

**C.R.B. v. C.C. AND B.C.¹: PROTECTING CHILDREN’S NEED FOR STABILITY IN
CUSTODY MODIFICATION DISPUTES BETWEEN BIOLOGICAL PARENTS AND THIRD
PARTIES**

“Custody litigation, unlike most other litigation, attempts to predict the future rather than to understand the past.”²

I. INTRODUCTION

More than one million American children are affected by their parents’ divorce each year,³ and custody decisions⁴ are “[a]mong the most difficult decisions judges must make today.”⁵ In particular, child custody disputes involving biological parents and third parties create extremely complex issues that challenge courts and legislators to determine the significance of biology.⁶ In *C.R.B. v. C.C. and B.C.*,⁷ a father and his

¹ 959 P.2d 375 (Alaska 1998).

² Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 762 (1985). Litigation results often depend on the court’s determination of whether a prior event did or did not occur. *Id.* However, in custody litigation, courts frequently examine the parties’ personalities, priorities, financial status, and emotional stability to attempt to make the optimum judgment for the child’s future. *Id.*

³ BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 106 (117th ed. 1997). During 1990, an estimated 1,075,000 children were involved in divorce. *Id.* During 1980, an estimated 1,174,000 children were involved in divorce. *Id.* During 1970, an estimated 870,000 children were involved in divorce. *Id.*

⁴ Cases and statutes rarely provide a definition of the term “custody.” HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 19.2 (2nd ed. 1988). It has been labeled as a “slippery” word because it “expresses a complex of both rights and obligations, the combination of which varies considerably from case to case.” *Id.* *Black’s Law Dictionary* defines ‘custody of children’ as “[t]he care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceedings.” BLACK’S LAW DICTIONARY 267 (6th ed. 1991). Significantly, statutory or common law in every state allows the courts to modify custody orders. Wexler, *supra* note 2, at 760; see discussion *infra* Part II.B.1. In contrast, adoption is a legal process that actually terminates the legal rights and obligations that exist between the biological parents and the child. See Homer, *supra*, at § 20.1.

⁵ Eric P. Salthe, Note, *Would Abolishing the Natural Parent Preference in Custody Disputes Be in Everyone’s Best Interest?*, 29 J. FAM. L. 539, 539 (1990/1991). Salthe asserts, “In many circumstances both prospective custodians feel very strongly about the child, and in the most difficult cases both are perfectly able to take on the responsibility of custody.” *Id.*

⁶ Carolyn Wilkes Kaas, *Breaking up a Family or Putting it Back Together Again: Refining the Preference in Favor of the Parent in Third-party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1048 (1996). Third party involvement in custody cases forces both courts and legislators to evaluate the very meaning of the term “parent.” *Id.* In addition, some of these custody cases “highlight the often conflicting societal values of providing nurturing

children's maternal grandparents⁸ were embroiled in a custody battle.⁹ The father attempted to modify a prior custody order that granted permanent custody of his children to the grandparents.¹⁰ Consequently, the Alaska Supreme Court was forced to weigh "two foundational policies in child custody law . . . the law's preference for parental over nonparental custody, and the law's desire to meet children's needs for stability"¹¹

This Note examines the collision of the "foundational policies" recognized by the Alaska Supreme Court. Part II provides an overview of the parental preference doctrine and custody modification standards.¹² Part III presents the facts, procedural history, and the Alaska Supreme Court's holding in *C.R.B.*¹³ Finally, Part IV analyzes the Alaska Supreme Court's decision and its consequences.¹⁴ The Alaska Supreme Court properly rejected the use of a parental preference in custody modification disputes, and its holding produced a desirable outcome.¹⁵ However, this Note establishes why the court should adopt a more stringent modification standard to safeguard children's need for stability in future custody modification cases.¹⁶

II. BACKGROUND

A. The "Parental Preference" Doctrine

and safe homes for children and leaving parents free to raise their children in their own way, without intrusion." *Id.* at 1048-49. In initial custody disputes between biological parents, courts award custody based on the best interests of the child. Janet Leach Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733, 734 (1992). Under this standard, the child's needs and welfare are superior to either parent's interest. *Id.*

⁷ *C.R.B. v. C.C.*, 959 P.2d 375 (Alaska 1998).

⁸ The nuclear family structure began to erode in the mid-1960's, and as a result, grandparents have been assuming active parental roles at an increasing rate. Robert C. Paden, Jr., *Child Custody and Visitation Rights: Parents v. Grandparents*, 52 J. MO. B. 156, 156 (1996). The number of children living in households headed by grandparents has increased by over fifty percent since 1970, and both parents are absent in approximately one-third of these households. Mary C. Rudasill, *Grandparents Raising Grandchildren: Problems and Policy from an Illinois Perspective*, 3 ELDER L.J. 215, 216 (1995). This growth in households headed by grandparents has prompted national attention, legislation, and state policy revisions. *Id.* at 216.

⁹ *C.R.B.*, 959 P.2d at 376.

¹⁰ *Id.* at 377.

¹¹ *Id.* at 379.

¹² See *infra* notes 17-51 and accompanying text.

¹³ See *infra* notes 52-72 and accompanying text.

¹⁴ See *infra* notes 73-124 and accompanying text.

¹⁵ See discussion *infra* Part IV.A.2.

¹⁶ See discussion *infra* Part IV.

1. Description, Development of the Law, and Current Trends

Custody standards that give preference to biological parents reflect the historical view of the relationship between parents and their children.¹⁷ Although society no longer regards children as the property of their parents, the view that biological parents have a natural right to the custody of their children has endured.¹⁸ The United States Supreme Court has not specifically addressed whether courts should apply a parental preference in custody disputes between a biological parent and a third party.¹⁹ However, the Supreme Court's decision in *Michael H. v. Gerald D.*²⁰ eliminates the

¹⁷ Melanie B. Lewis, Note, *Inappropriate Application of the Best Interests of the Child Standard Leads to Worst Case Scenario: In re C.C.R.S.*, 68 U. COLO. L. REV. 259, 262 (1997). Until the nineteenth century, the state refused to intrude on the parent-child relationship and gave parents total command over their children. *Id.* By the twentieth century, society recognized that children are individuals, and that they also require protection. *Id.* However, the state continued to refuse to intervene unless the parental care endangered the child. *Id.*

¹⁸ *Id.*; see also Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA.L. REV. 879 (1984) [hereinafter Bartlett, *Rethinking Parenthood*]. Bartlett discusses the role of natural law in the concept of parenthood as an exclusive status. *Id.* at 886. Natural law dictates that parental rights "arise from a relationship that is entirely apart from the power of the State." *Id.* These rights exist regardless of whether a parent acts in the child's best interest. *Id.* at 889. Also, natural law presumes that because the basic building block of society is the family, the entire fabric of society will disintegrate if parents are unable to raise their children without intervention. *Id.* at 888. Therefore, the law often dictates that relationships based on psychological bonds must be sacrificed for those based on biology. *Id.* at 882. However, the rigid nature of the natural law framework works to the detriment of children who form meaningful bonds outside of the nuclear family unit. *Id.* at 890. As stated by Bartlett, "[T]hese children are powerless to change the social patterns of which they are a part, and they cannot respond meaningfully to legal or social sanctions intended to promote the nuclear family." *Id.*

¹⁹ Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody Is Constitutionally Protected?*, 20 GA. L. REV. 705, 728-29 (1986).

²⁰ 491 U.S. 110 (1989), *superseded by statute as stated in Jones v. Trojak*, 586 A.2d 397 (Pa. Super. Ct. 1990). While Carole D. and Gerald D. were married and cohabitating, Carole gave birth to Victoria. *Id.* at 113. Michael H. filed an action in the California Superior Court to prove he was Victoria's biological father and obtain visitation rights. *Id.* at 114. Blood tests showed a 98.07% probability that Michael was Victoria's biological father. *Id.* However, pursuant to a state statute, the court refused to admit the blood tests into evidence, granted Gerald motion for summary judgment, and denied Michael any visitation. *See id.* at 115. Michael argued that the United States Supreme Court had previously recognized a parent's fundamental constitutional right to visitation or custody of their biological children. *Id.* at 123. However, the United States Supreme Court clarified that the fundamental right referred to in previous decisions was the right to a "protected family unit" rather than a biological parent's right to custody. *See id.* at 124.

contention that courts are required to utilize a parental preference.²¹ In addition, several recent Supreme Court decisions suggest that parental rights are derived from the biological parent's relationship with their child rather than the biological connection.²²

In initial custody disputes between a biological parent and a third party, a majority of states apply a parental preference standard.²³ First, several states²⁴ have adopted a parental rights standard, which precludes a court from considering a third party as a custodian without a threshold showing of extraordinary circumstances.²⁵ Second, most states apply a rebuttable presumption²⁶ that favors the biological parent.²⁷ Many

²¹ See Salthe, *supra* note 5, at 547. Salthe states that the essence of the Supreme Court's decision was to "shift the fundamental right at issue to one that protects the interpersonal relationships that develop within the unitary family, rather than one that singularly protects the biological relationships." *Id.* at 548. As a result, courts are free to make decisions based on public policy when deciding whether to favor biological parents in custody battles. *Id.* at 548.

