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Navigating Custody Waters without a Polar Star: Third-Party Custody Proceedings after *Petersen v. Rogers* and *Price v. Howard*

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NAVIGATING CUSTODY WATERS WITHOUT A POLAR STAR: THIRD-PARTY CUSTODY PROCEEDINGS AFTER *PETERSEN V. ROGERS* AND *PRICE V. HOWARD*

THOMAS L. FOWLER*

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*For over 100 years, the best interest of the child was the “polar star” that guided North Carolina courts in third-party custody proceedings. Between 1883 and 1994, the courts consistently recognized that the welfare of the child was the most important consideration in disputes between a biological parent and a third party—superior even to the parent’s right to custody. The North Carolina General Assembly affirmed this principle in 1967, codifying the best interest standard for all custody proceedings. In 1994, however, the North Carolina Supreme Court repudiated both precedent and statute, holding in *Petersen v. Rogers* that the biological parent’s right to custody is paramount and that courts cannot consider the child’s interest unless it is shown that the biological parent is unfit or has abused or neglected the child. Lower courts have since struggled to limit the application of *Petersen*. In 1997, the supreme court modified its rule, holding that courts may consider the child’s best interest if there is evidence of parental conduct that conflicts with the presumption that the parent will act in the child’s interest. Although the holding of the supreme court in *Price v. Howard* mitigates the effect of *Petersen*, it does not answer many questions raised by the *Petersen* decision. In this article, Mr. Fowler and Ms. Nelson analyze *Petersen* and its progeny, identify strategies for third-party custody proceedings in light of the current state of the law, and appeal for a return to the best interest standard for resolution of third-party custody disputes.*

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In North Carolina the best interest of the child is said to be the "polar star"

....

If the interest of the child and parent are in conflict, the child's interest controls.¹

[P]laintiffs argue that "North Carolina recognizes the right of a minor child to be placed in the custody of the person or entity which will meet that child's best interests"... [and that] "the welfare of the child is paramount to all common law preferential rights of the parents"... [W]e explicitly reject these arguments.²

The circumstances of the case *sub judice* are compelling. Plaintiff has served as *de facto* father and ... as primary caretaker ... of the minor child since her birth approximately nine years prior to trial Indeed, the trial court in its order ... concluded ... "[t]hat it is in the minor child's best interest that she be in the primary physical custody of the Plaintiff, but that the ruling in *Peterson* [sic] v. *Rogers* does not allow this Court to make that award." Like the trial court, ... I am constrained to agree we are bound by *Petersen*.³

I. INTRODUCTION

For more than 100 years, the welfare of the child has been the polar star that has guided North Carolina courts in resolving custody disputes. This approach has both allowed and compelled trial courts to consider evidence of the child's interest and welfare when resolving custody disputes between a biological parent and a third party. Although it had not adopted a pure best interest test,⁴ the

1. CHILDREN AND THE LAW: A CASEBOOK FOR PRACTICE 3 (Ilene B. Nelson ed., 1992) (citations omitted).

2. *Petersen v. Rogers*, 337 N.C. 397, 403, 445 S.E.2d 901, 905 (1994) (quoting the plaintiff's arguments).

3. *Price v. Howard*, 122 N.C. App. 674, 676-77, 471 S.E.2d 673, 674-75 (1996) (John, J., concurring) (quoting the trial court's findings of fact), *rev'd*, 346 N.C. 68, 484 S.E.2d 528 (1997).

4. A true best interest test focuses solely on the interest of the child with no party

presumed superior and no party bearing the burden of proof. The Hawaii Legislature has codified the best interest standard. *See* HAW. REV. STAT. § 571-46(2) (1992). The statute provides:

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

Id. An example of a case where the best interest test allowed the courts to exercise broad discretion is *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966). In *Painter*, the Supreme Court of Iowa awarded custody to the maternal grandparents, who were college graduates and highly-regarded in the community, instead of the fit natural father who had never graduated from college, was "either an agnostic or atheist," and who had a "Bohemian approach to finances and life in general." *Id.* at 154, 155. A true best interest test maximizes the discretion of the trial judge. For a discussion of the use of discretion by the trial judge, see generally Janet Leach Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733, 758-60 (1992). The author comments that "[t]he best interest approach lacks the advantages of judicial economy, predictability, and consistency that result from the use of a presumption." *Id.* at 760.

Judge (later United States Supreme Court Justice) Benjamin N. Cardozo first pronounced the best interest of the child standard in *Finlay v. Finlay*, 148 N.E. 624 (N.Y. 1925). Judge Cardozo stated that in exercising the *parens patriae* power, a judge should "put himself in the position of a 'wise, affectionate, and careful parent'" and "do what is best for the interest of the child." *Id.* at 626 (quoting *Queen v. Gyngall*, 2 Q.B. 232, 241 (1893)). By enunciating the best interest standard, Judge Cardozo was neither expanding the authority of judges to interfere in family matters nor altering the existing rules governing who receives custody. The best interest standard was to be applied only in situations when a judge had equitable jurisdiction to decide custody as between spouses (when no divorce action was pending). *See id.* It was intended as a guide for the judge's exercise of discretion when the judge already had the authority to exercise discretion, and was not meant to undermine the tradition of judicial non-interference in custody matters. *See id.*

