KATZ, J., with whom BORDEN and PALMER, Js., join, concurring. I agree with the majority's conclusion that the judgment of the Appellate Court affirming the trial court's judgment awarding custody of the minor child of the defendant, Andrew J. Fish, to the child's paternal aunt, Barbara Husaluk, over the defendant's objection must be reversed and the case remanded for further proceedings. Specifically, I agree with part II A of the majority opinion that, in order to satisfy the constitutional concerns highlighted by this court in *Roth* v. *Weston*, 259 Conn. 202, 234–35, 789 A.2d 431 (2002), a third party seeking custody, like a third party seeking visitation, must allege a parent-like relationship with the child to have standing to seek custody over a presumptively fit parent's objection. I also agree that the trial court improperly awarded custody solely on the basis of a determination that third party custody was in the best interests of the child. That is where my agreement with the majority ends.

The majority determines that a third party may obtain custody over the objection of a parent who has not been deemed unfit upon demonstrating by a mere preponderance of the evidence that parental custody would be "detrimental to the child" pursuant to General Statutes § 46b-56b.[1] Although the majority implicitly concludes that § 46b-56b requires a judicial gloss, it ultimately concludes that less stringent proof requirements than those established by this court in *Roth* to safeguard the constitutionally protected rights of the parent and the family unit when a third party petitions for visitation are adequate to protect those same constitutional interests when a third party petitions for custody. In rejecting the *Roth* standard of harm, the majority relies on the following reasoning: (1) the *Roth* standard is not sufficiently "flexible" and "provide[s] insufficient room for the judicial discretion necessary to formulate solutions that take into account the unique facts and circumstances of each particular case"; (2) other jurisdictions have adopted a "detriment" standard but have declined to define that term with more precision to allow such flexibility; (3) this court declined to adopt a standard of harm as restrictive as the *Roth* standard when we had an opportunity to interpret the detriment standard in a related context; and (4) prior to our decision in *Roth*, the legislature rejected the standard of harm adopted in *Roth*. In rejecting the heightened clear and convincing burden of proof that this court applied in *Roth*, the majority reasons that a lesser burden comports with due process in essence because third party custody does not rise to the level of termination of parental rights.

I disagree with this reasoning. The time tested *Roth*

standard strikes the proper balance between protecting the constitutional rights at stake and safeguarding the child's welfare. Because the intrusion on the constitutionally protected interests of the parent and the family unit is significantly greater when a court acts to deprive a parent of custody of his or her child than when a court awards visitation to a third party over a parent's objection, I cannot agree that a lesser standard suffices. Indeed, because third party custody not only deprives the parent and child of each other's companionship, but also deprives the parent of the right to make decisions affecting every aspect of a child's physical, social and moral development, the infringement on a parent's right to raise his or her own child and on the family unit's autonomy is akin to that arising from the termination of parental rights for as long as custody is vested in that third person to the exclusion of the parent. Accordingly, I would conclude that, in order to divest a parent of custody, a third party must plead and prove, by clear and convincing evidence, that they have a parent-like relationship with the child and that "real and substantial harm"; *Roth* v. *Weston*, supra, 259 Conn. 229; akin to that under our neglect statutes will result should custody not be vested in the third party.

I

To address the question of whether the *Roth* standard of harm constitutionally is mandated, I begin with this court's reasoning for adopting that standard in that case. In *Roth* v. *Weston*, supra, 259 Conn. 209–10, this court determined 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), we must reconsider the constitutional gloss that we had placed on the third party visitation statute, General Statutes § 46b-59, just six years earlier in *Castagno* v. *Wholean*, 239 Conn. 336, 684 A.2d 1181 (1996).[2] The court concluded that the jurisdictional requirements that we had added in *Castagno* "[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 Supreme] Court.' "[3] *Roth* v. *Weston*, supra, 216. Therefore, the court considered "what interest would be sufficiently compelling to warrant state intrusion into a parent's decision to limit or deny visitation to a third party." Id., 222. The court reasoned that, "[i]n light of the compelling interest at stake, the best interests of the child are secondary to the parents' rights. . . . Because parenting remains a protected fundamental right, the due process clause leaves little room for states to override a parent's decision even when that parent's decision is arbitrary and neither serves nor is motivated by the best interests of the child." (Citations omitted.) Id., 223. While recognizing the constitutional significance of the interests at stake, the court was mindful that "[t]here are . . . limitations on these parental

rights. . . . [I]t is unquestionable that in the face of allegations that parents are unfit, the state may intrude upon a family's integrity." (Citations omitted.) Id., 224; see *Troxel* v. *Granville*, supra, 68–69 ("so long as a parent adequately cares for his or her children [i.e., is fit], there will normally be no reason for the [s]tate to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children"). Accordingly, the court reasoned that "a requirement of an allegation such as abuse, neglect or abandonment would provide proper safeguards to prevent families from defending against unwarranted intrusions and would be tailored narrowly to protect the interest at stake." *Roth* v. *Weston*, supra, 224. The court considered whether some lesser harm could justify such an intrusion, but concluded that "the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody under General Statutes §§ 46b-120 and 46b-129—namely, that the child is 'neglected, uncared-for or dependent' as those terms have been defined." Id., 226. The court reasoned that, "although the plurality [opinion] in *Troxel* [had] avoided the issue, [the United States Supreme Court's] prior decisions clearly reflect a tolerance for interference with parental decisions only when the health or safety of the child will be jeopardized or there exists the potential for significant social burdens." Id., 228.

With this background in mind, I turn to the question of whether third party custody petitions implicate any lesser or substantively different intrusion on family autonomy and a parent's right to exercise care, control and custody over a child than the intrusion resulting from a third party visitation petition, such that the custody statutes need not embody the same procedural and substantive protections that we applied, as a judicial gloss, to § 46b-59 in *Roth*. I would conclude that they do not. Indeed, it is evident that third party custody constitutes a significantly greater infringement.

In *Roth*, after articulating the requisite pleading and proof requirements, the court expressly noted: "We recognize that the burden of harm that the statute imposes may be deemed unusually harsh in light of the fact that visitation, as opposed to custody, is at issue. We draw no distinction, however, for purposes of this discussion. Visitation is a limited form of custody during the time the visitation rights are being exercised . . . ."[4] (Internal quotation marks omitted.) *Roth* v. *Weston*, supra, 259 Conn. 229 n.13; accord *In re Marriage of Gayden*, 229 Cal. App. 3d 1510, 1517, 280 Cal. Rptr. 862 (1991) (visitation is "a limited form of custody during the time the visitation rights are being exercised"); *Jackson* v. *Fitzgerald*, 185 A.2d 724, 726 (D.C. 1962) ("[t]he right of visitation derives from the right to [c]ustody"); *Alison D.* v. *Virginia M.*, 77 N.Y.2d 651, 656–57, 572 N.E.2d

27, 569 N.Y.S.2d 586 (1991) ("[t]o allow the courts to award visitation—a limited form of custody—to a third person would necessarily impair the parents' right to custody and control"); *Clark* v. *Clark*, 294 N.C. 554, 575–76, 243 S.E.2d 129 (1978) ("[v]isitation privileges are but a lesser degree of custody"); *Middleton* v. *Johnson*, 369 S.C. 585, 594, 633 S.E.2d 162 (App. 2006) ("[u]nder the penumbra of custody is the lesser included right to visitation").

Although clearly related, the legal rights and privileges attendant to an order of custody are more intrusive than those attendant to an order of visitation. As one judge explained: "Full custody denotes the care, control, and maintenance of a child including all physical and legal aspects of custody, and the child resides with the person to whom custody was awarded. . . . Visitation normally represents a period of access by a non-custodial individual. It differs from full custody in that the child does not dwell with the non-custodial individual, and, although this individual can be responsible for the care and safety of the child, he or she may not make important decisions for the child. . . . Full custody confers rights and authority upon the one in whom it is placed as opposed to the privilege of visiting." (Citations omitted.) *Hiller* v. *Fausey*, 588 Pa. 342, 378–79, 904 A.2d 875 (2006) (Newman, J., concurring), cert. denied, U.S. , 127 S. Ct. 1876, 167 L. Ed. 2d 363 (2007).

Thus, an award of full custody to a third person deprives the parent of far more than the right to the child's companionship for some limited period during which visitation occurs. It deprives the parent of the quintessential rights of parenthood—to make decisions that affect the child's development, such as determining the child's associations, education and medical treatment, and to inculcate religious beliefs and moral values. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 232–33, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) ("the primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition," particularly in matters of "moral standards, religious beliefs, and elements of good citizenship"). As such, a third party custody petition implicates a significantly greater intrusion on a parent's constitutional interest than does a third party visitation petition.