²² Haynie, *supra* note 19 at 729; *see, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (concluding that the Constitution protects a family unit, even if the family members are not the child's biological parents, if it is providing for the child's needs); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (emphasizing that "the importance of the family relationship . . . stems from the emotional attachments that derive from the intimacy of daily association . . ."). Haynie argues that any standard used in custody disputes that provides a preference to a biological parent is unconstitutional. Haynie, *supra* note 19, at 706.

²³ See Haynie, *supra* note 19, at 711. States that do not apply a parental preference standard include Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, New Hampshire, North Dakota, South Carolina, Texas, and Wyoming. *Id.* at 721 & n.58. Instead, these states apply a best interests standard, which focuses solely on the needs and welfare of the child. *Id.* at 721. The best interests standard emerged in the mid-1960's in response to the erosion of the nuclear family. Paden, *supra* note 8, at 156. In states that apply the best interests standard, nonparents have a greater chance of obtaining custody since the court may find that nonparental custody is in the child's best interests. *Id.* This standard "has been criticized as resulting in an indeterminacy perhaps unparalleled in any other area of the law." Wexler, *supra* note 2, at 779-80; *see* discussion *infra* Part IV.A.1.

²⁴ Florida, Georgia, Idaho, Kansas, Montana, Oklahoma, and West Virginia clearly utilize a parental rights standard. Haynie, *supra* note 19, at 708 & n.12. Mississippi uses the language of the parental rights standard but seems to be willing to consider additional evidence. *Id.*

²⁵ Kaas, *supra* note 6, at 1065 (providing a "blueprint" for deciding third party initial custody disputes and distinguishing between appropriate standards for "removal" and "reunification"). Some jurisdictions consider this standard to be required by the United States Constitution, while other jurisdictions have adopted it as a matter of policy. *Id.* In New York, extraordinary circumstances include abuse, abandonment, neglect, or parental unfitness. *See, e.g.*, Bennett v. Jeffreys, 356 N.E. 2d 277, 280 (N.Y. 1976).

²⁶ A 'presumption' is "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. . . . A presumption is either conclusive or rebuttable." BLACK'S LAW DICTIONARY 822 (6th ed. 1991). A 'conclusive

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courts adopted this presumption based on the assumption that granting custody to a biological parent promotes the child's best interests.²⁸ Courts applying a parental preference will award custody to a "fit" parent²⁹ even if a child has been residing with a third party for an extended period of time.³⁰

2. Alaska: Development of the Law

Alaska courts apply a parental preference in initial custody disputes between biological parents and third parties.³¹ In *Turner v. Pannick*,³² the Alaska Supreme

presumption' is "created when a jury is charged that it must infer the presumed fact if certain predicate facts are established." *Id.* In contrast, a 'rebuttable presumption' "can be overturned upon the showing of sufficient proof." *Id.*

²⁷ See, e.g., Haynie, *supra* note 19, at 711. Haynie categorizes three types of presumptions. First, the fitness presumption standard presumes that the biological parent will be the best parent unless the third party proves that extraordinary circumstances make the third party more fit than the parent. *Id.* at 712. The third party's burden remains "almost unsurmountable." *Id.* Second, in the convincing presumption standard the biological parent has a prima facie right to custody unless the third party shows by clear and convincing evidence that they should have custody based on the best interests of the child. *Id.* at 715. Third, under the disappearing presumption standard, the courts consider factors regarding the best interests of the child, and the presumption gives custody to the biological parent only if all other factors are equal. *Id.* at 720.

²⁸ See Richards, *supra* note 6, at 736. ("This rule is based logically upon the experience of mankind that blood is thicker than water and that a natural parent will normally expend greater effort and sacrifice on behalf of a child than will a stranger or a third party . . .") (quoting *In re Custody of Hampton*, 5 Adams Co. L.J. 84, 91 (Pa. C.P. 1963)); see also Michael B. Thompson, *Child-Custody Disputes Between Parents and Non-parents: A Plea for the Abrogation of the Parental-right Doctrine in South Dakota*, 34 S.D. L. REV. 534, 534 (1989) (stating that a parental preference "focuses . . . on parental fitness, presuming that parents are best able to nurture their children").

²⁹ Factors indicating that a parent is not fit include "misconduct, neglect, immorality, abandonment and/or general dereliction of custodial duties." Salthe, *supra* note 5, at 541.

³⁰ Sandra R. Blair, *Jurisdiction, Standing, and Decisional Standards in Parent-Nonparent Custody Disputes--In Re Marriage of Allen*, WASH. L. REV. 111, 116 (1982) (asserting that the best interests of the child standard should be utilized since parental rights are a factor in the balancing process, and therefore, are protected, and stating that the parental preference doctrine is premised on an "almost mystical belief in the superiority of the biological parents").

³¹ See *Turner v. Pannick*, 540 P.2d 1051 (Alaska 1975); see also *Carter v. Novotny*, 779 P.2d 1195 (Alaska 1989); *Britt v. Britt*, 567 P.2d 308 (Alaska 1977). In contrast, in initial custody disputes between biological parents, the Alaska courts award custody based on the best interests of the child. See ALASKA STAT. § 25.24.150 (Lexis Law Publishing 1998). ALASKA STAT. § 25.24.150 (Lexis Law Publishing 1998) reads as follows:

- (a) In an action for divorce or for legal separation or for placement of a child when one or both parents have died, the court may, if it has jurisdiction under AS

Court held that in an initial custody determination, the court must award custody to a biological parent unless the third party shows³³ that “the parent is unfit,³⁴ has

25.30.300--25.30.320, and is an appropriate forum under AS 25.30.350 and 25.30.360, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of a child of the marriage, make, modify, or vacate an order for the custody of or visitation with the minor child that may seem necessary or proper, including an order that provides for visitation by a grandparent or other person if that is in the best interests of the child.

(b) If a guardian ad litem for a child is appointed, the appointment shall be made under the terms of AS 25.24.310(c).

(c) The court shall determine custody in accordance with the best interests of the child under AS 25.20.060 -- 25.20.130. In determining the best interests of the child the court shall consider

- (1) the physical, emotional, mental, religious, and social needs of the child;
- (2) the capability and desire of each parent to meet these needs;
- (3) the child's preference if the child is of sufficient age and capacity to form a preference;
- (4) the love and affection existing between the child and each parent;
- (5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- (6) the desire and ability of each parent to allow an open and loving frequent relationship between the child and the other parent;
- (7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;
- (8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;
- (9) other factors that the court considers pertinent.

(d) In awarding custody the court may consider only those facts that directly affect the well-being of the child.

(e) Notwithstanding the provisions of (d) of this section, in awarding custody the court shall comply with the provisions of 25 U.S.C. 1901 -- 1963 (P.L. 95-608, the Indian Child Welfare Act of 1978).

(f) If the issue of child custody is before the court at the time it issues a judgment under AS 25.24.160, the court shall concurrently issue a judgment for custody under this section unless, subject to AS 25.24.155, the court delays the custody decision for a later time.

Id.

³² 540 P.2d 1051 (Alaska 1975).

³³ *Carter*, 779 P.2d at 1197 (indicating that the burden of proof is on the third party); *Britt*, 567 P.2d at 310 (stating that the nonparent must overcome the parental preference by a preponderance of the evidence).