As the twentieth century progressed, most states, either in statutes or in case law, adopted language in some form indicating that the best interest of the child was the polar star or the paramount consideration of the courts in resolving legal disputes that involved the care or custody of a child. *See* Jay Folberg, *Custody Overview*, in *JOINT CUSTODY AND SHARED PARENTING* 4 (Jay Folberg ed., 1984). As gender-neutral standards supplanted both the common law preference for fathers and the tender years doctrine preference for mothers, the best interest standard became the accepted method for resolving custody disputes between divorcing spouses. But most state courts have never clearly worked out how the best interest standard should apply to custody disputes between natural parents and third parties. *See generally* Henry H. Foster, Jr., *Adoption and Child Custody: Best Interests of the Child*, 22 BUFF. L. REV. 1, 4-14 (1972) (describing several highly publicized child custody cases in Florida, Iowa, and New York and contrasting the various standards applied by those states); Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209, 234-44 (1978) (describing confusion in the Georgia courts regarding child custody standards); 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, 536-61 (1989) (describing the development of the *parens patriae* doctrine in South Dakota); Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1291-1316 (1994) (discussing

North Carolina Supreme Court retained a strong preference for biological parent custody. The court's custody jurisprudence from 1883 until 1994 acknowledged that the child's welfare and needs—and not the biological parent's right to custody—were paramount. In 1967, the General Assembly appeared to confirm that precedent by adopting statutes setting out a pure best interest test to be applied in all custody disputes;⁵ courts, however, continued to apply a presumption in favor of biological parents.⁶

United States Supreme Court decisions concerning the definition of family and the limits of constitutional protection for families).

The discretionary nature of the best interest test has bothered many appellate judges. In the *Baby Jessica* case, the Iowa Supreme Court found it “tempting . . . to resolve this highly emotional issue with one's heart,” but concluded that “we do not have the unbridled discretion of a Solomon.” *In re B.C.G.*, 496 N.W.2d 239, 241 (Iowa 1992). If there are no “established procedures,” the court stated, courts would be “‘engaged in uncontrolled social engineering.’” *Id.* (quoting the district court). The court concluded that judges may not “‘take children from parents simply by deciding another home offers more advantages.’” *Id.* (quoting *In re Burney*, 259 N.W.2d 322, 324 (Iowa 1977)).

5. See Act of July 6, 1967, ch. 1153, § 2, 1967 N.C. Sess. Laws 1772, 1772 (codified at N.C. GEN. STAT. §§ 50-13.1 & 50.13.2(a) (1995 & Supp. 1997)).

6. Despite near universal judicial testimonials to the child's welfare and best interest, most states do not apply a pure best interest standard to resolve custody disputes between biological parents and third parties. Instead, most states follow the traditional parental rights doctrine. In general, this doctrine permits an award of custody to a nonparent only if the parent is shown to be unfit or to have abandoned the child or to have relinquished custody voluntarily. See, e.g., *Larson v. Larson*, 384 S.E.2d 193, 194 (Ga. Ct. App. 1989) (“[T]he parent is entitled to custody of the child unless the third party shows by ‘clear and convincing evidence’ that the parent is unfit or otherwise not entitled to custody in an action by a third party to obtain custody.” (quoting *Blackburn v. Blackburn*, 292 S.E.2d 821, 825 (Ga. 1982) (quoting GA. CODE ANN. § 74-108)); *Stockwell v. Stockwell*, 775 P.2d 611, 613 (Idaho 1989) (“In custody disputes between a ‘nonparent’ . . . and a natural parent, Idaho courts apply a presumption that a natural parent should have custody This presumption operates to preclude consideration of the best interest of the child unless the nonparent demonstrates either that the natural parent has abandoned the child . . . [or] is unfit.”). In most cases, the nonparent bears the burden of demonstrating factors such as the natural parent's unfitness or abandonment, and the best interest analysis does not apply unless and until unfitness or abandonment has been established. See, e.g., *Michael G.B. v. Angela L.B.*, 642 N.Y.S.2d 452, 454 (App. Div. 1996).

Some states have adopted language requiring the existence of “extraordinary circumstances” that justify interference with the biological parent's right to custody. For example, the Illinois Supreme Court stated in *In re Kirchner*, 649 N.E.2d 324 (Ill. 1995), that

the superior right of natural parents to the care, custody and control of their child is the law of the land and is also embodied in Illinois statutory law. . . . Unless a parent consents or is adjudged unfit, a child may not be placed in the custody of a nonparent. . . . A nonparent may only assert standing under [this section of law] if the natural parent at issue does not have physical custody of his or her child.

Id. at 334-35. In addition, New York courts have noted that

[a]lthough no parent has an absolute right to custody of a child . . . , it is settled

Things changed in 1994, however, when a particularly difficult custody dispute, reminiscent of the highly publicized Baby Jessica case,⁷ found its way back to the North Carolina Supreme Court. The

law that, as between a biological parent (parent) and a nonbiological parent (nonparent), the parent has a superior right to custody that cannot be denied unless the nonparent can establish that the parent has relinquished that right because of "surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances."