In considering the constitutional question before us, it is important to recognize that the constitutional rights at stake include more than the parent's right to control the child's upbringing. It also includes the broader right of family autonomy or family integrity. "[The] right to family integrity . . . encompasses the reciprocal rights of both parent and children . . . the interest of the parents in the companionship, care, custody and management of [their] children . . . and of the children in not being dislocated from the emotional attachments

that derive from the intimacy of daily association with the parent . . . .'' (Citations omitted; internal quotation marks omitted.) *Pamela B.* v. *Ment*, 244 Conn. 296, 310, 709 A.2d 1089 (1998); see *In re Christina M.*, 280 Conn. 474, 486–87, 908 A.2d 1073 (2006) (''[i]n cases involving parental rights, the rights of the child coexist and are intertwined with those of the parent'' [internal quotation marks omitted]); see also *Santosky* v. *Kramer*, 455 U.S. 745, 760–61, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (prior to termination, it is presumed that interests of child and parent coincide). An award of custody to a third party invariably attenuates and potentially destroys the emotional attachments that the child derives from the intimacy of daily association with his or her parent. Thus, family integrity is undermined as a result of third party custody in a manner that is not implicated in third party visitation. In sum, the constitutional infringement is greater in third party custody; hence, a lesser standard of harm than that which we required in *Roth* for visitation reasonably cannot be justified. Moreover, the hypothetical possibility of an award of joint custody in third party custody petitions, which the majority relies on to dismiss the greater constitutional infringements attendant to an award of custody, does not change the fundamental effect of the intrusion.[5]

Although this court and the United States Supreme Court have recognized that there is an independent interest in ''safeguarding the physical and psychological well-being of a minor''; (internal quotation marks omitted) *Osborne* v. *Ohio*, 495 U.S. 103, 109, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990); accord *In re Juvenile Appeal (83-CD)*, 189 Conn. 276, 287, 455 A.2d 1313 (1983); the Supreme Court has rejected the view that this interest rises to the level of a constitutional right, such that it would stand on equal footing with the constitutional right to family autonomy; see *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U.S. 189, 201, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) (''[s]tate had no constitutional duty to protect [child from abuse while in parent's custody]''); and this court recently declined to address that issue under our state constitution; see *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 760 n.16, 865 A.2d 428 (2005) (declining, in light of scope of certified questions on appeal, to reach plaintiff's argument ''that there is a substantive due process right to child protection under the constitution of Connecticut''). As this court recognized in *Roth*, however, the state's interest in protecting children is of sufficient magnitude that a state may impose ''limitations'' on these constitutional rights.[6] *Roth* v. *Weston*, supra, 259 Conn. 224. The court explained therein that the jurisdictional pleading requirement of real and substantial harm akin to the requirements of §§ 46b-120 and 46b-129 both addresses this concern *and* conforms to constitutional jurisprudence by providing that the state may interfere with

the family's autonomy only when there is sufficient evidence that the constitutional interests no longer are paramount, such as when the child's health or safety is jeopardized. Id., 228; see also *In re Juvenile Appeal (83-CD)*, supra, 287–88 ("The language of [General Statutes] § 17-38a [e] clearly limits the scope of intervention to cases where the state interest is compelling . . . . Intervention is permitted only where 'serious physical illness or serious physical injury' is found or where 'immediate physical danger' is present. It is at this point that the child's interest no longer coincides with that of the parent, thereby diminishing the magnitude of the parent's right to family integrity . . . and therefore the state's intervention as parens patriae to protect the child becomes so necessary that it can be considered paramount." [Citations omitted.]). As I have noted previously herein, the court reached that conclusion because of the substantial body of case law "clearly reflect[ing] a tolerance for interference with parental decisions only when the health or safety of the child will be jeopardized or there exists the potential for significant social burdens." *Roth* v. *Weston*, supra, 228; see also *Parham* v. *J. R.*, 442 U.S. 584, 604, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) ("[i]n defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply"). Indeed, in recognition of these competing concerns, many other states have permitted an award of custody to a third party over a parent only if the parent is unfit or the child's welfare seriously is at stake.[7]

The majority concludes that a different standard than *Roth* should apply in custody disputes because, unlike visitation, "the overall competence of the parent to care for the child is directly challenged in third party custody petitions . . . ." I disagree. In *Roth*, this court rejected the possibility that something less than proof of the kind of harm akin to that contemplated by §§ 46b-120 and 46b-129, namely, that the child is "neglected, uncared-for or dependent" would provide a sufficient constitutional safeguard. *Roth* v. *Weston*, supra, 259 Conn. 225–26. Neglect is defined as, inter alia, circumstances wherein a child "is being denied proper care and attention, physically, educationally, emotionally or morally, or . . . is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child or youth, or . . . has been abused." General Statutes § 46b-120 (9) (B) (C) and (D). Given that *Roth* requires a third party seeking visitation to prove real and substantial harm akin to that under our neglect statutes should the petition not be granted, one reasonably cannot say that the parent's competency

is not at issue in visitation petitions. Accordingly, I would conclude that no lesser standard of constitutional protections than that which this court applied in *Roth* can apply to third party custody.

Turning to the parental presumption set forth in § 46b-56b, which requires a nonparent to show that parental custody would be "detrimental to the child," undoubtedly such a standard could be reconciled with *Roth*, depending on what detriment means. If "detriment" is construed to mean any degree of harm, no matter how insubstantial or short-lived, that standard readily could devolve to a best interests test, in contravention to the holdings of *Roth* and *Troxel*. See *Evans* v. *McTaggart*, 88 P.3d 1078, 1086–87 (Alaska 2004) (noting concern that detriment standard might not be readily distinguishable from best interest test). Such an open-ended term also could be construed to allow a third party to obtain custody solely because a child is suffering short-term emotional upheaval as a result of the dissolution of the parents' marriage or other disruptive events. See *In re Jessica M.*, 217 Conn. 459, 470, 586 A.2d 597 (1991) ("[i]t is not unlikely that most parent-child relationships in which state intervention is required, including custody disputes incidental to divorce, will exhibit signs of strain"). Detriment also could be construed to mean the inculcation of values and beliefs that are contrary to social norms. Cf. *Painter* v. *Bannister*, 258 Iowa 1390, 1393–96, 140 N.W.2d 152 (citing disapproval of father's bohemian lifestyle, despite evidence of his care and concern for child and view that grandparents' home provided "a stable, conventional, middle-class, middlewest background" in rationale for affirming award of custody to grandparents over father's objection), cert. denied, 385 U.S. 949, 87 S. Ct. 317, 17 L. Ed. 2d 227 (1966); see also *Santosky* v. *Kramer*, supra, 455 U.S. 764 ("[a]n elevated standard of proof . . . would alleviate the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior" [internal quotation marks omitted]). Thus, it is evident that some further refinement of the term "detriment" is necessary to ensure a uniform, constitutional application.

Mindful of such concerns, one of our sister states applied the following judicial gloss to the detriment standard: "Detriment refers to circumstances that produce or are likely to produce lasting mental, physical or emotional harm. . . . [D]etriment [i]s more than the normal trauma caused to a child by uprooting him from familiar surroundings such as often occurs by reason of divorce, death of a parent or adoption. It contemplates a longer term adverse effect that transcends the normal adjustment period in such cases. . . . Parental rights do not evaporate merely because parents have not been ideal parents." (Citations omitted; internal quotation marks omitted.) *In re Marriage of Matzen*, 600 So. 2d

487, 490 (Fla. App. 1992). Undoubtedly, this gloss is entirely consistent with the *Roth* standard.

The majority implicitly recognizes the constitutional problems inherent in the vagueness of the term "detriment," by virtue of its numerous attempts to refine its meaning. The majority engrafts onto the "detriment" standard the following gloss: "damaging, injurious or harmful to the child," a definition of "detriment" previously cited by this court in *In re Joshua S.*, 260 Conn. 182, 207, 796 A.2d 1141 (2002); "exceptional circumstances"; not "temporary harm of the kind resulting from the stress of the dissolution proceeding itself, but significant harm arising from the pattern of dysfunctional behavior that has developed between the parent and the child over a period of time"; and a "qualitatively different [analysis] from that involving the 'best interests of the child' . . . ." In my view, these descriptive terms, in conjunction with the majority's rejection of the *Roth* standard, do little to guide the courts in properly balancing the interests at stake.

Specifically, the majority cites the court's statement in *In re Joshua S.*, supra, 260 Conn. 207, wherein we held that "detriment may be shown, not just by demonstrating unfitness . . . but by demonstrating considerations that would be damaging, injurious or harmful to the child." The majority ignores entirely, however, the context in which the court made this statement. The custody dispute in *In re Joshua S.* was between testamentary guardians and foster parents, a fact that led the court to reject the constitutional presumption afforded to parents and the applicability of the *Roth* and *Troxel* holdings to the case. Id., 203–205. Accordingly, the court did not examine the meaning of detriment through a constitutional lens; rather, it simply looked to the dictionary for the common meaning of the term. Id., 207 n.19, citing Webster's New World Dictionary (2d Ed.). Notably, in rejecting the testamentary guardians' reliance on a pre-*Roth* case, *Doe* v. *Doe*, 244 Conn. 403, 455, 710 A.2d 1297 (1998), wherein the court had held that "[s]o long as due regard is given to the [parental] presumption . . . '[t]he best interests standard remains the ultimate basis of a court's custody decision,' " the court in *In re Joshua S.* stated: "In light of our recent decisions concerning third party visitation . . . *Roth* v. *Weston*, [supra, 259 Conn. 202]; *Crockett* v. *Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); we now question the vitality of the standard as set out in *Doe* by which to rebut the presumption favoring a parent over a nonparent in a custody dispute." *In re Joshua S.*, supra, 202 n.17. Thus, *In re Joshua S.* does no more than provide a dictionary definition of the term "detriment" and acknowledge that this court's pre-*Roth* and pre-*Troxel* case law may have questionable precedential value in setting sufficient constitutional standards for third party custody disputes.[8]

The majority's addition of the qualifying term "exceptional circumstances" hardly provides meaningful guidance to the trial courts. Although some other jurisdictions have used a similar term, many have used the term in conjunction with specific examples of harm to provide a contextual gauge for the requisite harm; many others have eschewed such an amorphous standard altogether in favor of a more fact specific inquiry or have declined to permit third party custody in the absence of parental unfitness. See footnote 7 of this concurring opinion. The majority at least limits the temporal nature of the harm, requiring something more than the temporary stress attendant to dissolution, but declines to tether the detriment standard to the contextual gauge provided by the *Roth* standard's time-tested application and its well understood contours.