³⁴ In *Britt*, the Alaska Supreme Court held that the superior court's finding that the mother was unfit was clearly erroneous. *Britt*, 567 P.2d at 310. The Alaska Supreme Court stated that evidence of the mother's youth, pregnancy, remarriage, and relocations fell “far short of the showing which must be made.” *Id.* at 311. “Where custody is being contested between a

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abandoned the child,³⁵ or that the welfare of the child requires that a non-parent receive custody.”³⁶ The “welfare of the child” requirement is satisfied by evidence that parental custody would be clearly detrimental to the child.³⁷

B. Modification of Custody: “Substantial Change in Circumstances” Standard

1. Description, Development of the Law, and Current Trends

Although it appears that there are a greater number of hearings and trials regarding modification of custody rather than initial custody, literature has paid little attention to custody modifications.³⁸ Regardless of whether the initial custody decree results from litigation or is consensual, it is universally recognized that the court possesses judicial power to modify the decree.³⁹

parent and a non-parent, it is not enough that this evidence may support the conclusion that the non-parent would provide a better environment for the child.” *Id.*

³⁵ The Alaska Supreme Court previously specified “what constitutes sufficient abandonment to deprive a mother of custody of her child.” *Turner*, 540 P.2d at 1055 & n.4 “[A]bandonment consists of conduct on the part of the parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship.” *Id.* (quoting *D.M. v. State*, 515 P.2d 1234, 1237 (Alaska 1973)).

³⁶ *Turner*, 540 P.2d at 1055. In *Turner*, the child’s mother filed a petition against the child’s aunt to obtain custody of her child. *Id.* at 1052. The Alaska Supreme Court noted that prior Alaska law was ambiguous in regards to the test applicable in custody disputes between a biological parent and a third party. *Id.* at 1053. The Alaska Supreme Court held that the mother was entitled to custody because the aunt did not show that the mother was unfit or had abandoned the child, or that the child’s welfare required the court to award custody to the aunt. *Id.* at 1055. The Alaska Supreme Court reasoned that it is dangerous to give courts the power to use the best interests test as its sole criterion to award custody to third parties. *Id.* at 1054. The Alaska Supreme Court was concerned that if a judge personally opposes the biological parents’ limited means, the parents may lose custody of their children. *Id.*

³⁷ *Turner*, 540 P.2d at 1054; *see also* *Buness v. Gillen*, 781 P.2d 985, 989 (Alaska 1989). In *Buness*, a third party was the child’s primary care-giver for ten years. *Id.* at 989. The Alaska Supreme Court held that there was a genuine issue of material fact regarding whether the child’s welfare dictated that the third party receive custody. *Id.* The Alaska Supreme Court reasoned that the child and the third party had a “strong emotional bond.” *Id.* A school psychologist’s report noted the child’s “highly emotional response” upon learning that he had to leave the third party’s home. *Id.*

³⁸ *Wexler*, *supra* note 2, at 757.

³⁹ *Id.* at 760. A court has the power to modify a custody order either by its “express statutory authority or by its common law equity powers over the welfare of children.” *Id.* Also, jurisdiction is always available, even if the court that issued the initial order did not reserve jurisdiction. *Id.* In contrast, an order terminating parental rights is final, and once it is entered, the parent loses any possibility of obtaining custody. *See, e.g.*, *Thompson*, *supra* note 28, at 559.

The trend in the law indicates that moving parties are obtaining custody modifications with greater ease.⁴⁰ There are three standards used by state courts to modify custody orders.⁴¹ First, the traditional custody modification standard permits modification if the moving party demonstrates a substantial change in circumstances that warrants a modification to further the child's best interests.⁴² Second, several states have relaxed these requirements and apply a best interests test without requiring a threshold showing of a substantial change in circumstances since the initial custody decree.⁴³ Finally, the standard under the Uniform Marriage and Divorce Act (hereinafter the "UMDA")⁴⁴ requires either consent or a showing of serious harm to the

⁴⁰ Wexler, *supra* note 2, at 760.

⁴¹ *Id.*

⁴² *Id.* The traditional standard has been the controlling law in a majority of jurisdictions for many years. *Id.* at 761. In most states adopting this standard, the standard is derived from judge-made law that adds gloss to general statutes stating that modification may be granted according to the child's best interests. *Id.* Judges applying this standard possess a tremendous amount of discretion. *Id.* at 762. Wexler writes, "Not surprisingly, decisions made in this framework are less a product of reasoned application of precedent than of the personality, temperament, background, interests, and biases of the trial judge or of the community that elected him." *Id.* The moving party must show that the change occurred subsequent to the initial custody order, or that a fact was not within the court's knowledge. *Id.* at 765. In states adopting this traditional standard, re-litigation, rather than finality, is encouraged. *Id.* at 763.

⁴³ *Id.* at 760-61.

⁴⁴ UNIF. MARRIAGE AND DIVORCE ACT § 101-506 (amended 1973), 9A U.L.A. 159 (1998). The modification standard provides:

[T]he Court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

- (1) the custodian agrees to the modification;
- (2) the child has been integrated into the family of the petitioner with consent of the custodian; or
- (3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment endangers seriously his physical, mental, moral or emotional health, and the harm likely to be caused by a change in environment is outweighed by its advantages to him.

Id. § 409(b). In addition, during the first two years after the initial custody order, a court cannot review a modification application unless the movant can establish by affidavit "that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health." *Id.* § 409(a).

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child prior to modification.⁴⁵

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2. Alaska: Development of the Law

In Alaska, a motion to modify custody must allege facts that, if proved, would establish a substantial change in circumstances.⁴⁶ Prior to *C.R.B.*, Alaska courts applied this standard in modification disputes between biological parents but had not determined which standard applies in disputes between biological parents and third parties.⁴⁷ The party moving for custody modification must show changes that affect the child's welfare.⁴⁸ In addition, these changes must reflect more than the passage of

⁴⁵ Wexler, *supra* note 2, at 773. Only two states have statutes which fully adopt the UMDA provisions. *Id.* at 776 (citing COLO. REV. STAT. § 14-10-131 (Supp. 1983); KY. REV. STAT. § 403.340 (1984)). Several other states, including Arizona, Illinois, and Washington, have adopted portions of the UMDA provisions. *Id.*

⁴⁶ ALASKA STAT. § 25.20.110 (Lexis Law Publishing 1998) states:

(a) An award of custody of a child or visitation with the child may be modified if the court determines that a change in circumstances requires the modification of the award and the modification is in the best interests of the child. If a parent opposes the modification of the award of custody or visitation with the child and the modification is granted, the court shall enter on the record its reason for the modification.

(b) When making a determination relating to child custody under (a) of this section, the court shall consider the past history of the parents with respect to their compliance with the child support payment provisions of temporary or permanent support orders or agreements relating to the child or to other children. Under this subsection, the court may consider a parent's failure to pay child support only if the parent had actual knowledge of the amount of the child support obligation and had funds available for payment of support or could have obtained those funds through reasonable efforts, as determined by the court.

(c) In a proceeding involving the modification of an award for custody of a child or visitation with a child, a finding that a crime involving domestic violence has occurred since the last custody or visitation determination is a finding of a change of circumstances under (a) of this section.

Id. Before and after codification of its rule in 1982, the Alaska Supreme Court required that the change in circumstances be "substantial." *See, e.g.,* Deivert v. Oseira, 628 P.2d 575, 578 (Alaska 1981) ("The concept of 'substantial change' of circumstances . . . may be considered simply a rule of judicial economy designed to discourage discontented parents from continually renewing custody proceedings."); Garding v. Garding, 767 P.2d 183, (Alaska 1989) (stating that the party moving for custody modification had the burden of proving a substantial change in circumstances).

⁴⁷ *See* C.R.B. v. C.C. 959 P.2d 375 & n.3 (Alaska 1998).