Michael G.B., 642 N.Y.S.2d at 454 (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277, 280 (N.Y. 1976)). In *Sider v. Sider*, 639 A.2d 1076 (Md. 1994), the court stated:

"Where parents claim the custody of a child, there is a *prima facie* presumption that the child's welfare will be best subserved in the care and custody of its parents rather than in the custody of others, and the burden is then cast upon the parties opposing them to show the contrary.... [I]t is only upon a determination by the equity court that the parent is unfit or that there are exceptional circumstances which make custody in the parent detrimental to the best interest of the child, that the court need inquire into the best interest of the child in order to make a proper custodial disposition."

Id. at 1084-85 (footnote omitted) (quoting *Ross v. Hoffman*, 372 A.2d 582, 586-87 (Md. 1977) and *Ross v. Pick*, 86 A.2d 463, 478 (Md. 1952)).

The case law often blurs the distinction between parental rights and interest of the child by observing that the best interest of the child is best served by granting custody to a fit natural parent. See Suzette M. Haynie, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 709 (1986). Indeed, it is not always easy to tell which test a state has adopted. Two studies done eight years apart show the difficulty in analyzing state standards for changed custody. A 1978 study of 15 states found that only four states had settled on the best interest standard. See McGough & Shindell, *supra* note 4, at 214 n.24. The other 11 states upheld the parental rights standard. See *id.* The study pointed out, however, that it is sometimes difficult to assess which standard a state applies. See *id.* at 215 n.24. For example, some states say they use the best interest test but actually apply the parental rights standard, while other states vacillate between the two. See *id.* A 1986 study found that eight states apply an irrebuttable parental rights standard to third-party custody disputes, and 29 states apply a rebuttable presumption parental rights standard. See Haynie, *supra*, at 708-11 n.22; see also 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, 1063-71 (1996) (discussing the various state standards and the difficulty of classification); Richards, *supra* note 4, at 737 nn.6, 7, & 9 (listing common law and statutory standards for child custody disputes); R. Todd Ehler, Comment, *Family Law: Don't Disobey the Parental Preference Doctrine*, 34 WASHBURN L.J. 119, 133 n.91 (1994) (listing the states that bestow custody on parents absent a finding of unfitness).

7. In *re* B.C.G., 496 N.W.2d 239 (Iowa 1992). In the Baby Jessica case, the child's unwed mother, Cara Clausen, relinquished her parental rights within two days of the birth, and a Michigan couple, Roberta and Jan DeBoer, filed a petition for adoption and took custody of the child. See *id.* at 240-41. The biological mother lied about the identity of the biological father and had another man sign the form terminating the father's parental rights. See *id.* at 241. Once the biological father learned of the birth, he sought and was allowed to intervene in the adoption proceeding. See *id.* Eleven months after Baby Jessica's birth (during which time she had lived with the DeBoers in Michigan), the Iowa trial judge denied the adoption petition and ordered the child returned to the biological father in Iowa. See *id.* There followed appeals to the Iowa appellate court, a new action filed in the Michigan courts, and an appeal to the United States Supreme

result in *Petersen v. Rogers*⁸ was defensible and perhaps for the best, but the court's underlying holding has caused some consternation for judges and practitioners. In *Petersen*, the North Carolina Supreme Court implicitly disavowed the child's best interest cases and the broad language of section 50-13.2(a) of the North Carolina General Statutes⁹ by holding that no inquiry into the child's interest or welfare was permitted in custody disputes between biological parents and third parties unless the biological parent was first shown to be unfit or to have neglected the child's welfare.¹⁰ The *Petersen* test—short, simple, and unambiguous—left no room for judicial discretion or best interest analysis, even in situations in which the child had established significant emotional bonds with third parties. Furthermore, the *Petersen* court indicated that such third parties were legal “strangers” to the child, and as such, lacked standing under § 50-13.1 to seek custody or visitation with the child.¹¹ The welfare of the children was no longer the polar star guiding North Carolina courts in resolving custody disputes. Since the supreme court handed down the *Petersen* opinion in July 1994, attorneys, district court judges, and various panels of the North Carolina Court of Appeals have applied the *Petersen* test and have attempted to discern possible limitations on its application.¹²

In 1997, the North Carolina Supreme Court had the opportunity to revisit *Petersen* in *Price v. Howard*,¹³ a case with particularly compelling facts. The case involved an eight-year-old girl, her fit¹⁴ biological mother, and the man who had raised the child since birth and whom the child believed to be her biological father.¹⁵ As both the trial judge and a majority of the court of appeals panel

Court—during which time Baby Jessica was allowed to remain with the DeBoers in Michigan. See *In re Baby Girl Clausen*, 501 N.W.2d 193, 194-96 (Mich. Ct. App. 1993) (per curiam); *DeBoer v. Schmidt*, 509 U.S. 938, 938-39 (1993) (Blackmun and O'Connor, JJ., dissenting). In 1993, after the United States Supreme Court refused to stay the state court rulings, see *DeBoer*, 509 U.S. at 938, the DeBoers surrendered the two and one-half year old Baby Jessica to Daniel Schmidt, the biological father whom the child had never before met. For a detailed discussion of the Baby Jessica case, see Bernadette Weaver-Catalana, Comment, *The Battle for Baby Jessica: A Conflict of Best Interests*, 43 BUFF. L. REV. 583 (1995).

8. 337 N.C. 397, 445 S.E.2d 901 (1994).

9. See N.C. GEN. STAT. § 50-13.2(a) (Supp. 1997)).

10. See *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905.

11. See *id.* at 405, 445 S.E.2d at 905.

12. See *infra* notes 217-80.

13. 346 N.C. 68, 484 S.E.2d 528 (1997).