The majority declines to do so because it finds the *Roth* standard lacking sufficient flexibility to address the myriad circumstances under which courts may need to intervene to protect children. It cites the possibility of some "unpredictable" significant harm that might fall short of the *Roth* standard, yet warrant removing a child from his or her parent's custody. I find this concern puzzling and troubling for several reasons. Contrary to the majority's suggestion, the definitions of neglected, uncared for and dependent are not limited to circumstances wherein the child's "actual safety may be . . . endangered." Indeed, the majority appears to equate the *Roth* standard with "abuse," rather than with the pertinent terms. Compare General Statutes § 46b-120 (4) (defining "abused") with General Statutes § 46b-120 (7), (9) and (10) (respectively, defining "dependent," "neglected" and "uncared for").[9] Thus, by concluding that some harm short of the *Roth* standard suffices, the majority necessarily determines that a lesser harm to the child than "being denied proper care and attention, physically, educationally, emotionally or morally, or . . . being permitted to live under conditions, circumstances or associations injurious to the well-being of the child or youth"; General Statutes § 46b-120 (9) (B) and (C); would be a constitutionally permissible basis on which to deprive a parent of custody. As I have discussed previously, the case law is to the contrary.

I am unaware of any criticism from our trial courts or the family law bar that our long-standing and expansively defined neglect standards have failed to meet the needs of the children of this state. Indeed, under our neglect statutes, the petitioner need not even allege and prove *actual* harm, only the genuine potential for real and substantial harm. See *In re Jermaine S.*, 86 Conn. App. 819, 831, 863 A.2d 720, cert. denied, 273 Conn. 938, 875 A.2d 43 (2005). Moreover, our trial courts are well versed in ascertaining the unique needs of each child and circumstances of each family even when determin-

ing the lesser standard of best interests of the child in family matters generally. See *Strohmeyer* v. *Strohmeyer*, 183 Conn. 353, 356, 439 A.2d 367 (1981) (noting "inherently fact-bound" inquiry in best interests of child determination).

I cannot accept the majority's premise that harm that falls short of the minimum threshold for an adjudication of neglect provides a constitutionally permissible basis for divesting a parent of custody in a third party custody petition. I have no doubt that trial courts will have difficulty drawing the line between detriment that falls short of neglect yet exceeds a mere best interests of the child determination. See *Evans* v. *McTaggart*, supra, 88 P.3d 1086–87 (noting concern that detriment standard might not be readily distinguishable from best interest test). Unlike the majority, I favor giving our trial courts a time-tested standard rather than inviting challenges to a more amorphous standard on a case-by-case basis. Moreover, I do not construe the Supreme Court's deference to state court standards to constitute its sanctioning of such vagaries.[10]

Undoubtedly, the more open-ended the standard, the more flexibility it allows. While flexibility may be a virtue in some circumstances, we are operating in the realm of constitutional rights, where concerns of vagueness and arbitrary application counsel against amorphous standards. We adopted a standard in *Roth* that has provided both sufficient flexibility to meet the legitimate concerns of the child's well-being and sufficient constraints to protect the constitutional rights of the parent and family unit.

Therefore, consistent with our obligation to construe statutes to avoid constitutional infirmities; see *Clerk of the Superior Court* v. *Freedom of Information Commission*, 278 Conn. 28, 38–39, 895 A.2d 743 (2006); I would construe the "detrimental to the child" standard under § 46b-56b to mean harm of the same nature and degree as that required in § 46b-59 under *Roth*. Accordingly, I would conclude that a third party seeking custody must plead and prove real and substantial harm, akin to the kind of harm contemplated by §§ 46b-120 and 46b-129.

II

I next turn to the issue of whether the heightened burden of proof prescribed in *Roth* similarly should apply to third party custody petitions. In *Roth*, this court concluded that the clear and convincing burden of proof was not constitutionally mandated in the context of third party visitation,[11] but that it nonetheless should apply because of the constitutional interest at stake and the ease with which a third party with greater resources could intrude on that interest. *Roth* v. *Weston*, supra, 259 Conn. 231–32. In the context of a third party custody petition, however, I would conclude that the

clear and convincing burden of proof is constitutionally mandated.

Although § 46b-56b does not state expressly by what degree of proof the parental presumption must be overcome, I agree with the majority that the legislative history to the statute indicates that the legislature declined to require that the courts apply the heightened burden of clear and convincing proof. As I previously have noted, however, given this court's evolving view of what the constitution mandates in third party visitation petitions, we reasonably could not expect the legislature to have been cognizant of such developments. See footnote 8 of this concurring opinion. Nonetheless, this court may impose a heightened burden of proof if the constitution so mandates. The majority concludes that the lowest possible burden of proof—preponderance of evidence—is constitutionally adequate because an award of custody differs from a proceeding to terminate parental rights in that custody: (1) involves the additional interest of the child's welfare; and (2) does not permanently sever parental rights. I disagree with this reasoning.

Specifically, the question before us is whether due process is violated by application of the preponderance of the evidence standard to a decision to award custody to a third party over a parent's objection, pursuant to General Statutes §§ 46b-56, 46b-56b and 46b-57, or whether due process mandates the more exacting standard of clear and convincing evidence. It is well settled that "[t]he 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." (Citations omitted; internal quotation marks omitted.) *Santosky* v. *Kramer*, supra, 455 U.S. 754–55. In stating its general rule, the Supreme Court noted that it "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 . . . the [c]ourt has deemed this level of certainty 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. . . . See, e.g., *Addington* v. *Texas*, [441 U.S. 418, 424, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)] (civil commitment); *Woodby* v. [*Immigration & Naturalization Service*, 385 U.S. 276, 285, 87 S. Ct. 483, 17

L. Ed. 2d 362 (1966)] (deportation); *Chaunt* v. *United States*, 364 U.S. 350, 353 [81 S. Ct. 147, 5 L. Ed. 2d 120] (1960) (denaturalization); *Schneiderman* v. *United States*, 320 U.S. 118, 125, 159 [63 S. Ct. 1333, 87 L. Ed. 1796] (1943) (denaturalization)." (Citations omitted; internal quotation marks omitted.) *Santosky* v. *Kramer*, supra, 756–57.

I agree with the majority that the nature of the process due in a third party custody proceeding turns on the balancing of the following three distinct factors: "the private interests affected by the proceeding; the risk of error created by the [s]tate's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."[12] Id., 754. Applying those three factors, the United States Supreme Court held that due process mandates the clear and convincing burden of proof in a proceeding to terminate parental rights. Id., 768–69. By contrast, this court held that due process is not violated by application of the preponderance of the evidence standard to either a petition by the state for temporary custody of a child; *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 295; a petition by the state to adjudicate a child neglected, uncared for or dependent; *In re Juvenile Appeal (84-AB)*, supra, 192 Conn. 263; or a third party petition for visitation; *Roth* v. *Weston*, supra, 259 Conn. 231. In order to gauge the requirements of due process in the present case, I consider where a third party custody petition falls within the spectrum of this precedent. To put that question in context, I begin by briefly summarizing the nature of proceedings at issue in these cases, and the reasoning for the particular burden of proof applied therein.

In Connecticut, the state may seek a summary or ex parte order for immediate temporary custody when: (1) a child is suffering from serious physical injury or serious physical illness or is in immediate physical danger from his surroundings; and (2) immediate removal from the home is necessary to ensure the child's safety. See General Statutes § 17-38a (e); *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 288–89 (construing § 46b-129 [b] to authorize immediate removal of child only under same circumstances as § 17-38a [e]). When immediate removal from the home is not necessary, but the child nonetheless may be neglected, uncared for or dependent, the state initiates a petition to adjudicate the child's status and to determine what disposition is appropriate. General Statutes § 46a-129 (a). Disposition options available to the court range from ordering supervised or unsupervised parental custody, to committing the child to the department of children and families (department) for a specified period of time, to vesting the child's care and personal custody to a suitable third person or agency. General Statutes § 46a-129 (j). If the child is committed to the department, the state thereafter may seek to continue the placement, to return the child to the parent or to termi-

nate parental rights. General Statutes §§ 17a-111a and 46b-129 (k) (2). The termination of parental rights severs permanently the legal ties between parent and child. See General Statutes § 45a-707 (8) (" '[t]ermination of parental rights' means the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and the child's parent or parents so that the child is free for adoption except it shall not affect the right of inheritance of the child or the religious affiliation of the child").

Accordingly, in *Santosky* v. *Kramer*, supra, 455 U.S. 759, the Supreme Court determined that clear and convincing proof was required to terminate parental rights principally because the state's action resulted in the final and irrevocable destruction of the parent's fundamental right and numerous considerations combined to magnify the risk of erroneous deprivation of that right: imprecise subjective standards are applied by the court; litigation resources available to the state usually dwarf those of the parents; and no protections are available to bar repeated termination efforts. Id., 762–64. By contrast, when this court determined that the preponderance standard was constitutionally adequate for temporary custody orders and neglect petitions, the court emphasized: that the interests of the child's safety would justify intervention in the family's autonomy if the child was suffering, or at imminent risk of suffering, serious physical harm; that the court had disposition options short of removing the child from the parent's custody; and that the court's decision was neither final nor irrevocable because it was subject to change via numerous statutorily prescribed stages of review. *In re Juvenile Appeal (84-AB)*, supra, 192 Conn. 263–64; *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 287–88, 291. With this background in mind, I turn to the three *Santosky* factors in the context of third party custody.