⁴⁸ S.N.E. v. R.L.B., 699 P.2d 875, 878 (Alaska 1985). In *S.N.E.*, the Alaska Supreme Court held that the superior court improperly relied on a "real or imagined social stigma attaching to Mother's status as a lesbian." *Id.* at 879. "Consideration of a parent's conduct is appropriate only when the evidence supports a finding that a parent's conduct has or reasonably will

time.⁴⁹ A party may show substantial change by demonstrating unilateral improvement in his or her own circumstances.⁵⁰ Significantly, Alaska courts have consistently recognized the importance of stability in children's lives by asserting that the changes must overcome our deep reluctance to shuttle children back and forth.⁵¹

III. STATEMENT OF THE CASE

A. *Facts*

During 1988, Catherine and Roberto⁵² got married.⁵³ Catherine had developed a cocaine addiction prior to the marriage.⁵⁴ Catherine and Roberto had two children, Peter, who was born in 1989, and Brian, who was born in 1991.⁵⁵ In 1992, Catherine and Roberto were divorced by decree of dissolution in the Superior Court at Anchorage, and Roberto gave sole custody of Peter and Brian to Catherine.⁵⁶

have an adverse impact on the child and his best interests." *Id.* The Alaska Supreme Court reasoned that the record indicated that parental neglect was absent, the child's development was superb, and there was no increased probability that the child would become homosexual. *Id.*; see also *Craig v. McBride*, 639 P.2d 303, 306 (Alaska 1982) (stating that a parent's instability in relationships will not justify modification of custody if the behavior does not affect the child).

⁴⁹ *Nichols v. Nichols*, 516 P.2d 732, 734 & n.3 (Alaska 1973) (holding that the evidence was insufficient to show a change in circumstances).

⁵⁰ See *Nichols v. Mandelin*, 790 P.2d 1367, 1372 & n.15 (Alaska 1990) (holding that evidence of the mother's "overall maturation," her control of a former alcohol problem, and changes in her employment and marital status constituted a substantial change in circumstances that warranted a modification of custody). The Alaska Supreme Court previously held that a change in custody cannot be justified by mere improvement in the circumstances of one of the parties. See, e.g., *Garding*, 767 P.2d at 186; *Gratrix v. Gratrix*, 652 P.2d at 76, 82 (Alaska 1982). However, *Nichols v. Mandelin* distinguished *Garding* and *Gratrix* "on the basis that these decisions were not intended to preclude a trial court from finding that significant long term changes in a party's lifestyle could constitute a substantial change in circumstances . . ." *Nichols v. Mandelin*, 790 P.2d at n.15.

⁵¹ *Nichols v. Nichols*, 516 P.2d at 735 ("Children should not be shuffled back and forth between divorced parents unless there are important circumstances justifying such change . . ."); see also *Gratrix*, 652 P.2d at 82-83 (Alaska 1982) (stating that "finality and certainty in custody matters are critical to the child's emotional welfare"); *Morel v. Morel*, 647 P.2d 605, 608 (Alaska 1982) (asserting that the Alaska Supreme Court has "continually stressed the desirability of maintaining continuity of care").

⁵² The Alaska Supreme Court used pseudonyms throughout its opinion. *C.R.B.*, 959 P.2d at 376.

⁵³ *Id.* at 377.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Brief for Appellees at 1, *C.R.B. v. C.C.*, 959 P.2d 375 (Alaska 1998) (No. S-8104)

B. Procedural History

A “drug-induced crisis” during 1993 motivated Carl and Betty Clark, the children’s maternal grandparents, to obtain interim custody and move for permanent custody in the Superior Court at Palmer.⁵⁷ Roberto subsequently filed a motion to modify the divorce decree to give him custody of Peter and Brian.⁵⁸ However, he withdrew his motion in 1994.⁵⁹ In January, 1995, the superior court granted the Clarks sole legal and physical custody of the children.⁶⁰ In September, 1996, Roberto moved to modify the custody order, arguing that changes in his circumstances warranted modification.⁶¹ The superior court dismissed Roberto’s motion during February, 1997.⁶² The superior court held that Roberto’s factual assertions, even if true, do not show a substantial change of circumstances to warrant modification.⁶³ Roberto appealed the denial of his

(incorporating by reference the Statement of the Case in their Cross Appellants’ Brief).

⁵⁷ *C.R.B.*, 959 P.2d at 377. The Clarks claimed not to know of Roberto’s whereabouts, but Roberto disputed this. *Id.* Roberto learned of the custody proceedings during 1993. *Id.*

⁵⁸ Brief for Appellees at 1, *C.R.B. v. C.C.*, 959 P.2d 375 (Alaska 1998) (No. S-8104) (incorporating by reference the Statement of the Case in their Cross Appellants’ Brief). “Contrary to [Roberto’s] assertion in his Appellant Brief . . . his motion to change custody was never opposed.” *Id.* In addition, Roberto filed “lengthy” affidavits from himself and his new wife claiming that they were “ready, willing and very anxious” to obtain custody. *Id.*

⁵⁹ *C.R.B.*, 959 P.2d at 377. During September, 1996, Roberto stated that he withdrew from the 1993-94 custody proceeding because the Clarks told him they only wanted temporary custody. *Id.* He stated that he did not realize his custody rights were at risk and did not keep in touch with his attorney because of his financial situation. *Id.* Roberto filed a letter that he wrote to the superior court after he withdrew his custody motion and prior to trial. “I still wish to gain custody and my visiting [privileges],” he stated in the letter, but “I have not filed for custody again as my budget cannot endure any more lawyer and court fees I am not an absent[ee] parent” *Id.*

⁶⁰ *Id.* Roberto did not appear at the trial in the superior court on the Clarks’ motion for permanent custody. *Id.* In addition, Roberto did not visit his children from July, 1993 until March, 1996. Brief for Appellees at 1, *C.R.B. v. C.C.*, 959 P.2d 375 (Alaska 1998) (No. S-8104) (incorporating by reference the Statement of the Case in their Cross Appellants’ Brief).

⁶¹ *C.R.B.*, 959 P.2d at 377. Roberto argued that the following changes in circumstances were substantial and that they warranted a modification of the custody order: Roberto obtained his American citizenship; Roberto’s marriage and business had grown stable and successful; Roberto and his new wife purchased a home in a suburb that was well-suited for the children; Roberto was rebuilding relationships with his sons after three years without communication; the Clarks had developed health problems; the Clarks were interfering with Roberto’s relations with his sons; and Roberto discovered that Betty Clark was the subject of a child-in-need-of-aid (“CINA”) investigation in 1980. *Id.*

⁶² *Id.* at 378. The superior court dismissed the motion without a hearing. *Id.*

⁶³ *Id.* at 384.

motion for modification of custody.⁶⁴

C. Alaska Supreme Court Decision

The Alaska Supreme Court analyzed whether a biological parent moving to modify a court order awarding permanent legal custody to a third party must make the same threshold showing of a substantial change in circumstances as in a dispute between biological parents.⁶⁵ The court held that a biological parent must “show no less substantial a change in circumstances” as in dispute between biological parents.⁶⁶

⁶⁴ *Id.* at 378.

⁶⁵ *Id.* at 377. Roberto argued that the policies underlying the parental preference doctrine dictate that a parental preference should apply when a biological parent moves to modify nonparental custody. *Id.* at 379. Therefore, Roberto insisted, a parent attempting to modify nonparental custody does not need to show as substantial a change in circumstances as a parent modifying another parent’s custody. *Id.* In addition, Roberto argued that a parent can show a less substantial change to modify visitation. *Id.*; e.g., *Hermosillo v. Hermosillo*, 797 P.2d 1206, 1209 (Alaska 1990). However, the Alaska Supreme Court asserted that a change in visitation is less significant to a child than a change in custody, and Roberto did not provide any reason to view a change in permanent custody like a change in visitation. *C.R.B.*, 959 P.2d at 379.

