that visitation confers such rights. It simply observes that, according to the concurrence, third party custody, *unlike visitation*, has the *additional* effect of depriving the parent of the "quintessential rights of parenthood" because it removes the child from the parent for a longer period of time and thus may preclude the parent from making fundamental decisions concerning the child's life.

[25] The majority does not "dismiss" the constitutional infringement on parental rights that results from an award of custody, as the concurrence suggests. Nor does it rely on the "hypothetical possibility" of an award of joint custody to justify its conclusions. Indeed, not only are these gross exaggerations, but they miss the point entirely. First, the majority recognizes at the outset of its discussion that the liberty interest of a parent in the care, custody and control of his or her child is one of the oldest of the fundamental liberty interests deserving of heightened protection. See *Troxel* v. *Granville*, supra, 530 U.S. 65. Our subsequent conclusion is not intended to diminish or ignore this interest but is based on our view that the standard we articulated in *Roth* gives insufficient weight to the troubled parent-child relationship, which is directly challenged in a third party custody proceeding. We similarly conclude that the right of the parent and child to family autonomy or family integrity, although extremely significant, also must be viewed with caution in the context of a third party custody proceeding because of our view that it is not desirable to preserve family autonomy if parental custody will result in significant harm to the child.

Second, the majority does not discuss joint custody to justify the standard of harm but to demonstrate the wide *variation* in custody orders and that a third party custody award does not necessarily preclude a parent from continued participation in the child's life. See General Statutes § 46b-57 (court may award *partial* custody to any third party "upon such conditions and limitations as it deems equitable"). In the present case, for example, the court ordered that "[t]here shall be reasonable telephone and e-mail contact between the child and her parents" and that the paternal aunt would be required to consult with both parents prior to making decisions affecting the child's welfare. While these orders fall short of allowing the defendant to exercise *final* decision-making authority, the court in another case might have ordered such decisions to be made jointly by the third party and the parent.

In addition, the concurrence's suggestion that the majority's failure to adopt the standard of harm in *Roth* will encourage nonparents to circumvent the more stringent visitation standards by simply seeking limited joint custody instead of visitation is sheer speculation and suggests, at best, a misunderstanding of the differences between the two standards. Third party visitation petitioners must prove that the child will be harmed *by lack of contact with the petitioner*, whereas third party custody petitioners must prove that the child will be harmed *by an award of custody to the parent*. Thus, because third party visitation and custody focus on the child's relationship with different persons, a nonparent wishing to obtain visitation rights because of his or her close relationship with the child presumably would have no factual evidence available to prove that the child's relationship with the parent is detrimental, which is necessary to gain custody. In other words, it would appear to be more, rather than less, difficult for a petitioner seeking visitation to obtain contact with the child by seeking custody instead, assuming that the petitioner would even wish to take on the added responsibility that custody requires.

The concurrence further argues that the availability of the less intrusive "disposition option" of joint custody should have "no weight in determining the procedural and substantive protections necessary to protect the constitutional interests at stake"; footnote 5 of the concurring opinion; again implying that the majority considers the availability of joint custody as a justification for adopting the broader standard. As we previously noted, however, the majority does *not* view less intrusive disposition options as justification for a broader standard of harm. It is the *concurrence* that makes the point, in a subsequent part of its analysis, that it is the *range of available disposition options* that correlate directly to the risk to the child and the parent's ability to meet the child's needs that justifies application of the fair preponderance standard rather than the clear and convincing standard in *neglect* proceedings. The concurrence provides no explanation for this apparent inconsistency in its reasoning.

We finally note that, if we were to adopt the reasoning of the concurrence, the court could award one parent custody over another under the best interests of the child standard but would be required to apply the very restrictive standard articulated in *Roth* if it wished to award a parent and a nonparent joint custody over the objection of the other parent.

[26] The concurrence asserts that most of these jurisdictions have not held that "extraordinary circumstances" means harm of a "lesser degree" than the harm articulated in *Roth*. Footnote 7 of the concurring opinion. We do not necessarily agree. The jurisdictions in question refer to harm arising from "extraordinary circumstances" most likely because they wish the standard to include harm that may not be expressly described within existing statutory and legal definitions. Similarly, our purpose in allowing trial courts to consider harm arising from "extraordinary circumstances" is to broaden the standard, thus granting courts additional flexibility in awarding custody to a third party when a child suffers from harm that may not be specifically identified in the temporary custody and neglect statutes.

[27] We disagree with the concurrence that the only reason the United States Supreme Court did not consider the standard of harm in *Troxel* was "its well established policy of affording substantial deference to state courts in determining the contours of family law, an area of law traditionally relegated to the states." Footnote 10 of the concurring opinion. In our view, the court was not simply recognizing that such issues are best decided by state courts but was making the additional point that *family* courts within the states, which confront these issues on a daily basis, are in a better position to resolve them pursuant to a more flexible, rather than a more strictly defined, standard of harm. See *Troxel* v. *Granville*, supra, 530 U.S. 73.