A

Under the first factor, the question of "[w]hether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss." *Santosky* v. *Kramer*, supra, 455 U.S. 758. The fundamental, constitutional dimension of the interest at stake when a child is removed from a parent's custody is well established. "[I]t [is] plain beyond the need for multiple citation that a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." (Internal quotation marks omitted.) Id., 758–59; accord *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 284. As I have noted in part I of this concurring opinion, the constitutional interest, more broadly framed, is recognized as a right to family integrity or family autonomy

that is held collectively by parent and child. See *Pamela B.* v. *Ment*, supra, 244 Conn. 310.

Although a custody proceeding also implicates another interest, that of the child's safety and well-being; see *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 287; I address that interest, to the extent that it conflicts with the child's interest in maintaining family integrity, when analyzing the third *Santosky* factor of the countervailing interest in a lesser burden of proof. I underscore at this juncture, however, my disagreement with what appears to be the equivalent weight given by the majority to the child's safety interest (or more accurately under the majority's standard, the child's interest in being protected from any degree of harm) and the constitutional interests of the parent and family unit. As noted previously, given the absence of authority holding that the child's general safety interest is of equal constitutional dimension to the child's interest in maintaining the integrity of the family unit and to the parent's rights; *DeShaney* v. *Winnebago County Dept. of Social Services*, supra, 489 U.S. 201; see *Teresa T.* v. *Ragaglia*, supra, 272 Conn. 760 n.16; I would conclude that the constitutional rights should be the paramount concern in determining the proper burden of proof. See *Santosky* v. *Kramer*, supra, 455 U.S. 760–61 ("At the fact-finding, the [s]tate cannot presume that a child and his parents are adversaries. After the [s]tate has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. . . . But until the [s]tate proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures." [Citation omitted.]); see also *In re Juvenile Appeal (83-CD)*, supra, 287 (state's interest in child's safety becomes paramount only when serious physical injury or illness is found or when immediate physical danger is present).

Turning to the extent of the deprivation, it is clear that a successful third party custody petition does not necessarily deprive a parent of all parental rights nor of custody permanently. Nonetheless, as explained in part I of this concurring opinion when contrasting the effect of a visitation petition with that of a custody petition, during the period that a parent is deprived of full custody, his or her rights vis-á-vis the child may bear substantial similarities to those of a parent whose rights have been terminated. Indeed, an award of custody can undermine family integrity irreparably. As emphasized previously, an award of full custody to a third party deprives the parent of the most essential attributes of parenthood—the right to make decisions affecting the child's development, such as determining the child's associations, education and medical treat-

ment and the right to inculcate religious beliefs and moral values. See *Wisconsin* v. *Yoder*, supra, 406 U.S. 232–33; *Roth* v. *Weston*, supra, 259 Conn. 216–17. Indeed, as the present case clearly demonstrates, a court granting a third party custody petition may not leave the parent with any decision-making authority with respect to the child, and may not order meaningful visitation.[13]

The Supreme Court has recognized that even a temporary deprivation of a constitutional right may require a heightened burden of proof to assure the correctness of the judgment. See *Santosky* v. *Kramer*, supra, 455 U.S. 759. Indeed, the court's decision in *Addington* v. *Texas*, supra, 441 U.S. 422, in which the court determined that the clear and convincing burden was required in a civil commitment proceeding, is one such example. As a result of that proceeding, the appellant had been committed involuntarily to a state mental hospital for an indefinite period. Id., 420–21. The court concluded that the heightened burden was required even though, under Texas law, the appellant had the right to treatment, periodic review of his condition, and immediate release when he no longer was deemed to be a danger to himself or others. Id., 422.

This court has understood that a temporary deprivation of a parent's constitutional right to care and custody of his or her child gives rise to a risk of such irreparable harm that it has deemed interlocutory orders affecting that interest final judgments for purposes of appeal. See *Sweeney* v. *Sweeney*, 271 Conn. 193, 208–10, 856 A.2d 997 (2004) (pendente lite order related to religious and educational upbringing of minor child); *In re Shamika F.*, 256 Conn. 383, 405–406, 773 A.2d 347 (2001) (order of temporary custody pursuant to neglect statute); *Taff* v. *Bettcher*, 243 Conn. 380, 386–87, 703 A.2d 759 (1997) (judicially imposed one year ban on review of custody and visitation issues); *Madigan* v. *Madigan*, 224 Conn. 749, 756–58, 620 A.2d 1276 (1993) (order of temporary physical custody in dissolution action). As this court explained with respect to a court order imposing a one year filing ban on parties to a dissolution action, such an order "may interfere with a parent's custodial rights over a significant period in a manner that cannot be redressed at a later time. A lost opportunity to spend significant time with one's child is not recoverable. . . . Any chance by the noncustodial parent to restructure custody and visitation to enhance the relationship or further establish a foundation in that interval cannot be replaced by a subsequent modification one year later. Nor can any harm to the child caused by the custodial arrangement be meaningfully addressed one year after it occurs." (Citation omitted.) *Taff* v. *Bettcher*, supra, 387. Indeed, this court has recognized that actions undertaken while the child is removed from the parent's custody may have a long lasting effect on the child and the parent-child

relationship even if parental custody thereafter is restored.[14] See *Sweeney* v. *Sweeney*, supra, 211.

Thus, the fact that a parent later may seek to regain custody by filing a motion for modification of the judgment does not diminish substantively the constitutional significance of the deprivation of the interest at stake. Indeed, this court determined that the lesser preponderance burden was permissible for neglect proceedings in part because the dispositional options available to the court included keeping the child in the parent's custody. *In re Juvenile Appeal (84-AB)*, supra, 192 Conn. 263; *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 288. Accordingly, the first factor weighs in favor of the heightened clear and convincing standard of the burden of proof.

B

Turning to the second factor, "we next must consider both the risk of erroneous deprivation of private interests resulting from use of a 'fair preponderance' standard and the likelihood that a higher evidentiary standard would reduce that risk. . . . Since the [third party] proceeding is an adversary contest between the [third party] and the . . . parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding between these two parties." (Citation omitted.) *Santosky* v. *Kramer*, supra, 455 U.S. 761.

Santosky raised some specific concerns as to the risk of erroneous deprivation in a termination proceeding. One of these concerns, the imbalance of resources to litigate the action, is not implicated in a meaningful way when the state is not a party to the proceeding. Private litigants always face the risk that they may have to defend against a party with greater resources. Other concerns raised in *Santosky*, however, are implicated in the present case. As I have explained in part I of this concurring opinion, the detriment standard adopted by the majority leaves the adjudication unusually open to the subjective values of the judge. Indeed, this court has recognized that such problems may arise even under the more specific neglected, dependent and uncared for standard under §§ 46b-120 and 46b-129. See *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 292 ("[p]etitions for neglect and for temporary custody orders, like the petitions to terminate parental rights . . . are particularly vulnerable to the risk that judges or social workers will be tempted, consciously or unconsciously, to compare unfavorably the material advantages of the child's natural parents with those of prospective adoptive parents [or foster parents]" [citations omitted; internal quotation marks omitted]). This subjectivity is magnified when these standards are applied to a third party custody petition because the court lacks the concomitant obligation that it has when the state initiates a neglect petition to delineate the specific deficiencies that the

parent must remedy to regain custody. See General Statutes § 46b-129 (b) and (d).

Additionally, as in termination proceedings, there is no double jeopardy or other doctrinal bar to protect a parent from a third party's repeated efforts to relitigate the custody issue. Cf. *Rivera* v. *Minnich*, 483 U.S. 574, 582, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987) (concluding that finality of judgment in paternity suit weighs in favor of preponderance standard). Although a third party can intervene only in an existing custody controversy before the court; see General Statutes § 46b-57; it is not uncommon for numerous such controversies to come before the court over a period of years.[15] See, e.g., *Taff* v. *Bettcher*, supra, 243 Conn. 382–83 (after 1994 dissolution judgment, defendant filed motions relating to custody and visitation in 1995 and 1996); *Janik* v. *Janik*, 61 Conn. App. 175, 176–77, 763 A.2d 65 (2000) (after 1995 dissolution judgment, plaintiff moved to modify custody in 1997 and 1998), cert. denied, 255 Conn. 940, 768 A.2d 949 (2001); see also *Strobel* v. *Strobel*, 92 Conn. App. 662, 663, 886 A.2d 865 (2005) (in eight years since dissolution action, plaintiff father had filed 111 motions, and defendant mother had filed 119 motions); *Berglass* v. *Berglass*, 71 Conn. App. 771, 774, 804 A.2d 889 (2002) (in two years prior to 1998 judgment of dissolution, there were 124 docket entries; during postjudgment years of 1998 and 1999, there were forty-six entries).

Other concerns that were not implicated in *Santosky*, however, arise in third party custody proceedings that demonstrate that the preponderance standard creates a substantial risk of erroneous deprivation of the right to family integrity. Specifically, although this court concluded that an adjudication of neglect, uncared for or dependent under §§ 46b-120 and 46b-129 requires only proof by a preponderance of the evidence, the different effect of, and protections attendant to, that state initiated proceeding underscores why the preponderance standard is inadequate to prevent error in third party custody petitions.