⁶⁶ *C.R.B.*, 959 P.2d at 381. According to the Alaska Supreme Court, research suggests that its holding is a majority rule. *Id.* at 380-81. The court cited the following cases and annotation: *Ex Parte McLendon*, 455 So.2d 863, 865-66 (Ala. 1984) (limited by *Reuter v. Neese*, 586 So.2d 232 (Ala. Civ. App. 1991)) (ruling that a mother showing improved circumstances and that she could provide for her child in the same manner in which the custodial grandparents had been providing for the child failed to show that a custody modification would materially promote the child’s welfare and best interest); *Jones v. Strauser*, 585 S.W.2d 931, 932 (Ark. 1979) (holding that a father attempting to modify an order awarding custody of his child to the maternal grandparents failed to show that the grandfather’s death was a change in circumstances justifying a modification when considered from the standpoint of the child’s welfare); *Bivens v. Cottle*, 462 S.E.2d 829, 830-31 (N.C. Ct. App. 1995) (holding that a mother attempting to modify a order awarding custody of her children to their grandparents was not entitled to a parental preference and was required to show a change in circumstances); *In re Whiting*, 590 N.E.2d 859, 861-62 (Ohio Ct. App. 1990) (ruling that a mother entering into a judicially approved contractual agreement giving custody of her son to her sister and brother-law surrendered her right to a parental preference, and the mother was not entitled to a modification of custody because she alleged a change in her circumstances rather than in the circumstances of the custodian or the child); *Johnson v. Johnson*, 681 P.2d 78, 80-81 (Okla. 1984) (holding that although a mother demonstrated that her fitness to be a custodial parent had changed, she was not entitled to a modification of an order awarding custody of her children to the paternal grandparents because she did not show that this change directly affected the best interests of her children); *Lear v. Lear*, 863 P.2d 482, 484 (Or. Ct. App. 1993) (ruling that a mother of a child in permanent custody of paternal grandparents did not show a substantial change in her parenting abilities to warrant relitigation of custody, and stating that evidence that the child is well adjusted in her home is

Accordingly, the Alaska Supreme Court affirmed the superior court's decision.⁶⁷

a relevant factor); Taylor v. Meek, 276 S.W.2d 787, 789-90 (Tex. 1955) (reaffirmed after amendment of custody statute in In re Ferguson, 927 S.W.2d 766, 768-69 (Tx. Ct. App. 1996)) (holding that when a third party has custody of a child, a custody modification should be ordered only when the biological parent shows a change that is positive for the child, and reasoning that "a change of custody disrupts the child's living arrangements and the channels of a child's affection"); Dyer v. Howell, 184 S.E.2d 789 (Va. 1971) (denying a father's petition for modification of custody from the child's aunt and uncle to himself, and holding that the father, who was declared not guilty of killing the child's mother by reason of insanity and was later determined to be mentally competent, did not show a substantial change of circumstances); Carol Crocca, Annotation, *Continuity of Residence as Factor in Contest Between Parent and Nonparent for Custody of Child Who Has Been Residing with Nonparent--Modern Status*, 15 A.L.R. 5th 692, 807-14 (1993) (collecting cases in which biological parents were required to prove a change in circumstances). *Id.* at 381 n.10.

In addition, the Alaska Supreme Court held that a court may deny a motion for modification of child custody, without a hearing, based solely on the pleadings or material beyond the pleadings, such as affidavits. *Id.* at 378. The court must treat the facts alleged as "established." *Id.* (citing Christiansen v. Melinda, 857 P.2d 345, 346 n.2 (Alaska 1993)). Roberto argued that a parent moving for modification of custody deserves the same right to a hearing as a parent who has lost custody in a child-in-need-of-aid ("CINA") case but claims to be rehabilitated. *Id.* at 379; *see, e.g.*, Rita T. v. State, 623 P.2d 344, 346-47 (Alaska 1981). However, the Clarks asserted that the CINA statute stresses family preservation, and Title 25 focuses on permanently placing children in stable homes. *C.R.B.*, 959 P.2d at 379. The Alaska Supreme Court held that the Clarks' arguments were more persuasive than Roberto's. *Id.* Significantly, pursuant to *Rita T.*, once a child moves to a permanent adoptive placement, a parent's right to a rehabilitation hearing ends. *Rita T.*, 623 P.2d at 346.

Prior to its decision in *C.R.B.*, the Alaska Supreme Court had not established which standard of review applies when there is no hearing on a motion to modify custody. *Id.* When there is a hearing, the Alaska Supreme Court will overturn a custody order only if the superior court abused its broad discretion or its factual findings were clearly erroneous. *Id.* (citing Hayes v. Hayes, 922 P.2d 896, 898, n. 3. (Alaska 1996)). The Alaska Supreme Court established that when there is no hearing, the standard of review of a denial of a motion to modify custody is *de novo*. *Id.* The Alaska Supreme Court will affirm the decision if "the facts alleged, even if proved, cannot warrant modification, or if the allegations are so general or conclusory, and so convincingly refuted by competent evidence, as to create no genuine issue of material fact requiring a hearing." *Id.*

⁶⁷ *C.R.B.*, 959 P.2d at 385. The Alaska Supreme Court held that Roberto's citizenship was "irrelevant, as it does not affect the children." *Id.* at 382. The success of Roberto's marriage and business were "relevant, but not controlling" because the superior court did not base its initial custody decision on concerns relating to instability. *Id.* at 383. In addition, Roberto and Penny's purchase of a home and Roberto's contact with his sons were "good steps towards readiness for custody but not sufficient to warrant a change." *Id.* The Alaska Supreme Court stated that the Clarks' health problems were illusory. *Id.* at 382. The Clarks' interference with Roberto's visitation would be a factor in a best interests inquiry but cannot constitute a substantial change of circumstances. *Id.* *But see* Siekawitch v. Siekawitch, 956

The Alaska Supreme Court reasoned that “we should not . . . sacrifice the child’s need for stability in its care and living arrangements”⁶⁸ The court asserted that application of a parental preference in the initial custody proceeding may create an “inevitable sacrifice.”⁶⁹ This sacrifice occurs when the children’s interests indicate that a court should award custody to the third party, but the third party cannot rebut the parental preference.⁷⁰ Therefore, in an initial custody proceeding, a biological parent’s rights are protected, despite the risk of this sacrifice.⁷¹ The court concluded that children’s need for stability should not be sacrificed by allowing a parental preference to weaken the requirements for modification of custody.⁷²

IV. ANALYSIS

In *C.R.B.*, the Alaska Supreme Court wisely refused to apply a parental preference in custody modification disputes between biological parents and third parties, and the court’s decision adequately protected Peter and Brian’s need for stability.⁷³ However, for the reasons analyzed below, if the Alaska Supreme Court continues to apply the substantial change in circumstances modification standard, it may not adequately safeguard children’s need for stability in future cases.⁷⁴

P.2d 447, 451 (Alaska 1998) (holding that an inability to agree on a visitation schedule represented a change in circumstances that warranted a re-examination of the original custody decision). The Alaska Supreme Court stated that Roberto’s allegation that Betty Clark was the subject of a child-in-need-of-aid (“CINA”) investigation in 1980 were speculative. *C.R.B.*, 959 P.2d at 383-84.

⁶⁸ *C.R.B.*, 959 P.2d at 380.

⁶⁹ *Id.*

⁷⁰ *Id.*; see *supra* notes 17-30 and accompanying text.

⁷¹ *C.R.B.*, 959 P.2d at 380. The Alaska Supreme Court acknowledges that the “parental preference is a vital safeguard against enabling nonparents to convince courts to remove children improperly from their parents.” *Id.* In addition, the court did not want to take “a step toward a totalitarian government.” *Id.* (quoting *Turner v. Pannick*, 540 P.2d 1051, 1054 (Alaska 1975) (Dimond, J., concurring)). In *Turner*, the Alaska Supreme Court expounded on the dangerous effects of a refusal to adopt a parental preference in an initial custody proceeding. *Turner*, 540 P.2d at 1054.

[W]e would be taking a step toward a totalitarian government. Children could be removed from their parents’ custody at the will of the state, depending upon what some governmental petty tyrant decides is meant by the term . . . ‘best interests’ of the children. Such a state of affairs would be entirely contrary to the form of government envisioned by the founding fathers of our nation.

Id. at 1056 (Dimond, J., concurring).

⁷² *C.R.B.*, 959 P.2d at 380.

⁷³ See discussion *infra* Part IV.A.1-2.

⁷⁴ See discussion *infra* Part IV.C.

A. *Collision of Foundational Policies*

1. Law's Preference for Parental Over Third Party Custody

The law prefers parental custody over third party custody in initial custody disputes.⁷⁵ In *C.R.B.*, the children's biological father argued that policy reasons dictate that a parental preference should be applied to weaken the requirements for custody modification.⁷⁶ Advocates of the parental preference assert that it is necessary to protect the sanctity of the relationship that exists between a parent and a child.⁷⁷ Application of a parental preference creates predictability and judicial economy,⁷⁸ and acts as a crucial safeguard that prevents a judge from utilizing extremely broad judicial discretion to make decisions based on personal biases.⁷⁹ In particular, utilization of a

⁷⁵ See discussion *supra* Part II.A.1.

⁷⁶ *C.R.B.*, 959 P.2d at 379; see *supra* note 65 and accompanying text.