14. See *infra* notes 228-47 and accompanying text (discussing the elements of what constitutes a “fit” parent).

15. See *Price*, 346 N.C. at 70-71, 484 S.E.2d at 529.

acknowledged, under *Petersen* the court was required to award custody to the fit biological mother.¹⁶ Perhaps troubled by this result, the supreme court rewrote the *Petersen* test to add a third, broadly defined basis for biological parents to lose their paramount right to custody, thereby permitting inquiry at the custody hearing into the best interest of the child.¹⁷ Under *Price*, conduct of the biological parent that is "inconsistent" with the presumption that the biological parent will act in the child's best interest can be sufficient to trump the *Petersen* right to custody and, consequently, to allow consideration of the child's best interest in determining custody.¹⁸

Although *Price* appears to provide a much needed safety valve for cases that are ill-served by the rigid *Petersen* test, many questions remain for the court of appeals and the trial courts. Several aspects of the legal analysis of *Petersen* and *Price* are not clear, including the effect of the 1967 custody statutes (§ 50-13.1 and § 50-13.2), the parameters of the privacy and family interest that is protected by due process, and whether or not the third-party psychological parents¹⁹ in both *Petersen* and *Price* had standing under § 50-13.1 to bring the custody actions in the first place.

In Part II, this Article considers the development of the "best interest of the child" test as the polar star guiding courts in custody

16. See *Price v. Howard*, 122 N.C. App. 674, 676, 471 S.E.2d 673, 674 (1996), *rev'd*, 346 N.C. 68, 484 S.E.2d 528 (1997).

17. See *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35.

18. See *id.* at 79, 484 S.E.2d at 534 ("[C]onduct inconsistent with the parent's protected status . . . would result in application of the 'best interest of the child' test without offending the Due Process Clause.").

19. In their ground-breaking book *Beyond the Best Interests of the Child*, authors Joseph Goldstein, Anna Freud, and Albert Solnit contend that the important emotional attachment a child has to his "parent" is not directly caused by the "physical" realities of his conception and birth but rather by the "day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation." JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 19 (2d ed. 1979). Moreover, the authors note that:

Whether any adult becomes the psychological parent of a child is based . . . on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

Id. at 19. The authors thus argue that the law governing placement decisions should safeguard the child's need for continuity of relationships, i.e., should safeguard any psychological parent-child relationship that has developed between the child and a third party. See *id.* at 31-34. But this approach is at odds with the traditional recognition and protection of a biological parent's right to the custody and control of the child. See, e.g., *Brickell v. Hines*, 179 N.C. 254, 254-55, 102 S.E. 309, 310 (1920).

and related matters.²⁰ It explores this development from the first statement of the doctrine in 1883 to statutory codification in the 1960s through the *Petersen* decision in 1994.²¹ Part III analyzes the facts of *Petersen* and the issues considered by the North Carolina Court of Appeals and the North Carolina Supreme Court.²² Part IV considers whether *Petersen* provides guidance in cases involving intact families, changed circumstances, or time limits for the exercise of parental rights.²³ Part V revisits the *Petersen* standard and how its issues were developed and modified by subsequent cases, most notably *Price*.²⁴ Part VI considers issues in third-party custody proceedings in the wake of *Price*.²⁵ The Article concludes with suggestions for strategies in third-party custody proceedings under current statutes and case law.²⁶

II. NORTH CAROLINA CUSTODY LAW UNTIL 1994

A. *The Shift from the Common Law to the Polar Star*

The "polar star" arose in 1883, when the North Carolina Supreme Court significantly changed its approach to child custody in *In re Lewis*.²⁷ The court first pointed out that common law doctrines had "been greatly weakened of late."²⁸ It noted that courts were looking less exclusively to the "strict legal rights of parents" and "more to the interests, moral and physical, of the infants."²⁹ Then it summarized its view of the state of affairs at that time: "[W]here the custody of children is the subject of controversy, the legal rights of parents . . . will be respected by the courts . . . [; however,] the welfare of the infants themselves is the *polar star* by which the discretion of the courts is to be guided."³⁰ The supreme court appeared to announce that in resolving custody disputes it would henceforth be guided by the interest of the child.

This approach contrasted with the English common law, adopted by most American courts in the early nineteenth century, under

20. See *infra* notes 27-108 and accompanying text.

21. See *infra* notes 27-108 and accompanying text.

22. See *infra* notes 109-210 and accompanying text.

23. See *infra* notes 211-80 and accompanying text.

24. See *infra* notes 281-362 and accompanying text.

25. See *infra* notes 363-75 and accompanying text.

26. See *infra* notes 376-83 and accompanying text.

27. 88 N.C. 31 (1883).

28. *Id.* at 33.

29. *Id.* at 34.