First, a neglect adjudication under § 46b-129 does not result necessarily in an order depriving the parent of custody, a factor that we have deemed constitutionally significant. See, e.g., *In re Juvenile Appeal (84-AB)*, supra, 192 Conn. 261; *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 288. If the facts demand the less preferable option of removing the child from the home, the focus of the state's efforts subsequent to that disposition is to enhance the possibility of reunification of the family. See General Statutes § 17a-111b; *In re Devon B.*, 264 Conn. 572, 581–82, 584, 825 A.2d 127 (2003); *In re Juvenile Appeal (84-AB)*, supra, 258. There are numerous procedural protections prescribed to meet that goal. See generally Practice Book c. 32a (setting forth rights of parties to neglect and termination proceedings); Practice Book c. 35a (prescribing procedures

for hearing concerning neglected, uncared for and dependent children). The court must provide to the parent specific steps he or she must take in order to regain custody. General Statutes § 46b-129 (b) and (d); see, e.g., *In re Ebony H.*, 68 Conn. App. 342, 344, 789 A.2d 1158 (2002). The court also provides to the department the specific steps that it must take to provide the parent with support services reasonably necessary to accomplish reunification. General Statutes § 46b-129 (b) and (d); see *In re Devon B.*, supra, 589 (*Zarella*, *J.*, dissenting) ("the 'specific steps' provisions of § 46b-129 have two purposes: first, to instruct the parent on the specific conduct in which he or she must engage in order to satisfy the petitioner and the trial court that he or she is a fit parent and, second, to ensure that the petitioner does what it reasonably can to facilitate, rather than to impede, reunification"). Indeed, this court recently recognized that the courts may use their civil contempt power to ensure that the department meets these obligations, which are predicated on the constitutional interests at stake. See *In re Leah S.*, 284 Conn. 685, 696–97, A.2d (2007). The decision to deprive the parent of custody is subject to specified, periodic judicial review to ensure that the department is making reasonable efforts to advance this goal.[16] See General Statutes § 46b-129 (b), (j) and (k). Finally, throughout these proceedings, the parent is entitled to appointed counsel if he or she cannot afford one. General Statutes §§ 46b-129 (b) and (d), and 46b-135 (b).

By contrast, in a third party custody petition, the sole relief sought by the party initiating the proceeding is to remove the child from the parent's custody. Neither the state nor third party has any obligation to aid in the reunification of the family. The parent is not entitled to the procedural protections to which he or she would have been entitled had the state, rather than a third party, alleged that the child was neglected, uncared for or dependent.[17] This court has cited such protections as significant in determining whether due process has been satisfied. See *In re Juvenile Appeal (84-AB)*, supra, 192 Conn. 263–64; *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 288–91, 299–300; see also *In re Devon B.*, supra, 264 Conn. 589 (*Zarella*, *J.*, dissenting) ("[t]hese provisions are designed to ensure that [the] department takes 'appropriate measures . . . to secure reunification of parent and child' . . . so that the parent's fundamental right to family integrity is not violated" [citation omitted]). Although procedural protections will not obviate necessarily the need for a heightened burden of proof; see, e.g., *Santosky* v. *Kramer*, supra, 455 U.S. 748–49 (citing procedural protections provided under New York's permanent neglect statutes); the absence of such protections does weigh in favor of a burden of proof that decreases the risk of error.

The majority points to the fact that one possible dis-

position under our neglect statutes is an order vesting custody in a "suitable and worthy" third person; see General Statutes § 46b-129 (j); and rationalizes that, because this court had held in a 1985 opinion that periodic judicial review is not required in such circumstances; see *In re Juvenile Appeal (85-BC)*, 195 Conn. 344, 361, 488 A.2d 790 (1985); the absence of such protections should not bear on the issue before us. The majority assumes too much. Our appellate courts never have considered whether a court is authorized under the statute to vest custody with a third party *directly* following an adjudication of neglect without providing the procedural protections otherwise prescribed under § 46b-129, nor have our courts considered whether the *constitution* mandates application of those procedural protections even if the child is transferred from the custody of the commissioner of children and families (commissioner) to a third party. In *In re Juvenile Appeal (85-BC)*, supra, 345–48, the court simply addressed the question of "whether, under . . . § 46b-129, the commissioner . . . must petition to extend a commitment of custody of two minor children, who had been adjudicated neglected, when their custody was committed originally to the commissioner but subsequently had been transferred to their paternal grandmother . . . ." In that case, the court considered a pure question of statutory construction, expressly basing its conclusion on the fact that the statute requires a motion to extend commitment only when the commissioner assumes custody, and the court emphasized certain "critical" facts of the particular case, namely, that the custody of the children had been transferred from the commissioner to the grandparents fifteen months after the commissioner had filed a neglect petition and eight months after the court had committed the children to the commissioner. Id., 349–50. The court never stated that reunification efforts and the attendant measures are not required if a court vests custody in a third party following an adjudication of neglect.

Notably, the only other mechanism available to a third party seeking to deprive a parent of custody is by way of an application to have the parent removed as guardian. See General Statutes § 45a-610.[18] Guardianship bears substantial similarities to legal and physical custody. See *In re Juvenile Appeal (85-BC)*, supra, 195 Conn. 365 ("the ultimate effect of a custody-guardianship vested by the Superior Court in a 'suitable and worthy' third party pursuant to [§ 46b-129 (j)] may be identical to that rendered by an appointment of guardianship made by the Probate Court"); see also General Statutes § 45a-707 (4) (" '[g]uardianship' means guardianship, unless otherwise specified, of the person of a minor and refers to the obligation of care and control, the right to custody and the duty and authority to make major decisions affecting the minor's welfare, including, but not limited to, consent determinations regarding

marriage, enlistment in the armed forces and major medical, psychiatric or surgical treatment"). Just as a parent may seek to regain custody through a motion for modification, a parent may seek to be reinstated as guardian. See General Statutes § 45a-611. A third party seeking custody via a guardianship petition must fall within a limited class of persons granted standing; General Statutes § 45a-614; and must prove harm akin to that required under the neglect statute. See footnote 18 of this concurring opinion. The third party, however, must prove the requisite harm by clear and convincing evidence. General Statutes § 45a-610. Accordingly, if the preponderance standard were to apply to a third party custody petition, the risk of erroneous deprivation of parental custody would be greater than if the state had initiated a neglect proceeding, wherein the preponderance burden applies but the parent receives substantial procedural protections, and greater than if a third party had initiated a guardianship proceeding, wherein the heightened burden applies but fewer procedural protections are provided.[19]

"Given the weight of the private interests at stake, the social cost of even occasional error is sizable. Raising the standard of proof would have both practical and symbolic consequences. Cf. *Addington* v. *Texas*, [supra, 441 U.S. 426]. The [Supreme] Court has long considered the heightened standard of proof used in criminal prosecutions to be 'a prime instrument for reducing the risk of convictions resting on factual error.' *In re Winship*, 397 U.S. [358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)]. An elevated standard of proof . . . would alleviate 'the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior.' *Addington* v. *Texas*, [supra, 427]. 'Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate' [deprivations of parental custody] will be ordered." *Santosky* v. *Kramer*, supra, 455 U.S. 764–65. Accordingly, the second factor weighs in favor of the clear and convincing burden of proof.

C

Finally, I turn to the third factor, the countervailing governmental interest supporting use of the challenged procedure. *Santosky* v. *Kramer*, supra, 455 U.S. 766, identified two interests that also are relevant here: "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. A standard of proof more strict than preponderance of the evidence is consistent with both interests."[20]

Although the state is not a party to a third party custody proceeding, in light of the substantial relation-

ship that must be established by the third party, I would view the third party intervening in a custody dispute as representing the state's interest in protecting the child's welfare. This court has concluded, however, that it is only when serious physical harm or immediate danger is present, "that the child's interest no longer coincides with that of the parent, thereby diminishing the magnitude of the parent's right to family integrity . . . and therefore the state's intervention as parens patriae to protect the child becomes so necessary that it can be considered paramount." (Citation omitted.) *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 287–88. Moreover, although the child's interests in family integrity and his welfare are in equipoise in a neglect proceeding; *In re Juvenile Appeal (84-AB)*, supra, 192 Conn. 263–64; that balance exists 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. Thus, under our neglect statutes, even though a child has been found to be neglected, uncared for or dependent, the proper disposition nonetheless may be to keep the family unit intact. Id., 263. Indeed, due process requires that steps short of removal be undertaken when possible in preference to disturbing the family integrity. *In re Juvenile Appeal (83-CD)*, supra, 288; see also *Pamela B.* v. *Ment*, supra, 244 Conn. 313 ("[a]lthough a child's physical and emotional well-being outweighs the interest in preserving the family integrity, the disruption of a child's family environment should not be extended beyond what is unequivocally needed to safeguard and preserve the child's best interests"). The child's dual interests in family integrity and personal welfare are not in equipoise, however, when a third party seeks custody because a successful third party petition can result only in removal of the child and does so even in the absence of imminent danger to the child.

The interest in protecting the child's welfare does not mandate the lesser preponderance burden of proof. In the rare case in which there is proof by a preponderance of the evidence, but not clear and convincing evidence, that denial of the third party custody petition would result in real and substantial harm to the child, the court still has authority to take action to protect the child. The court could bring the department into the action and either order supervised parental custody or commit the child to the department. In so doing, the court would trigger the full panoply of the procedural protections attendant to neglect proceedings to promote family integrity. The majority's concern that our trial courts would not take remedial action to ensure some oversight of the child in the rare case wherein the petitioner has proved by a preponderance of the evidence, but not clear and convincing evidence, that a child is at risk of serious harm is, quite simply, unfair to our trial courts. I have full faith that our trial courts

would not look the other way should such a case be presented. Thus, application of the heightened burden of proof to third party custody petitions would prevent the erroneous deprivation of family autonomy without increasing the risk that the child could be exposed to serious harm. Cf. *Rivera* v. *Minnich*, supra, 483 U.S. 581 (Concluding that the preponderance standard was proper because "in a paternity suit the principal adversaries are the mother and the putative father, each of whom has an extremely important, but nevertheless relatively equal, interest in the outcome. Each would suffer in a similar way the consequences of an adverse ruling; thus, it is appropriate that each share roughly equally the risk of an inaccurate factual determination."). Accordingly, the heightened burden of proof properly balances the interests in both family integrity and the child's safety.