⁷⁷ See Richards, *supra* note 6, at 734 (asserting that in some circumstances, parents' rights are not adequately protected when the courts award custody based solely on the child's best interests); *supra* notes 17-18 and accompanying text. The nuclear family, which is comprised of a married couple and their children, is the preferred social unit in America. See Bartlett, *Rethinking Parenthood*, *supra* note 18, at 879. Parental autonomy provides incentives for parents to raise their children to the best of their abilities by creating security that neither the state nor third parties will interfere. *Id.* In addition, experts have determined that the loss experienced by children who have been adopted and separated from their biological families is more profound than loss caused by divorce or even death. See Bernadette Weaver-Catalana, *The Battle for Baby Jessica: A Conflict of Best Interests*, 43 BUFF. L. REV 583, 600 (1995). This sense of loss stems from an adoptee's search for self, which is one of the fundamental dimensions of psychological development. *Id.* The adoptee's search for self is affected by the adoptee's attempts to deal with perceived rejection. *Id.* at 601. But see Katherine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 [hereinafter Bartlett, *Re-Expressing Parenthood*] (proposing that child custody should adopt a view of parenthood based on attachment and responsibility rather than possessiveness and rights); Thompson, *supra* note 28, at 572 (asserting that when courts utilize a parental preference standard, they are disregarding contemporary psychological studies indicating that psychological ties, rather than biology, bind a child to an adult); Salthe, *supra* note 5, at 545 (arguing that although a parental preference should be applied in initial custody disputes, the definition of "parent" should be expanded to include "psychological parents" as well as a biological parents).

⁷⁸ See Kaas, *supra* note 6, at 1090. Kaas states, "Predictability has the benefit of discouraging the filing of groundless cases and encouraging the settlement of pending cases." *Id.*

⁷⁹ *Id.* at 1090. Without the parental preference, the best interest of the child standard will be used. See *supra* note 23. According to Katherine Bartlett:

[T]he best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for our children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or

parental preference mitigates the risk that a judge's class biases⁸⁰ and lifestyle biases⁸¹ will determine the outcome of a custody dispute.⁸²

*Painter v. Bannister*⁸³ is frequently cited as a vivid example of the potential social engineering that may occur when a court applies its own value judgments rather than a parental preference.⁸⁴ In *Painter*, the Iowa Supreme Court awarded permanent custody of a young boy to his grandparents,⁸⁵ even though there was no suggestion in the record that his biological father was an unfit parent.⁸⁶ The court based its decision on a comparison of the father's "Bohemian" lifestyle with the grandparents' "conventional" way of life.⁸⁷

scientific data about what is "best" for children. The resolution of conflicts over children ultimately is less a matter of objective fact-finding than it is a matter of deciding what kind of children and families--what kind of relationships--we want to have.

Bartlett, *Re-expressing Parenthood*, *supra* note 77, at 303. *But see* Thompson, *supra* note 28, at 534. Thompson argues that the parental preference should be abolished. *Id.* at 572. He asserts that courts have a duty to protect children under the *parens patriae* doctrine. *Id.* This doctrine evolved as a result of England's feudal system, and was adopted by courts of equity in America. *Id.* at 551. The *parens patriae* doctrine dictates that courts have an obligation to protect individuals who cannot protect themselves, including children, the elderly, and the insane. *Id.* Thompson reasons that when a nonparent is a party in a custody dispute, the court's focus shifts from the child to the parent. *Id.* at 534. Consequently, the court abandons the child's best interests, and also abandons its duty to protect the child under the *parens patriae* doctrine. *Id.* at 561.

⁸⁰ Custody disputes are often decided based on economic factors. *See* Weaver-Catalana, *supra* note 77, at 605. In addition, the third party's strategy may include an attempt to deplete the parent's financial resources through legal fees. *Id.* at 606. Weaver-Catalana writes, "[W]e are heading down a slippery slope at the bottom of which lurks an issue we Americans are reluctant to face: the awful realities and inequalities of wealth and class." *Id.* (quoting Richard Cohen, *Class Action*, WASH. POST MAG., Sept. 12, 1993, at W9).

⁸¹ "The best interest of the child standard can be used to validate certain lifestyles while condemning others as immoral. When the subjective morality of a parent can be used in custody decisions, everyone, apparently is at risk." Weaver-Catalana, *supra* note 77, at 607; *see, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429 (1984) (overturning the decision of a Florida court that took custody of a child away from a biological parent who married a person of a different race).

⁸² *See* Weaver-Catalana, *supra* note 77, at 604.

⁸³ 140 N.W.2d 152 (Iowa 1966), *cert. denied*, 385 U.S. 949 (1966).

⁸⁴ *See* Lewis, *supra* note 17, at 267.

⁸⁵ *Painter*, 140 N.W.2d at 158.

⁸⁶ *Id.* at 154. The boy's father placed him with his grandparents on a temporary basis after his mother and sister were tragically killed in a car accident. *Id.* at 153. Approximately sixteen months later, the grandparents refused to return the boy pursuant to the father's request. *Id.*

⁸⁷ *Id.* at 154. The Iowa Supreme Court stated:

Also, proponents of the parental preference argue that custody decisions that are not based on biology create incentives for third parties to kidnap or wrongfully retain a child.⁸⁸ In *Hoy v. Willis*,⁸⁹ a testifying expert asserted that if a couple kidnapped a baby, became its psychological parents, and were equal in all respects to the biological parents, it would be in the child's best interests to award custody to the kidnappers.⁹⁰ Likewise, without the application of a parental preference, parents who face difficult circumstances and need child care assistance on a temporary basis may risk losing custody of their children.⁹¹

Based on the public policy reasons favoring the parental preference in initial custody disputes between biological parents and third parties, some courts have extended a parental preference to custody modification cases.⁹² However, for reasons discussed in the next section, the parental preference should not be extended to modification cases, and in *C.R.B.*, the Alaska Supreme Court properly rejected Roberto's arguments in

The Bannister home provides Mark with a stable, dependable, conventional, middle-class midwest background and an opportunity for a college education and profession, if he desires it. It provides a solid foundation and secure atmosphere. In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic impractical and unstable.

Id.

⁸⁸ See Lewis, *supra* note 17, at 265-66 & n.37 (stating that "many situations can be imagined in which this result is perfectly plausible"). Katharine Bartlett proposes that third parties should not be recognized as a possible custodians unless they prove that their relationship with the child arose pursuant to consent from the biological parent(s) or a court order. Bartlett, *Rethinking Parenthood*, *supra* note 18, at 947.

⁸⁹ 398 A.2d 109 (N.J. Super. Ct. App. Div. 1978).

⁹⁰ John Batt, *Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/ Freud/ Solnit Position and the Group's Painter v. Bannister Jurisprudence*, 16 NOVA L. REV. 621, 655-56 (1992) (citing *Hoy v. Willis*, 398 A.2d 109 (N.J. Super. Ct. App. Div. 1978) as evidence that a strict application of the best interests model "may beget monsters of jurisprudential injustice").

⁹¹ See Richards, *supra* note 6, at 748. In *Painter*, the father's intention was to place the children with their grandparents on a temporary basis. *Painter*, 140 N.W.2d at 156. Ironically, the court proclaimed, "A father should be encouraged to look for help with the children, from those who love them without the risk of thereby losing the custody of the children permanently." *Id.*

⁹² See, e.g., *Anderson v. Hall*, 823 S.W.2d 109 (Mo. Ct. App. 1991). In *Anderson*, the biological father attempted to modify a custody decree awarding custody to the child's grandparents. *Id.* at 111. The Missouri Court of Appeals ignored the plain language of the custody modification statute, which required a change in the child's or the custodian's circumstances. *Id.* at 115. The court applied a parental preference and modified the custody decree based solely on changes in the father's circumstances. *Id.*

reaching its holding.⁹³ A biological parent's change of heart should not be permitted to disrupt a child's stability.⁹⁴

2. Law's Desire to Meet Children's Needs for Stability

Almost all psychologists and psychiatrists agree that it is crucial for a child to maintain stable and continuous relationships.⁹⁵ Goldstein, Freud and Solnit (hereinafter "Goldstein") created a jurisprudential paradigm⁹⁶ that has helped to "revolutionize" the analysis of child custody disputes.⁹⁷ Under this paradigm, a child's psychological well-being is a paramount concern in custody litigation,⁹⁸ and interruptions in relationships are viewed as being extremely damaging to a child's psychological development.⁹⁹ The amount of potential damage created by these interruptions depends on a child's age, and the younger the child, the greater the risk.¹⁰⁰ Significantly, Goldstein asserts that this

⁹³ See discussion *infra* Part IV.A.2.