[28] The concurrence rejects this standard for reasons that are difficult to grasp. On the one hand, it is critical of the majority's attempt to elaborate on the meaning of detriment so as to provide courts with additional guidance. On the other hand, it charges that the majority does "little to guide the courts in properly balancing the interests at stake." The concurrence specifically complains that the standard of harm that the majority adopts could "devolve to a best interests test" or be construed to mean (1) "short-term emotional upheaval" resulting from dissolution of the parents' marriage or some other disruptive event, or (2) "the inculcation of values and beliefs that are contrary to social norms," such as a Bohemian lifestyle, thus allowing the court to consider its own more conventional lifestyle preferences when making an award of custody. The majority has rejected these interpretations, however, and the concurrence concedes as much when it states that the majority "limits the temporal nature of the harm, requiring something more than the temporary stress attendant to dissolution . . . ." Finally, the concurrence inexplicably concludes that a broad definition of detriment by an intermediate Florida appeals court that makes no reference to the type of harm described in Connecticut's neglect statutes "is entirely consistent" with the standard in *Roth*. See *In re Marriage of Matzen*, 600 So. 2d 487, 490 (Fla. App. 1992) (" '[d]etriment' refers to circumstances that produce or are likely to produce lasting mental, physical or emotional harm").

[29] We note that the standard of harm that we adopt for third party custody awards does not rely solely on *In re Joshua S.*, supra, 260 Conn. 207, but is consistent with that of numerous other jurisdictions that also have adopted a more flexible approach. See part IV A of this opinion.

[30] The court in *Santosky* determined that the parent's interest in the accuracy and justice of a decision terminating his or her parental rights is "a commanding one" and that such a decision, because it is "final" and "irrevocable," results in "a unique kind of deprivation." (Emphasis in original; internal quotation marks omitted.) *Santosky* v. *Kramer*, supra, 455 U.S. 759. Accordingly, consideration of "the private interest affected . . . weighs

heavily against use of the preponderance standard at a state-initiated permanent neglect proceeding." Id. The court noted that the fact-finding or fault stage of a termination proceeding is "not intended . . . to balance the child's interest in a normal family home against the parents' interest in raising the child" but, rather, focuses on the fitness of the parent, and thus "pits the [s]tate directly against the parents." Id. Moreover, during the fact-finding stage of the proceedings, "the [s]tate cannot presume that a child and his parents are adversaries." Id., 760.

[31] The concurrence discusses the third, fourth and fifth points in its analysis of the third *Santosky* factor. We discuss them in this context, however, because the focus of the first *Santosky* factor is on the private interests involved, which, in third party custody proceedings, include those of the child.

[32] General Statutes § 46b-129 (j) provides: "Upon finding and adjudging that any child or youth is uncared-for, neglected or dependent, the court may commit such child or youth to the Commissioner of Children and Families. Such commitment shall remain in effect until further order of the court, except that such commitment may be revoked or parental rights terminated at any time by the court, or the court may vest such child's or youth's care and personal custody in any private or public agency that is permitted by law to care for neglected, uncared-for or dependent children or youths or with any person or persons found to be suitable and worthy of such responsibility by the court. The court shall order specific steps that the parent must take to facilitate the return of the child or youth to the custody of such parent. The commissioner shall be the guardian of such child or youth for the duration of the commitment, provided the child or youth has not reached the age of eighteen years or, in the case of a child or youth in full-time attendance in a secondary school, a technical school, a college or a state-accredited job training program, provided such child or youth has not reached the age of twenty-one years, by consent of such youth, or until another guardian has been legally appointed, and in like manner, upon such vesting of the care of such child or youth, such other public or private agency or individual shall be the guardian of such child or youth until such child or youth has reached the age of eighteen years or, in the case of a child or youth in full-time attendance in a secondary school, a technical school, a college or a state-accredited job training program, until such child or youth has reached the age of twenty-one years or until another guardian has been legally appointed. The commissioner may place any child or youth so committed to the commissioner in a suitable foster home or in the home of a person related by blood to such child or youth or in a licensed child-caring institution or in the care and custody of any accredited, licensed or approved child-caring agency, within or without the state, provided a child shall not be placed outside the state except for good cause and unless the parents or guardian of such child are notified in advance of such placement and given an opportunity to be heard, or in a receiving home maintained and operated by the Commissioner of Children and Families. In placing such child or youth, the commissioner shall, if possible, select a home, agency, institution or person of like religious faith to that of a parent of such child or youth, if such faith is known or may be ascertained by reasonable inquiry, provided such home conforms to the standards of said commissioner and the commissioner shall, when placing siblings, if possible, place such children together. *As an alternative to commitment, the court may place the child or youth in the custody of the parent or guardian with protective supervision by the Commissioner of Children and Families subject to conditions established by the court.* Upon the issuance of an order committing the child or youth to the Commissioner of Children and Families, or not later than sixty days after the issuance of such order, the court shall determine whether the Department of Children and Families made reasonable efforts to keep the child or youth with his or her parents or guardian prior to the issuance of such order and, if such efforts were not made, whether such reasonable efforts were not possible, taking into consideration the child's or youth's best interests, including the child's or youth's health and safety." (Emphasis added.)