As the court noted in *Santosky* v. *Kramer*, supra, 455 U.S. 766–67, "[s]ince the [s]tate has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision at the factfinding proceeding. . . . As parens patriae, the [s]tate's goal is to provide the child with a permanent home. . . . Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the parens patriae interest favors preservation, not severance, of natural familial bonds. . . . [T]he [s]tate registers no gain towards its declared goals when it separates children from the custody of fit parents." (Citations omitted; internal quotation marks omitted.)

Finally, I note that the state's administrative and fiscal burdens also do not weigh in favor of the lesser burden of proof. Our trial judges, and in particular family court judges, are well versed in the application of the clear and convincing standard in numerous other contexts. See, e.g., General Statutes §§ 17a-78 and 17a-80 (hospitalization of child with mental disorder); General Statutes §§ 17a-111b, 17a-112 and 45a-717 (termination of parental rights); General Statutes § 45a-610 (removal of parents as guardian); General Statutes § 45a-650 (appointment of conservator); General Statutes § 45a-676 (appointment of plenary guardian for mentally retarded person); General Statutes § 46b-129 (termination of department's duty to make reasonable efforts to reunify family).

Balancing the three aforementioned factors, the logical conclusion is that due process requires application of the clear and convincing burden of proof. "The reason for adopting this heightened burden of proof in custody disputes between a biological parent and a third party is the same as the reason for adopting a heightened standard in termination of parental rights cases. The state and federal constitutions require a heightened standard because of the possible effects the proceeding might have on a biological parent's parent-

ing rights. . . . To prevent unwarranted termination or interference with a biological parent's parenting rights, the grounds for judicial action must be established by clear and convincing evidence. . . . Evidence that satisfies this heightened burden of proof eliminates any serious or substantial doubt concerning the correctness of the conclusion to be drawn from the evidence . . . . It should produce in the fact-finder's mind a firm belief or conviction regarding the truth of the allegations sought to be established." (Citations omitted.) *Ray* v. *Ray*, 83 S.W.3d 726, 733 (Tenn. App. 2001). Therefore, in accordance with this court's obligation to construe statutes to avoid constitutional defects, I would conclude that a third party seeking to intervene in a custody proceeding must allege and prove, by clear and convincing evidence: (1) a relationship with the child that is similar to a parent-child relationship; and (2) real and substantial harm to the child akin to that under §§ 46b-120 and 46b-129 should the court deny the petition.

Accordingly, I respectfully concur in the judgment.

[1] 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."

[2] In *Castagno* v. *Wholean*, supra, 239 Conn. 350, the court engrafted threshold jurisdictional requirements onto § 46b-59 that would permit the trial court to entertain a petition for visitation only when the family life of the minor child had been disrupted either by state intervention analogous to the situations included within the custody statutes, General Statutes §§ 46b-56 and 46b-57 or "in a manner similar to that addressed by §§ 46b-56 and 46b-57, but in which the courts have not yet become involved." The court declined to state precisely what those similar circumstances would be, but cited as possibilities the death of a parent, a de facto separation of the parents or "when there has been a good faith allegation by a third party of abuse or neglect." Id., 352.

[3] The Supreme Court's decisions recognizing this fundamental right date back to at least 1923. See *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 401–403, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (concluding that "proficiency in foreign language . . . is not injurious to the health, morals or understanding of the ordinary child" and recognizing right of parents to "establish a home and bring up children" and to "control the education of their own"); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (holding that state could not interfere with parents' decision to send children to private schools when decision was "not inherently harmful" and recognizing right "to direct the upbringing and education of children under their control"); *Wisconsin* v. *Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (exempting Amish from state compulsory education law requiring children to attend public school until age eighteen, recognizing that "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); see also *Prince* v. *Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944) ("[i]t is cardinal with us 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"); *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) ("[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this [c]ourt with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' "); *Quilloin* v. *Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) ("[w]e have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham* v. *J. R.*, 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.

Our cases have consistently followed that course."); *Santosky* v. *Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Washington* v. *Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) ("[i]n a long line of cases, we have held that, in addition to the specific freedoms protected by the [b]ill of [r]ights, the 'liberty' specially protected by the [d]ue [p]rocess [c]lause includes the righ[t] . . . to direct the education and upbringing of one's children" [citations omitted]).

[4] The majority dismisses these statements as "overly simplistic" in the context of the issue in the present case and misconstrues the relationship that I have drawn between visitation and custody. With respect to the first point, this court implicitly recognized in *Roth* that the stringent standard of harm that we adopted in that case clearly would be justified if the state was engaging in the greater intrusion on the parent's constitutional rights attendant to a custody order, but that the lesser intrusion resulting from visitation was sufficiently similar in kind, albeit not degree, to justify the heightened standard.

The majority misconstrues the point I have made in citing to this analogy by asserting that the concurrence declares that: visitation is "merely" a limited form of custody; that both therefore "intrude on the liberty interest of the parent in essentially the same manner"; and 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 . . . .' " With the lone exception of accurately quoting the phrase "quintessential rights of parenthood," the majority misconstrues the discussion herein as to the relationship between, and the differences attendant to, visitation and custody. As the discussion herein clearly makes evident, visitation is one limited aspect of the bundle of rights that constitutes custody. Irrespective of how long the period of visitation ordered, visitation never confers the "quintessential rights of parenthood" attendant to custody.

[5] The majority's reliance on the possibility of joint custody is troubling for several reasons. The present case does not illustrate the availability of this disposition. The trial court did not order that joint custody be shared with the parent that opposed Husaluk's petition for custody; the court ordered that Husaluk and the plaintiff, Paula J. Fish, the child's mother, who did not object to Husaluk's petition, share custody. Moreover, the court's orders pertaining to both parents leave them with none of the essential rights of parenthood, only the illusory right of "consultation" before Husaluk makes any decision regarding the child's upbringing. Thus, the present case illustrates the unlikelihood that a court will determine that parental custody is contrary to the child's interests and yet still permit that parent to share custody with a third party.

More troubling, however, is the effect of the majority's suggestion that joint custody is a proper disposition when a third party seeks custody over a fit parent's objection in conjunction with its holding that less stringent standards of pleading and proof apply in custody petitions than those applied in third party visitation petitions. By so concluding, the majority in effect encourages nonparents to circumvent the more stringent visitation standards by simply seeking limited joint custody instead of visitation.

Finally, I note that, even if joint legal custody may be a disposition option in a third party custody dispute, the fact that a less intrusive disposition may be available has no weight in determining the procedural and substantive protections necessary to protect the constitutional interests at stake. Courts gauge requisite constitutional standards on the basis of the greatest possible infringement that could result from an adverse decision in the proceeding, not the least intrusive result. For example, in a proceeding to terminate parental rights, a heightened standard of proof is constitutionally mandated, even though the court may determine in the dispositional phase that termination is not warranted, because the proceeding *could* result in the termination of parental rights. See *In re Deana E.*, 61 Conn. App. 185, 189, 763 A.2d 37 (2000) (citing clear and convincing evidence standard applied in two tier analysis before termination may be ordered and noting "[i]t is thus possible for a court to find that a statutory ground for termination of parental rights exists but that it is not in the best interests of the child to terminate the parental relationship, although removal from the custody of the parent may be justified" [internal quotation marks omitted]), cert. denied, 255 Conn. 941, 768 A.2d 949 (2001); see also *In re Baby Girl B.*, 224 Conn. 263, 279, 618 A.2d 1 (1992) ("[t]ermination of parental rights does not follow automatically from parental conduct justifying the removal of custody").

[6] The Supreme Court continually has reaffirmed that "a [s]tate's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' . . . 'A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.' . . . Accordingly, [the court has] sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." (Citations omitted.) *New York* v. *Ferber*, 458 U.S. 747, 756–57, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). With the exception, however, of cases involving neglect or abuse consistent with the standard under §§ 46b-120 and 46b-129, wherein a parent temporarily may lose custody or eventually have his or her parental rights terminated, the cases in which the court has permitted the state to infringe upon the constitutionally protected rights of the parent and family unit upon a lesser degree of harm involve a discrete, limited intrusion on one aspect of parental decision-making, not a wholesale usurpation of the parent's role or the destruction of the family unit. See, e.g., *Prince* v. *Massachusetts*, 321 U.S. 158, 168, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (upholding statute prohibiting child from distributing literature on street notwithstanding statute's effect on freedom of religious expression and parent's right to teach child tenets and practices of religious faith); see also *Stanley* v. *Illinois*, 405 U.S. 645, 651–52, 657–58, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (concluding that, whereas father's interest in "companionship, care, custody, and management" of his children is "cognizable and substantial," state's interest in caring for his children is "de minimis" if father is in fact fit parent).