⁹⁴ See Bartlett, *supra* note 18, at 902.

⁹⁵ Blair, *supra* note 30, at 116.

⁹⁶ J. GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973). A jurisprudential paradigm is the result of "observation, conceptualization, and imagination," and acts as a guide to "research, policy creation, norm construction, proof presentation, and decision-making." Batt, *supra* note 90, at 621-22. Batt states that courts can make better decisions when expert witnesses, lawyers, and judges use paradigms. *Id.* at 623. This "interdisciplinary effort" is based on law, psychiatry, and psychoanalysis. *Id.* at 685 n.5.

⁹⁷ Batt, *supra* note 90, at 623. "Judges, lawyers, law professors, law students, mental health professionals, social scientists and concerned laymen have been very affected by their message." *Id.* at 625. However, Batt argues that Goldstein is "overly apprehensive." *Id.* at 641. Batt discusses a study indicating that psychiatrists claiming there is a link between childhood trauma and adult psychopathology often derive their research from observations of disturbed individuals. *Id.* Because these psychiatrists do not study individuals who faced childhood trauma and did not develop mental problems as adults, their conclusions may be incorrect. *Id.* Batt asserts, "Not every child of divorce or of a custody dispute is a victim proximate to his or her psychic undoing. Life is as it is . . . Children are resilient." *Id.* at 642-43. Therefore, the courts must examine the "totality of relevant psychosocial circumstances." *Id.* at 645.

⁹⁸ GOLDSTEIN ET AL., *supra* note 96, at 4.

⁹⁹ *Id.* at 32-33. In addition, Goldstein asserts that courts must look at interruptions in continuity from children's subjective perceptions of time and act quickly to prevent permanent psychological harm. *Id.* at 41.

¹⁰⁰ *Id.* at 32. The child's needs must be analyzed by examining "the totality of relevant psychosocial circumstances." Batt, *supra* note 90, at 645. Therefore, in order to make the optimum decision for a child, courts must determine what the child's needs are in relation to the child's developmental status. *Id.* Erik Erikson's theoretical model, which contains eight life stages, is "soundly rooted in clinical observation." *Id.* at 674. According to Batt, "Erikson is certainly Western culture's foremost student of human development." *Id.* at 685 n.7. The five stages that can provide guidance in child custody disputes are as follows:

damage can consist of mental illness, dependence on society, or criminal behavior.¹⁰¹

According to Goldstein, custody determinations should be made according to a “least detrimental alternative” standard.¹⁰² Application of this standard maximizes a

Stage I--(approximately the first year of life). During this developmental phase, the child has the opportunity to achieve a positive life view called basic trust. Basic trust develops when the child is well cared for, psychologically and physically, by an adult or adults of attachment. An appropriate experience in attachment during this stage of development prepares one for human intimacy and social interaction in later stages.

Stage II--(about the second and third year of life). The child seeks to develop personal autonomy and begins to explore the home environment.

Stage III--(about age four and five). The child starts to take a serious interest in life outside of the home. The child is learning through play. Attachments to people outside of the home are made.

Stage IV--(approximately the sixth through the eleventh year). The child becomes immersed in the outside culture. The acquisition of culturally approved skills and knowledge is the major task of this stage. This is the stage of essential learning.

Stage V--(about the twelfth through eighteenth year). The child is in the process of consolidating the emerging self. Cultural and gender identities are worked out.

Id. at 646. At the time of the Alaska Supreme Court’s decision in *C.R.B.*, both Peter and Brian were in Stage IV of Erikson’s model. *See C.R.B. v. C.C.* 959 P.2d 375 (Alaska 1998). A child in this stage is in the process of moral, cognitive, social, aesthetic, and emotional development. Batt, *supra* note 90, at 651-52. Therefore, according to Batt, “To appropriately decide a child custody case involving a learning stage child, one must think not only about the parents, but must engage in a prospective analysis which considers the psycho-social situation of the child in adolescence.” *Id.* at 653-54. However, the Alaska Supreme Court focuses on maintaining stability in the Peter and Brian’s lives. *C.R.B.*, 959 P.2d at 380.

¹⁰¹ *See* GOLDSTEIN ET AL., *supra* note 96, at 18. In addition, psychologists state that a judicial separation of a child and a psychological parent can hinder the child’s capacity to trust and care for others, injure the child’s self-esteem, and hurt the child’s identification with social ideals. Thompson, *supra* note 28, at 562. Also, research indicates that when children perceive that they have minimum control over environmental changes subsequent to a divorce, they may experience depression, social withdrawal, and aggressive behavior. Wexler, *supra* note 2, at 796-97. Some researchers have indicated that a change in residence can be very detrimental to children. *Id.* at 796.

¹⁰² GOLDSTEIN ET AL., *supra* note 96, at 53. Goldstein believes that the “least detrimental alternative” standard will serve as a reminder that custody decisions are intrinsically unsatisfactory. *Id.* at 63.

The least detrimental alternative, then, is that specific placement and procedure for placement which maximizes in accord with the child’s sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.

Id. at 53.

child's opportunity to maintain a relationship with a "psychological parent" who meets the child's needs on a daily basis.¹⁰³

[F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his "psychological parent" in whose care the child can feel valued and "wanted." An absent biological parent will remain, or tend to become, a stranger.¹⁰⁴

Also, according to this paradigm, all custody decisions should be final since custody modifications threaten continuity of relationships.¹⁰⁵

¹⁰³ *Id.* Bartlett notes that experts proclaim that children need one parent or set of parents who have complete and undivided control of them. Bartlett, *Rethinking Parenthood, supra* note 18, at 882. In addition, Bartlett analyzes Goldstein's assertion that only one relationship should be maintained when a family is torn apart because a child's confusion regarding loyalties will impede their adjustment to new circumstances. *Id.* at 908. However, Bartlett argues against these contentions and proposes that protection of a child's need for stability in relationships may dictate that courts provide the means for the child to maintain significant relationships with more than one parent or set of parents. *Id.* at 882. When a child's biological parents obtain a divorce, the law assumes that each parent will continue to have a relationship with the child. *Id.* at 899. According to Bartlett, recent research indicates that children who do not maintain contact with absent caretakers will suffer damage at every developmental stage. *Id.* at 909. Maintenance of a child's ties to the past provide feelings of security even when the family relationship is unstable. *Id.* at 910. In *C.R.B.*, the Alaska Supreme Court noted that the superior court's order denying Roberto's motion for modification encouraged Roberto to become a more involved parent, and indicated that it is important for Peter and Brian to have a strong bond with their biological father. *C.R.B. v. C.C.* 959 P.2d 375, 384 (Alaska 1998). The Alaska Supreme Court indicated that the superior court ordered that Peter and Brian fly to Seattle to visit their father twice a year. *Id.*

¹⁰⁴ GOLDSTEIN ET AL., *supra* note 91, at 19. This model views attachment as crucial to healthy psychological development. Batt, *supra* note 90, at 629. A biological parent who is physically absent cannot be a psychological parent. *Id.* Also, Katharine Bartlett proposes three additional criteria that courts should utilize to identify a "psychological parent." Bartlett, *Rethinking Parenthood, supra* note 18, at 946. First, the adult must have physical custody of the child for a minimum of six months. *Id.* at 946-47. Second, the adult must demonstrate motivations based on sincere concern and care for the child's welfare. Also, the child's view of the relationship must be ascertained. The child must believe that the adult has a parental role rather than a companion or a babysitter. *Id.* at 947. Third, to avoid the creation of incentives for kidnapping, the petitioning adult must prove that the relationship began pursuant to the consent of the biological parent(s) or a court order. *Id.*

¹⁰⁵ Batt, *supra* note 90, at 661 (disagreeing and noting that a policy that disallows custody modifications and "places the child at the total mercy of one parent until the end of adolescence can do very little to insure justice for the young").