Notably, there is no option permitting unsupervised custody following an adjudication of neglect.

[33] The concurrence states that this conclusion is "unfair" to our trial courts because it reflects a "concern" that the courts will not take remedial action in such cases. To the contrary, the majority has great confidence in the ability of trial courts to interpret the law properly so as not to infringe unnecessarily on the liberty interests of parents. Insofar as the majority

recognizes that trial courts will follow the law and refrain from awarding custody to third parties or take other actions to protect children when the burden of proof has not been satisfied, it merely recognizes that the courts are not, and may not be, expected to take actions, sua sponte, that are not required pursuant to their duties as adjudicators of the law.

[34] The court in *Santosky* held that numerous factors combine to magnify the risk of error in a termination proceeding. *Santosky* v. *Kramer*, supra, 455 U.S. 762–63. These include "imprecise substantive standards that leave determinations unusually open to the subjective values of the judge"; id., 762; the state's superior resources and ability to assemble its case, which dwarfs the parents' ability to mount a defense, and the state's ability to engage in repeated termination efforts, which the parents cannot forestall, upon the gathering of additional evidence, even when they have attained the level of fitness that the state requires. See id., 763–64. The court noted that "the primary witnesses at the hearing [would] be the agency's own professional caseworkers whom the [s]tate [had] empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the [s]tate even has the power to shape the historical events that form the basis for termination." Id., 763. The court thus concluded that the fair preponderance standard, which by its very terms demands consideration of the quantity rather than the quality of the evidence, "create[d] a significant prospect of erroneous termination." Id., 764. The court further stated that, because the likely consequences of an erroneous termination of parental rights were far more severe for the parents than for the child, who could remain in a foster home, for example, a standard that allocated the risk of error nearly equally between the two outcomes did not reflect properly their relative severity. Id., 766.

[35] We do not ignore the fact that periodic judicial review is directed toward the goal of family reunification but merely observe that when the custody of a child adjudicated as neglected is vested in an appropriate third party under § 46b-129 (j), the custody order is not subject to judicial review. See *In re Juvenile Appeal (85-BC)*, supra, 195 Conn. 361.

The concurrence attempts to diminish this conclusion by stating that *In re Juvenile Appeal (85-BC)* does not address whether the vesting of custody in a third party *directly following* the court's adjudication of neglect, rather than at some later time following transfer from the custody of the commissioner of children and families (commissioner), as in that case, eliminates the need for "reunification efforts and the attendant measures" articulated in § 46b-129. *In re Juvenile Appeal (85-BC)*, however, makes no such hair-splitting distinction. The court merely states that the commissioner does not have the same obligation to conduct judicial review when the trial court vests custody in an appropriate third party as when a child is committed to the commissioner's custody. See *In re Juvenile Appeal (85-BC)*, supra, 195 Conn. 361. The court explained that commitment cases require judicial review because of legislative concerns regarding lengthy placements of children in foster homes or other institutions during the commitment period, which do not exist when the child is placed in the custody of an appropriate third party under § 46b-129. See id. Finally, the fact that the court did not consider whether the constitution mandates judicial review is no reason to ignore its analysis of judicial review in the present context.

[36] The court in *Santosky* declared that the third factor, the state's countervailing interest in parental rights termination proceedings, consists of "a parens patriae interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings," both of which it deemed to be compatible with the clear and convincing standard of proof. *Santosky* v. *Kramer*, supra, 455 U.S. 766. The court specifically concluded that "the parens patriae interest favors preservation, not severance, of natural familial bonds"; id., 766–67; and that "a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the [s]tate." Id., 767. The court stated that these goals would be served by "procedures that promote an accurate determination of whether the natural parents can and will provide a normal home." Id. In this regard, the court noted that New York family court judges already were familiar with the higher standard of proof in other parental rights termination proceedings not involving permanent neglect. Id.

The court ultimately determined that the fair preponderance standard was "constitutionally intolerable" in a parental rights termination context because "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." (Internal quotation marks

omitted.) Id., 768. The court thus held that either the reasonable doubt standard or the clear and convincing standard would satisfy due process in such a proceeding. See id., 769–70.

[37] Although the Appellate Court summarily concluded that "there was ample evidence for the [trial] court to conclude that the presumption in the defendant's favor was rebutted"; *Fish* v. *Fish*, supra, 90 Conn. App. 757; the court conducted no analysis of whether it would be detrimental to the child to remain in the defendant's custody.

[38] See footnote 6 of this opinion.