30. *Id.* (emphasis added).

which children were treated essentially as property owned exclusively by the husband and father or, if illegitimate, by the mother.³¹ Initially, no exceptions defeated a parent's property interest in his child.³² As American society evolved in the late nineteenth century and early twentieth century, however, public awareness, concern, and outrage over the treatment of children grew. The courts gradually acknowledged that states had *parens patriae*³³ authority to protect children from abuse and cruelty and upheld criminal child abuse statutes.³⁴ As an exception to the father's automatic right to custody and control, many courts adopted the "tender years" doctrine, which established a rebuttable presumption that the mother, if fit, rather than the father, should be granted custody of a very young child.³⁵ Nevertheless, these exceptions retained the common law's focus on the rights of the parents as opposed to the interest or welfare of the child: The supreme court's decision to consider the welfare of the

31. See generally MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 1-84 (1994) (describing child custody laws from colonial era until 1890); Jay Einhorn, *Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law*, 4 BEHAV. SCI. & L. 119, 120-28 (1986) (describing the early common law preference for the father in family matters and a similar preference in American courts until the late nineteenth century).

32. See *Latham v. Ellis*, 116 N.C. 30, 33, 20 S.E. 1012, 1012 (1895) ("Under the common law, the father's claim to the custody of his minor children, under all circumstances, was paramount."). While recognizing this older principle, however, the court held that "where the husband and wife are living in a state of separation without being divorced, the court . . . may award the charge and custody of the child or children to either the husband or the wife, as may appear to be for the best interests and welfare of the child or children." *Id.*; see also *Tyner v. Tyner*, 206 N.C. 776, 780, 175 S.E. 144, 146 (1934) ("The father has at common law an unquestioned right of custody and control over his minor children as against the mother, and still more clearly as against any third person." (quoting *Patrick v. Bryan*, 202 N.C. 62, 70, 162 S.E. 207, 211 (1932))). While recognizing the common law principle, the court held that "[i]n determining the custody of children, their welfare is the paramount consideration. Even paternal love must yield to the claims of another, if, after the judicial investigation, it is found that the best interest of the children is subserved thereby." *Id.* at 779, 175 S.E.2d at 146.

33. *Parens patriae* refers to "the role of the state as sovereign and guardian of persons under legal disability, such as juveniles or the insane." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

34. See *Latham*, 116 N.C. at 33, 20 S.E. at 1012-13 ("In North Carolina the father has always been entitled to the custody of his children against the claims of every one . . . unless he is found to be unfitted to keep their charge and custody by reason of his brutal treatment of them, or his reckless neglect of their welfare and interests."); Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 306-22 (1972); Caroline T. Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 189-94 (1998).

35. See Allan Roth, *The Tender Years Presumption in Custody Disputes*, 15 J. FAM. L. 423, 425 (1976-77).

child as the polar star appeared to free custody hearings from this narrow focus solely on the parents' status and conduct.

For more than 100 years after *In re Lewis*, the North Carolina Supreme Court regularly repeated that in custody matters the welfare of the child was the polar star.³⁶ As a practical matter, however, the court's opinions have not always been models of clarity, and they often appear result-oriented and unclear about the precise test applied. The traditional interest or right of the biological parent to custody of his minor child was never lightly disregarded or ignored, but it was defeated in a variety of situations, generally when "the morals or safety or interests of the children strongly require[d] it."³⁷

36. For example, in *Tyner*, the court cited the common law rule that the father has the first priority in custody, but it noted that that rule "has more recently been relaxed." *Tyner*, 206 N.C. at 779, 175 S.E. at 146 (quoting *Newsome v. Bunch*, 144 N.C. 15, 16, 56 S.E. 509, 509 (1907)). While "the legal rights of parents and guardians will be respected by the courts as being founded in nature and wisdom, and essential to the virtue and happiness of society," the court stated, "the welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion." *Id.* (emphasis added) (quoting *Newsome*, 144 N.C. at 16, 56 S.E. at 509). The *Tyner* court concluded that courts "may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person for good and sufficient reasons." *Id.* (quoting *Newsome*, 144 N.C. at 15, 56 S.E. at 509); see also *Phelps v. Phelps*, 337 N.C. 344, 354, 446 S.E.2d 17, 23 (1994) ("The welfare or best interest of the child, in the light of all the circumstances, is the paramount consideration which guides the court in awarding the custody of the minor child. It is 'the polar star by which the discretion of the court is guided.'" (quoting *Hinkle v. Hinkle*, 266 N.C. 189, 196, 146 S.E.2d 73, 79 (1966) (quoting 3 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 244, at 21 (3d ed. 1963))); *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984) (emphasizing that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] . . . to wit, that the best interest of the child is the polar star. The fact that a parent does provide love, affection and concern . . . should not be determinative."); *In re Peal*, 305 N.C. 640, 645-46, 290 S.E.2d 664, 667-68 (1982) ("[T]he 'paramount consideration' and 'polar star,' which have long governed and guided the discretion of our trial judges . . . , are the welfare and needs of the child, not the persons seeking his or her custody, and even parental love must yield to the promotion of those higher interests." (citations omitted)); *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968) ("The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody." (quoting *Thomas v. Thomas*, 259 N.C. 461, 467, 130 S.E.2d 871, 876 (1963))). Many older cases held similarly. See, e.g., *Chriscoe v. Chriscoe*, 268 N.C. 554, 556, 151 S.E.2d 33, 34 (1966) (per curiam); *Holmes v. Sanders*, 246 N.C. 200, 201, 97 S.E.2d 683, 684 (1957) (per curiam); *Kovacs v. Brewer*, 245 N.C. 630, 635, 97 S.E.2d 96, 100-01 (1957); *Finley v. Sapp*, 238 N.C. 114, 117, 76 S.E.2d 350, 352 (1953); *In re Turner*, 151 N.C. 474, 477, 66 S.E. 431, 432 (1909) (note that this is the case name as it appears in the North Carolina Reporter; it is entitled *Ex parte Turner* in the South Eastern Reporter); *Newsome v. Bunch*, 144 N.C. 15, 16, 56 S.E. 509, 509 (1907).