[7] See, e.g., La. Civ. Code Ann. art. 133 (West 1999) (custody to parent would result in "substantial harm" to child); Minn. Stat. §§ 257C.01 (3) and 257C.03 (6) and (7) (2006) (child has lived with petitioner two years immediately preceding custody petition without parent's presence and without parental involvement for six months to one year, depending on child's age; parent has abandoned, neglected or disregarded child's well-being to extent that child will be harmed by living with parent, presence of physical and/or emotional danger to child in remaining with parent, or other extraordinary circumstances); Tex. Fam. Code Ann. §§ 102.004 (a) (1) and 153.131 (a) (Vernon 2002) (parental custody "presents a serious question concerning child's physical health or welfare" or "would significantly impair the child's physical health or emotional development"); *H.E.B.* v. *J.A.D.*, 909 So. 2d 840, 842 (Ala. App. 2005) (parent "is guilty of . . . [such] misconduct or neglect to a degree which renders that parent an unfit and improper person to be entrusted with the care and upbringing of the child in question" [internal quotation marks omitted]); *Evans* v. *McTaggart*, 88 P.3d 1078, 1079, 1083–84 (Alaska 2004) (parent unfit or parental custody clearly detrimental to welfare of child); *Murphy* v. *Markham-Crawford*, 665 So. 2d 1093, 1094 (Fla. App. 1995) (same), review denied, 675 So. 2d 928 (Fla. 1996); *Clark* v. *Wade*, 273 Ga. 587, 598, 544 S.E.2d 99 (2001) (physical harm or significant, long-term emotional harm); *Stockwell* v. *Stockwell*, 116 Idaho 297, 299–300, 775 P.2d 611 (1989) (parent patently unfit or has abandoned his child; or nonparent has custody of child for appreciable period of time and best interests of child dictate custody being placed with nonparent); *In re Guardianship of Williams*, 254 Kan. 814, 826, 869 P.2d 661 (1994) (parent must be unfit unless "highly unusual or extraordinary circumstances" demonstrate parental presumption has "no application"); *Davis* v. *Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989) (parental unfitness as shown by abuse, moral delinquency, abandonment, emotional or mental illness, or failure, for reasons other than poverty alone, to provide essential care of child); *In the Matter of Jeffrey G.*, 153 N.H. 200, 204, 892 A.2d 1234 (2006) (specific harm to child requires showing that parent is unfit as determined in either abuse and neglect proceeding or termination of parental rights proceeding); *Watkins* v. *Nelson*, 163 N.J. 235, 245, 748 A.2d 558 (2000) (parent's gross misconduct or unfitness or other "extraordinary circumstances" affecting welfare of child—denial of petition would cause harm to child); *McDuffie* v. *Mitchell*, 155 N.C. App. 587, 591, 573 S.E.2d 606 (2002) (parent has engaged in "acts that would constitute 'unfitness, neglect, [or] abandonment,' or any other type of conduct so egregious as to result in defendant's forfeiture of his constitutionally protected status as a parent"), review denied, 357 N.C. 165, 580 S.E.2d 368 (2003); *Camburn* v. *Smith*, 355 S.C. 574, 579, 586 S.E.2d 565 (2003) (parental unfitness); *Ray* v. *Ray*, 83 S.W.3d 726, 732 (Tenn. App. 2001) (substantial harm, meaning "real hazard or danger that is not minor, trivial, or insignificant"); *Bailes* v. *Sours*, 231 Va. 96, 100, 340 S.E.2d 824 (1986) (parental unfitness, previous order of divestiture, voluntary relin-

quishment, abandonment or "special facts and circumstances . . . constituting an extraordinary reason for taking a child from its parent"); *In re Custody of Shields*, 157 Wash. 2d 126, 144–45, 136 P.3d 117 (2006) (extraordinary circumstances demonstrating actual detriment to child's growth and development); *In re E.G.*, 212 W. Va. 715, 719–20, 575 S.E.2d 325 (2002) (parent unfit because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody).

Although the majority suggests that some of these jurisdictions apply a standard that is comparable to the one it has adopted, it overlooks the fact that most of those jurisdictions have not held, as has the majority implicitly, that extraordinary circumstances means harm of a lesser degree than when a child "is being denied proper care and attention, physically, educationally, emotionally or morally, or . . . is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child . . . ." General Statutes § 46b-120 (9) (B) and (C) (defining neglect). It also glosses over the fact that many of these jurisdictions apply a clear and convincing burden of proof. See footnote 12 of this concurring opinion.

I also note that, although some states do not provide specifically for statutory intervention by third parties in dissolution proceedings to obtain custody, as does Connecticut, a majority of states have considered the question of when it is proper for a court to award custody to a third party over a parent. That question may arise in any one of several contexts—a guardianship, dissolution or paternity proceeding or in some other context not expressly provided for by statute. Because in my view the constitutional limits on a state's ability to exercise its power to vest custody of a child in a third party over a parent's objection generally remain the same irrespective of which procedural vehicle is used to invoke the court's authority, I do not distinguish the states based on the particular procedure by which the third party may obtain custody.

[8] This court's recognition in *In re Joshua S.* that *Roth* and *Troxel* signal a change in the legal landscape also undermines reliance on legislative intent as to the meaning of detriment. Although I do not agree with the majority that the legislative history demonstrates a rejection of the *Roth* standard of harm, because the focus of legislative debates preceding adoption of the parental presumption in § 46b-56b clearly was on the burden of proof, we cannot presume in any event that the legislature adopted the detriment standard fully mindful of the constitutional implications. The legislature amended § 46b-56b in 1986 to add the provision regarding the grounds for rebutting the parental presumption. See Public Acts 1986, No. 86-224. In light of the fact that, in 2000, this court in *Roth* overruled its 1994 holding in *Castagno* following the Supreme Court's 2000 decision in *Troxel*, we hardly could expect the legislature to be more prescient than this court in predicting constitutional developments. Moreover, even if the legislature had considered what the constitution demands, it clearly is the province of the court to determine whether a statutory standard passes constitutional muster. See *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 574–75, 858 A.2d 709 (2004), citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).

[9] General Statutes § 46b-120 provides the following relevant definitions: "(4) '[A]bused' means that a child or youth (A) has been inflicted with physical injury or injuries other than by accidental means, or (B) has injuries that are at variance with the history given of them, or (C) is in a condition that is the result of maltreatment such as, but not limited to, malnutrition, sexual molestation or exploitation, deprivation of necessities, emotional maltreatment or cruel punishment . . . (7) a child or youth may be found 'dependent' whose home is a suitable one for the child or youth, save for the financial inability of parents, parent, guardian or other person maintaining such home, to provide the specialized care the condition of the child or youth requires . . . (9) a child or youth may be found 'neglected' who (A) has been abandoned, or (B) is being denied proper care and attention, physically, educationally, emotionally or morally, or (C) is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child or youth, or (D) has been abused; (10) a child or youth may be found 'uncared for' who is homeless or whose home cannot provide the specialized care that the physical, emotional or mental condition of the child requires. . . ."

[10] In my view, the majority misconstrues the Supreme Court's disinclination in *Troxel* v. *Granville*, supra, 530 U.S. 73, to reach the issue of whether

a specific showing of harm constitutionally was required before a third party could obtain visitation over a fit parent's objection. The court's statement that, "[b]ecause much state-court adjudication in this context occurs on a case-by-case basis, we would hesitate to hold that specific nonparental visitation statutes violate the [d]ue [p]rocess [c]lause as a per se matter"; id.; simply reflects 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. See *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) ("One of the principal areas in which this [c]ourt has customarily declined to intervene is the realm of domestic relations. Long ago we observed that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the [s]tates and not to the laws of the United States.' . . . So strong is our deference to state law in this area that we have recognized a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.' . . . Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue . . . in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." [Citations omitted.]).

[11] In *Roth*, the court did not elaborate on the basis for its determination that due process did not mandate a heightened burden of proof, stating only: "We recognize that due process requires the clear and convincing test be applied to the termination of parental rights because it is the *complete severance* by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent; *Santosky* v. *Kramer*, supra, 455 U.S. 747–48; while abuse and neglect petitions require proof only by a preponderance of the evidence because 'any deprivation of rights [at that stage] is reviewable and nonpermanent and, thus, warrants a slightly less exacting standard of proof.' . . . *In re Shamika F.*, 256 Conn. 383, 401 n.22, 773 A.2d 347 (2001). It is evident, however, that in the visitation context, the heightened standard of clear and convincing evidence is not constitutionally mandated." (Emphasis in original.) *Roth* v. *Weston*, supra, 259 Conn. 231.

[12] In recognition of the significance of the interest at stake, many states apply the clear and convincing burden of proof to a custody contest between a parent and a third party as a matter of legislative or judicial policy. See, e.g., Ariz. Rev. Stat. § 25-415 (B) (2007); Mich. Comp. Laws § 722.25 (2005); Minn. Stat. § 257C.03 (6) and (7) (2006); N.M. Stat. Ann. § 40-10B-8 (2006); Va. Code Ann. § 20-124.2 (B) (2004); *Evans* v. *McTaggart*, 88 P.3d 1078, 1079 (Alaska 2004); *Calle* v. *Calle*, 625 So. 2d 988, 990 (Fla. App. 1993); *Clark* v. *Wade*, 273 Ga. 587, 587–88, 544 S.E.2d 99 (2001); *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002); *In re Guardianship of D.J.*, 268 Neb. 239, 247–49, 682 N.W.2d 238 (2004); *Watkins* v. *Nelson*, 163 N.J. 235, 249, 748 A.2d 558 (2000). As I discuss further in part II B of this concurring opinion, the Connecticut legislature also has determined that the clear and convincing burden of proof applies in a petition to remove a parent as guardian, the only proceeding other than a dissolution action in which a third party may seek custody.