At the time of the Alaska Supreme Court's decision in *C.R.B.*, Peter was nine years old, Brian was seven years old, and their grandparents had cared for them for over five years.¹⁰⁶ Also, Roberto had not seen his sons during almost three years of this time period.¹⁰⁷ Therefore, according to Goldstein's paradigm, it is very likely that Peter and Brian's grandparents were their psychological parents.¹⁰⁸ Because destruction of stability may be extremely detrimental to children, the law's goal should be to promote continuity in children's lives.¹⁰⁹ However, application of a parental preference focuses on parental rights and ignores the negative consequences of tearing children away from their psychological parents.¹¹⁰ Fortunately, the Alaska Supreme Court's holding produced an optimum result in *C.R.B.* because it did not tear Peter and Brian away from their grandparents.¹¹¹

B. Consequences of the Alaska Supreme Court's Decision

Although the Alaska Supreme Court's refusal to apply a parental preference produced a desirable outcome in *C.R.B.*, the substantial change in circumstances modification standard does not adequately protect children.¹¹² It appears that courts are "defining changed circumstances as a change in any circumstance pertinent to the best interests of the child, so that the two standards merge de facto."¹¹³ The flexibility allowed under a substantial change in circumstances standard of modification may create undesirable consequences.¹¹⁴ For example, custody modification decisions frequently reflect the belief that remarriage is a substantial change in circumstances that

¹⁰⁶ See *C.R.B. v. C.C.* 959 P.2d 375, 377 (Alaska 1988).

¹⁰⁷ *Id.*

¹⁰⁸ See discussion *supra* Part IV.A.2.

¹⁰⁹ Bartlett, *Rethinking Parenthood*, *supra* note 18, at 902.

¹¹⁰ See Lewis, *supra* note 17, at 265 (discussing arguments advanced by critics of the parental preference standard). Lewis also indicates that laws should "mandate speedy resolution of custody disputes to prevent rewarding the party who can retain physical possession of the child for the longest time." *Id.* at 283.

¹¹¹ See *C.R.B.*, 959 P.2d at 380.

¹¹² See C. Gail Vasterling, *Child Custody Modification Under the Uniform Marriage and Divorce Act: A Statute to End the Tug-of-War?*, 67 WASH. U. L.Q. 923, 931 (1989). Vasterling states, "Modification under this standard . . . may not promote the child's "best interests," and in fact, often promotes the contrary." *Id.* at 931. In addition, utilization of the substantial change in circumstances standard produces negative consequences for each party. *Id.* at 930-31. Because the standard is vague and discretionary, it promotes relitigation of custody modification disputes. *Id.* at 930. Relitigation creates emotional and financial turmoil for each person who is involved in the litigation. *Id.* at 931.

¹¹³ See Wexler, *supra* note 2, at 782.

¹¹⁴ See *id.* at 796; see also Vasterling, *supra* note 112, at 930. Because the substantial change of circumstances standard is vague, courts may base their custody decisions on irrelevant changes or personal biases. *Id.*

justifies the elimination of stability in a child's life.¹¹⁵ However, there is no empirical support for the assumption that this remarriage will produce a stable nuclear family, and in fact, remarriage may actually cause increased difficulties for children.¹¹⁶ Tragically, if the Alaska Supreme Court continues to apply the substantial change in circumstances standard in custody modification disputes, there is a risk that children will experience psychological damage¹¹⁷ due to the destruction of stability in their lives.¹¹⁸

C. States Should Adopt a Revised Version of the Uniform Marriage and Divorce Act's¹¹⁹ Custody Modification Standard

The Court's ability to modify custody orders should be limited by strict statutory criteria.¹²⁰ The UMDA's drafters acknowledged the importance of stability in a child's life, and recognized that "insuring the decree's finality is more important than determining which party should be the custodian."¹²¹ Because the UMDA's modification provisions promote continuity in children's lives by placing procedural and substantive limitations on a court's ability to modify initial custody orders, states should enact these provisions.¹²² However, the UMDA's modification provision that requires a

¹¹⁵ See Wexler, *supra* note 2, at 795.

¹¹⁶ *Id.* According to Wexler, the remarriage example is only one illustration of the "potential abuse" that may occur due to the use of "amorphous" substantial change of circumstances standards. *Id.* "Courts operating under such malleable substantive rules are able to use assumptions unsupported by empirical evidence to effect changes that, upon closer analysis, make no sense . . ." *Id.*

¹¹⁷ See *supra* note 101 and accompanying text. Social science research has influenced the development of the law in initial custody disputes, and there is no reason that this data should be less important in the context of custody modifications. Wexler, *supra* note 2, at 784.

¹¹⁸ See Vasterling, *supra* note 112, at 931-32 (recognizing that experts agree that "stability is paramount to a child's development" and that courts can decrease the negative consequences that result from a disruption in stability by "ensuring the finality of the initial custody decree").

¹¹⁹ UNIF. MARRIAGE AND DIVORCE ACT § 101-506 (amended 1973), 9A U.L.A. 159 (1998). For a discussion of UMDA, see *supra* notes 44-45 and accompanying text.

¹²⁰ See Wexler, *supra* note 2, at 760. Wexler indicates that custody modifications are becoming easier to obtain, and that the "law today is moving in precisely the wrong direction." *Id.* Wexler examines social science research indicating that stability is an important factor in children's lives, and argues that modification is justified only in "special cases." *Id.*

¹²¹ UNIF. MARRIAGE AND DIVORCE ACT § 409 cmt. (amended 1973), 9A U.L.A. 439-40(1998) (citing Andrew S. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969)).

¹²² Vasterling, *supra* note 112 at 947. UMDA section 409(b) limits the judge's discretion by dictating that the change in circumstances must relate to either the child or the custodian. *Id.* at 932. Also, section 409(b) assumes that unless one of the three conditions exists, a

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change that seriously endangers the child's physical or mental health¹²³ should specifically define "endangers seriously" to avoid a liberal interpretation by the courts.¹²⁴

V. CONCLUSION

The Alaska Supreme Court's refusal to utilize a parental preference produced a proper outcome in *C.R.B.*¹²⁵ However, the substantial change in circumstances modification standard does not adequately protect children's need for stability.¹²⁶ If this standard is applied in future cases, there is a risk that children may face emotional harm.¹²⁷ It is better to make a biological parent cope with feelings of despair regarding loss of custody than to make a child cope with further disruption and instability.¹²⁸

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change in custody does not promote a child's best interests. *Id.* At 933. The UMDA requires a two year waiting period subsequent to a final custody order, but there is a provision for emergency situations. *See* UNIFORM MARRIAGE AND DIVORCE ACT § 409(a). This emergency provision recognizes that protecting a child from serious physical or mental harm should always take precedence over stability in residence. *See* UNIFORM MARRIAGE AND DIVORCE ACT § 409 cmt. Wexler noted that the threshold modification standard that a movant must satisfy during the first two years after the issuance of the decree acts as a procedural hurdle since it is the same modification standard that all movants must establish. *See* Wexler, *supra* note 2, at 775.

¹²³ UNIF. MARRIAGE AND DIVORCE ACT § 409(b)(3); *see supra* note 44.

¹²⁴ *See* Wexler, *supra* note 2, at 782. Illinois adopted the UMDA provisions from October 1, 1977 until July 1, 1982, and Wexler indicates that Illinois' case law is "the largest body of judicial interpretation of the UMDA test." *Id.* at 766. Wexler determined that the Illinois courts utilized a "liberal approach to an intentionally illiberal statute" and exercised significant discretion in granting modifications. *Id.* at 778; *see, e.g.*, *Kraft v. Kraft*, 439 N.E. 2d 491, 496 (Ill. App. Ct. 1982) (finding that a child was in serious danger because, although she was doing well in school, she was not achieving her potential); *Jarrett v. Jarrett*, 400 N.E. 2d 421 (Ill. 1979), *cert. denied*, 449 U.S. 927 (1980) (modifying custody to protect the children's moral development after the custodial parent announced that a male friend was going to be living with her); Wexler, *supra* note 2, at 777-78. Therefore, the definition of "endangers seriously" should specifically relate to whether the custodian is safeguarding the child's physical and mental health rather than whether the child's best interests are being served. *Id.* at 782.

¹²⁵ *See* discussion *supra* Part IV.A.2.

¹²⁶ *See* discussion *supra* Parts IV.A.2 and IV.C.

¹²⁷ *See* discussion *supra* Parts IV.A.2 and IV.C.

¹²⁸ *See* Haynie, *supra* note 19, at 744. "[T]hird party custody disputes most often involve children subjected to disruption of the traditional family by divorce, death, or other hardships. In these cases, the ideal family situation is not an alternative for the child." *Id.* at 745.