37. *Atkinson v. Downing*, 175 N.C. 244, 247, 95 S.E. 487, 488 (1918) (stating that "parents have prima facie the right of the custody and control of their infant children, a natural and substantive right not to be lightly denied or interfered with except when the good of the child clearly requires it"); see also *Spitzer v. Lewark*, 259 N.C. 50, 59, 129

Three cases are illustrative. In *James v. Pretlow*,³⁸ twins were born to parents who soon thereafter divorced. Both parents remarried and shared custody³⁹ of the twins.⁴⁰ The natural father was killed in an automobile accident when the twins were fifteen.⁴¹ The natural mother, Carolyn Christie James, and the step-mother, Ruth Raines Pretlow, each sought custody of the twins.⁴² The trial judge found that the twins had equal affection and love for their mother, stepmother, and stepfather, that the mother and stepmother were both women of good character, that their respective homes were fit and proper places for the twins to live, and that the twins desired to live with their stepmother so that they could continue to attend the same high school.⁴³ The judge concluded that the best interest, welfare, and happiness of the children would be promoted by awarding custody to the stepmother.⁴⁴

On appeal, the supreme court summarized the applicable law, noting that when there is only one living parent, that person "has a natural and legal right to the custody" of his children.⁴⁵ While that "right is not absolute," the court stated, it can be challenged "only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it."⁴⁶ A balance must be struck, the court noted, between the child's "happiness and welfare" and "the legal rights of parents."⁴⁷ Finally, the court added that the law should "'work in harmony with nature'" to uphold "'those ties which bind man to his own flesh.'"⁴⁸

S.E.2d 620, 623 (1963) (stating that the courts should not interfere with parental rights unless the interest and welfare of the child clearly requires it); *Brickell v. Hines*, 179 N.C. 254, 254-55, 102 S.E. 309, 310 (1920) (noting that parents have prima facie the right to the custody of infant children and that courts must duly protect this substantive right).

38. 242 N.C. 102, 86 S.E.2d 759 (1955).

39. For a detailed discussion of various shared custody arrangements, see Persia Woolley, *Shared Parenting Arrangements*, in *JOINT CUSTODY AND SHARED PARENTING*, *supra* note 4, at 16-24.

40. See *Pretlow*, 242 N.C. at 103, 86 S.E.2d at 760.

41. See *id.*

42. See *id.* at 103, 86 S.E.2d at 760-61.

43. See *id.* at 103-04, 86 S.E.2d at 760-61.

44. See *id.* at 104, 86 S.E.2d at 760-61.

45. *Id.* at 104, 86 S.E.2d at 761.

46. *Id.* (citations omitted). The court reiterated this point by quoting similar language from its decision in *Tyner*: "In determining the custody of children, their welfare is the paramount consideration. Even parental love must yield to the claims of another, if, after judicial investigation, it is found that the best interest of the children is subserved thereby." *Id.* at 105, 86 S.E.2d at 761 (quoting *Tyner v. Tyner*, 206 N.C. 776, 779, 175 S.E. 144, 146 (1934)).

47. *Id.* at 105, 86 S.E.2d at 761.

48. *Id.* (quoting *Morris v. Grant*, 27 S.E.2d 295, 296 (Ga. 1943)).

The court concluded that in order for a third party to prevail over a parent for custody of a child, "there must be substantial reasons or, as various courts have put it, the reasons must be real, compelling, cogent, weighty, strong, powerful, serious, or grave."⁴⁹ The court made a distinction between the weight given to the child's desire in choosing between natural parents and choosing between a parent and a third party. When the choice is between parents, courts should give "considerable weight" to the child's wish when the child is old enough "to exercise discretion."⁵⁰ But when the choice is between the parent and a third party, the child's desire should "not ordinarily prevail over the natural right of the parent, unless essential to the child's welfare."⁵¹

The supreme court then affirmed the award of custody to the stepmother for the upcoming school year, noting that it was clearly in the best interests of the children.⁵² The court vacated that part of the trial court's order providing for custody beyond the upcoming school year on the grounds that, as to that time period, the trial court's findings of fact did not "clearly and plainly show that [the children's] interests and welfare [would] be promoted by awarding their custody to their stepmother."⁵³ The court in *Pretlow* thus held that the biological parent's natural right to custody was subject to challenge, not only by evidence of that parent's unfitness or other conduct evidencing neglect or abandonment, but also by clear and compelling evidence that the best interest of the children required custody with another.⁵⁴

In *In re Gibbons*,⁵⁵ the adoptive (and thus legally natural)⁵⁶ father sought custody of his seven-year-old son who had been raised by the Brights, a couple unrelated to the boy but in whose care the

49. *Id.* (quoting 67A C.J.S. *Parent and Child* § 20b (1978) (footnotes omitted)).

50. *Id.*

51. *Id.* (citing 67A C.J.S. *Parent and Child* § 20b (1978)).

52. *See id.* at 106, 86 S.E.2d 759, 762-63.