Only a few courts, however, have addressed the question of what burden of proof is mandated by due process. There is no clear consensus among those courts, and, as a general matter, the courts summarily have reasoned either that the heightened burden of proof is mandated because of the significance of the constitutional interest at stake; see, e.g., *In the Matter of Guardianship of Blair*, Court of Appeals, Docket No. 2-950, 2003 WL 182981 at *5 (Iowa January 29, 2003); *Pittman* v. *Jones*, 559 So. 2d 990, 994 (La. App.), cert. denied, 565 So. 2d 451 (La. 1990); *In the Matter of R.A. & J.M.*, 153 N.H. 82, 98–101, 104, 891 A.2d 564 (2005); *In the Matter of R.A. & J.M.*, supra, 110 (Nadeau and Galway, Js., concurring in part and dissenting in part); *Bennett* v. *Hawks*, 170 N.C. App. 426, 428–29, 613 S.E.2d 40 (2005); *Ray* v. *Ray*, 83 S.W.3d 726, 733 (Tenn. App. 2001); *Paquette* v. *Paquette*, 146 Vt. 83, 92, 499 A.2d 23 (1985); or that the lesser burden is permissible because an award of custody is not necessarily a permanent deprivation of that interest. See *In re Custody of A.D.C.*, 969 P.2d 708, 710 (Colo. App. 1998); *In re Guardianship of Doe*, 106 Haw. 75, 77–79, 101 P.3d 684 (App. 2004); *In re Guardianship of Barros*, 701 N.W.2d 402, 408 (N.D. 2005); *In the Matter of the Marriage of Winczewski*, 188 Or. App. 667, 706 n.30, 72 P.3d 1012 (2003) (Deits, J., concurring), review denied, 337 Or. 327, 99 P.3d 291 (2004); *In the Matter of the Marriage of Winczewski*, supra, 758 n.62 (Brewer, J., dissenting). The only court to consider this question at length and to

apply expressly all of the factors prescribed for such an inquiry by the United States Supreme Court in *Santosky* v. *Kramer*, supra, 455 U.S. 754, is the Maryland Court of Appeals, which concluded that application of the preponderance standard did not violate due process. See *Shurupoff* v. *Vockroth*, 372 Md. 639, 660, 814 A.2d 543 (2003). I do not find the reasoning of *Shurupoff* persuasive, however, because the court therein principally relies, as does the majority in the present case, on the fact that an award of custody is not equivalent to termination of parental rights. See id., 656–57. I do not read *Santosky* to stand for the proposition that the preponderance burden of proof constitutionally may be applied to any deprivation short of the complete and final destruction of parental rights. For the reasons set forth in part II C of in this concurring opinion, I also disagree with the concern voiced by the Maryland Court of Appeals, which the majority opinion shares, that "if the standard of proof for rebutting [the parental] presumption is too high, it may well be the child who will suffer." Id., 658.

I also note that, to extent that the majority relies on dicta in *Lehrer* v. *Davis*, 214 Conn. 232, 238, 571 A.2d 691 (1990), for the proposition that this court already has concluded that a lesser standard of proof would be constitutionally permissible, the majority again appears to take an anachronistic view of third party intervention into family autonomy, unwilling to recognize the watershed effect of *Troxel* on this court's reevaluation of its jurisprudence in this area.

[13] In the present case, under the trial court's order, the defendant has no authority to render decisions on any major events affecting his child's life, only the right of consultation with the intervening paternal aunt, Husaluk, in whom the court vested custody and final authority on all such matters. Although the court ordered that the child return to Connecticut during her breaks from school, the order provides only that she is to be "encouraged" to spend equal visitation time with her parents and that she may decline to stay overnight with the defendant.

[14] As this court recently explained in *Sweeney* v. *Sweeney*, supra, 271 Conn. 211, wherein at issue was an order permitting a minor child to attend a parochial school against one parent's wishes: "The lost opportunity to have a child exposed only to academic and religious influences sanctioned by a joint legal custodian cannot be replaced by any subsequent court order. Moreover, such a pendente lite order may impact this parental right over a significant period of time, with the harm to the parental interest increasing exponentially as the minor child spends more time in the educational institution at issue. Subsequent attempts by an aggrieved parent to modify such a pendente lite order also may not be an adequate substitute for vindication of the parent's rights through an appeal. Finally, a pendente lite order such as this may result in a spillover effect with regard to subsequent decisions related to the enrollment of the minor child. Charged with the determination as to what is in the best interests of the minor child, the trial court may later be reluctant to create a degree of instability in the daily life of the minor child, and adversely impact personal bonds created with teachers and classmates, by ordering the transfer of the minor child to another educational institution."

[15] Thus, I disagree both as a matter of fact and logic with the majority's contention that a lesser standard of proof is warranted because "§ 46b-57, unlike the visitation statute, permits third party intervention only in an existing controversy before the court." This reasoning appears to resurrect the precise logic that this court rejected in *Roth* v. *Weston*, supra, 259 Conn. 212, when it overruled the holding in *Castagno*, wherein this court previously had attempted to remedy the constitutional concerns by construing § 46b-59 "to afford the trial court jurisdiction to entertain a petition for visitation only when the minor child's family life has been disrupted in a manner analogous to the situations addressed by [the custody statutes] §§ 46b-56 and 46b-57." *Castagno* v. *Wholean*, supra, 239 Conn. 352.

[16] The court must determine within sixty days after issuing an ex parte temporary custody order or committing the child to the department's custody whether the department has made reasonable efforts to keep the parent with the child prior to the issuance of the court's order. General Statutes § 46b-129 (b) and (j). Nine months after an order of commitment, the commissioner of children and families (commissioner) must file a motion for review of a permanency plan for the child. General Statutes § 46b-129 (k) (1). The permanency plan may recommend family reunification, with or without supervision. General Statutes § 46b-129 (k) (2) (B). Nine months after the permanency plan is approved, the commissioner must file a motion for review of the plan, and a hearing must be held within ninety days after the

motion is filed. General Statutes § 46b-129 (k) (1). After an initial permanency hearing, subsequent permanency hearings must be held at least every twelve months as long as the child remains in custody of the department. General Statutes § 46b-129 (k) (1). The commissioner can avoid its obligation to reunify the child with the parent if the court determines, by clear and convincing evidence, that the parent has subjected the child to certain aggravated circumstances, such as sexual or physical abuse. General Statutes § 17a-111b (b).

[17] The majority points to chapter 25 of the Practice Book and asserts that "many of the due process protections in chapters 32a and 35a of the Practice Book accorded the parents of a child in a neglect or termination proceeding, including the right to a hearing, are provided in a custody proceeding." Chapter 25 does not, however, provide for appointment of counsel for parents contesting custody. It provides for appointment of counsel for the minor child; Practice Book § 25-24; appointment of counsel in civil contempt proceedings related to family matters; Practice Book § 25-63; and appointment of counsel in state initiated paternity actions. Practice Book § 25-68; see also *Foster* v. *Foster*, 84 Conn. App. 311, 320, 853 A.2d 588 (2004) (parent has no constitutional right to counsel in custody or visitation proceedings).

The majority also posits that certain broadly phrased permissive provisions of our General Statutes and rules of practice applicable to custody "might" prompt a trial court to issue specific steps to aid reunification efforts following an order of third party custody. There is, however, no mandate to do so.

[18] General Statutes § 45a-610 provides: "If the Court of Probate finds that notice has been given or a waiver has been filed, as provided in section 45a-609, it may remove a parent as guardian, if the court finds by clear and convincing evidence one of the following: (1) The parent consents to his or her removal as guardian; or (2) the minor child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility for the minor child's welfare; or (3) the minor child has been denied the care, guidance or control necessary for his or her physical, educational, moral or emotional well-being, as a result of acts of parental commission or omission, whether the acts are the result of the physical or mental incapability of the parent or conditions attributable to parental habits, misconduct or neglect, and the parental acts or deficiencies support the conclusion that the parent cannot exercise, or should not in the best interests of the minor child be permitted to exercise, parental rights and duties at the time; or (4) the minor child has had physical injury or injuries inflicted upon the minor child by a person responsible for such child's health, welfare or care, or by a person given access to such child by such responsible person, other than by accidental means, or has injuries which are at variance with the history given of them or is in a condition which is the result of maltreatment such as, but not limited to, malnutrition, sexual molestation, deprivation of necessities, emotional maltreatment or cruel punishment; or (5) the minor child has been found to be neglected or uncared for, as defined in section 46b-120. If, after removal of a parent as guardian under this section, the minor child has no guardian of his or her person, such a guardian may be appointed under the provisions of section 45a-616. Upon the issuance of an order appointing the Commissioner of Children and Families as guardian of the minor child, or not later than sixty days after the issuance of such order, the court shall make a determination whether the Department of Children and Families made reasonable efforts to keep the minor child with his or her parents 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 minor child's best interests, including the minor child's health and safety."

As the statute indicates, if the commissioner is appointed as guardian, rather than a private party, the department still has the obligation to make reasonable efforts to reunify the family, if possible.

[19] The parent is entitled to appointed counsel in a guardianship proceeding. General Statutes § 45a-609 (b). If the commissioner, rather than a third party, is appointed as guardian, the court must determine whether reasonable efforts were made to keep the child with the parent before the court issued the order. General Statutes § 45a-610.

[20] Thus, contrary to the majority's statement, the Supreme Court recognized that more than the parent's interest is at stake in termination proceedings, specifically, the child's welfare, but nonetheless concluded that the child's interest, to the extent that it might diverge from the parent's interest, adequately was protected by the heightened burden of proof.