53. *Id.*

54. *See id.* Similarly, in *Holmes v. Sanders*, 246 N.C. 200, 97 S.E.2d 683 (1957) (*per curiam*), the trial judge rejected the custody claim of a natural father with "a good reputation" in favor of continued custody with the maternal grandparents. The supreme court upheld the custody order, noting that it was "in accord with our decisions that the child's welfare is the paramount consideration, and that a parent's love must yield to another if, after judicial investigation, it is found that the best interest of the child is subserved thereby." *Id.* at 201, 97 S.E.2d at 684.

55. 247 N.C. 273, 101 S.E.2d 16 (1957).

56. Adoptive parents are considered the legal parents of a child. *See* N.C. GEN. STAT. § 48-1-106 (1995).

father had left the boy for several years.⁵⁷ The trial court applied the polar star test and found both parties fit, but found that the Brights' evidence did not show that the best interest of the child *clearly required* that custody be awarded to them; accordingly, the trial court awarded custody to the father.⁵⁸ The supreme court reversed on the basis that the trial court had not sufficiently factored into its best interest analysis the great attachment the child had formed with the Brights.⁵⁹ It noted that the boy had this strong attachment because the father had "voluntarily" left the boy with the Brights from age two and one-half until age seven.⁶⁰ The court emphasized that because of the father's actions, the Brights had become "all [the boy] knows of home."⁶¹ Consequently, the court held that the father's "little interest" in the child served to tip the balance in favor of the child's wishes.⁶² Critical to the court's analysis was "that the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness."⁶³ Thus, the *Gibbons* court applied the polar star test and best interest analysis and impliedly emphasized the importance of several factors, including: (1) whether the child has long been in the custody of the third party; (2) whether a psychological family relationship has developed; and (3) whether the natural parent's conduct caused or contributed to this situation.

Likewise, in *In re Custody of Hughes*,⁶⁴ the supreme court upheld the trial court's award of custody to the grandmother instead of the mother based, among other things, upon the mother's unfitness.⁶⁵ The court's analysis, however, left little doubt that parental unfitness was just one way of justifying a denial of custody to a biological parent. The court acknowledged the presumption of a natural parent's "prior right to custody," but noted that such a right was not absolute.⁶⁶ "[T]he crucial test," it stated, is "[t]he welfare of the child," and by neglecting the child's "welfare and interest," a parent

57. See *Gibbons*, 247 N.C. at 274-76, 101 S.E.2d at 17-18.

58. See *id.* at 275-77, 101 S.E.2d at 18-19.

59. See *id.* at 282, 101 S.E.2d at 21, 23.

60. *Id.* at 280, 101 S.E.2d at 21.

61. *Id.*

62. *Id.*

63. *Id.* at 280, 101 S.E.2d at 21-22.

64. 254 N.C. 434, 119 S.E.2d 189 (1961).

65. See *id.* at 435, 119 S.E.2d at 190.

66. *Id.* at 436-37, 119 S.E.2d at 191.

can “waive[] his usual right of custody.”⁶⁷ The court quoted with approval Justice Parker’s statement in *In re Gibbons* that parents have no “‘controlling’” legal right to their children “‘when circumstances connected with the present and prospective welfare of the child clearly exist to overcome it, or when to enforce such legal right will imperil the personal safety, morals, or health of the child.’”⁶⁸ One of these circumstances is when the child has been in the custody of the third party for a significant period of time.⁶⁹ The court in *Hughes* thus stated a test that, consistent with the polar star cases *Pretlow*⁷⁰ and *Holmes*,⁷¹ encompasses more than unfitness. In such cases, the court must “determine facts necessary to make an award” of custody.⁷²

Even in cases when the courts appeared to award custody using the natural parent presumption, the analysis actually employed by the courts focused on the child’s interest. For instance, in *In re Fain*,⁷³ the supreme court reversed the trial judge’s award of custody to the child’s two grandmothers on the basis that the father was entitled to custody as a matter of right, unless it appeared that he was an unfit or unsuitable person to whom to entrust the child’s welfare.⁷⁴ Nevertheless, the *Fain* court included the broader term “unsuitable” in its test and the opinion focused on the lack of evidence of the father’s unsuitability and the uncontradicted evidence of the father’s ability to take good care of the child.⁷⁵ In particular, the court noted that the father lived with his parents, who were “people of good character and well-to-do financially,” and that the father’s mother was “a woman of most excellent character” who “had agreed to rear the child for her son.”⁷⁶ While the court claimed to decide the case on narrower grounds, the broad unsuitability test, coupled with the

67. *Id.* at 437, 119 S.E.2d at 191.

68. *Id.* (quoting *In re Gibbons*, 247 N.C. 273, 278, 101 S.E.2d 16, 20 (1957)).

69. *See id.* (stating that a true “stranger” may not be able to challenge the custody right of a fit parent, but “the person having custody” of the child can do so); cf. *Thomas v. Thomas*, 259 N.C. 461, 467, 130 S.E.2d 871, 876 (1963) (upholding the trial court’s award of legal custody to the fit father on the condition that the physical custody of the children be vested in their maternal grandparents with whom they had lived for most of their lives).

70. *See supra* notes 38-54 and accompanying text (discussing *James v. Pretlow*, 242 N.C. 102, 86 S.E.2d 759 (1955)).

71. *See supra* note 54 (discussing *Holmes v. Sanders*, 246 N.C. 200, 97 S.E.2d 683 (1957) (per curiam)).

72. *Hughes*, 254 N.C. at 437, 119 S.E.2d at 191.

73. 172 N.C. 790, 90 S.E. 928 (1916).

74. *See id.* at 791-92, 90 S.E. at 928-29.

75. *See id.*

76. *Id.*

court's focus on the facts establishing the father's suitability to raise the child, indicates that the court was focused on the welfare of the child—and, arguably, followed the best interest of the child cases.⁷⁷

Similarly, in *Newsome v. Bunch*,⁷⁸ the supreme court upheld an order removing custody from the grandparents and giving custody to the fit father when the evidence showed the father had not abandoned the child.⁷⁹ In one part of the opinion, the court stated that the father had done nothing to "incur[] a forfeiture of his right to the custody of his offspring," and that, consequently, there was "no room for the exercise even of a sound discretion in favor of the grandparents who now have possession of the child."⁸⁰ Moreover, the court stated that the award of custody to the father was permissible because the grandparents had not shown "that the interests and welfare of the child [would] be materially prejudiced by ... restoration [of custody] to the [father]."⁸¹ Again, the actual test applied by *Newsome* appears to comport with the polar star cases: The father's right to custody can be lost if he is proven unfit, if he is found to have engaged in improper conduct, or if the interest and welfare of the child clearly require it.

By the 1970s, commentators, lawyers, and judges generally accepted the notion that in custody disputes between a natural parent and a third party, a best interest inquiry was required to determine if the presumption of natural parent custody should be rebutted.⁸² The

77. See *supra* notes 38-72 (discussing best interest of the child cases). This interpretation is supported by the concurring and dissenting justices in *Fain*. In his concurrence, Justice Walker stated that the opinion did not hold that the parent's right to custody was "absolute or unquestionable." *Fain*, 172 N.C. at 792, 90 S.E. at 928 (Walker, J., concurring). While the parent does have "the preferred or paramount right," Justice Walker continued, "he may lose it by his conduct or other causes resulting in unfitness." *Id.* (Walker, J., concurring). He endorsed the court's "sound discretion" to award custody to someone other than a parent "when the facts and circumstances justify" such a decision, but he concluded that the facts of *Fain* did not present such a situation. *Id.* at 791, 90 S.E. at 929 (Walker, J., concurring) (quoting *Newsome v. Bunch*, 144 N.C. 15, 17, 56 S.E. 509, 510 (1907)). Chief Justice Clark, on the other hand, applied the same rule to reach the opposite conclusion, arguing that the trial judge had sufficient evidence to find that the father was "not a fit person to be entrusted with [the child's] care at this tender age," and that the trial judge had used "sound discretion" to place the baby in the custody of the child's grandmothers. *Id.* at 795, 90 S.E. at 929 (Clark, C.J., dissenting).

78. 144 N.C. 15, 56 S.E. 509 (1907).

79. See *id.* at 17-18, 56 S.E. at 510.

80. *Id.* at 17-18, 56 S.E. at 510.

81. *Id.* at 16, 56 S.E.2d at 509.

82. The rebuttable presumption rule was summarized by Professor Robert E. Lee in his treatise on family law in North Carolina. See 3 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW (3d ed. 1963). He stated that in cases with "unusual circumstances" and when justified by the child's best interest, a court may award custody to "grandparents or

North Carolina Court of Appeals held repeatedly that custody can be granted to a third party without a determination that the parents are unfit. For example, in *In re Kowalzek*,⁸³ the court of appeals stated that while the parent's fitness was "of paramount significance in determining the best interests of the child," fitness was not determinative.⁸⁴ Accordingly, the court held that trial courts need not declare the natural parent unfit in order to award custody of a child to a third party.⁸⁵ Similarly, in *Best v. Best*,⁸⁶ the court stated that although there is a presumption in favor of the natural parent, that presumption is rebuttable.⁸⁷ The court concluded that "it is not necessary for the natural parent to be found unfit for the presumption to be overcome."⁸⁸

others." 3 *id.* § 224, at 24. In some cases, he said, " 'a parent's love must yield . . . if . . . the best interest of the child is served thereby.' " 3 *id.* at 24-25 (quoting *James v. Pretlow* 242 N.C. 102, 105, 86 S.E.2d 759, 761 (1955)). But, Professor Lee concluded, the "rebuttable presumption [is] that the child's welfare will be best served by committing it to the custody of one or the other of the parents." 3 *id.* This presumption, he stated, can be rebutted only by "convincing proof that the parent is an unfit person . . . or for some other extraordinary fact or circumstance." 3 *id.* (citing 2 WILLIAM T. NELSON, NELSON ON DIVORCE AND ANNULMENT § 15.15, at 246-47 (F. Reed Poore et al. eds., 2d ed. rev. 1961)).

83. 37 N.C. App. 364, 246 S.E.2d 45 (1978).

84. *Id.* at 368, 246 S.E.2d at 47.

85. *See id.*

86. 81 N.C. App. 337, 344 S.E.2d 363 (1986).

87. *See id.* at 342, 344 S.E.2d at 367.

88. *Id.*; *see also In re Gwaltney*, 68 N.C. App. 686, 688, 315 S.E.2d 750, 752 (1984) (holding that in a child abuse and neglect action the primary concern of the trial court should be the welfare of the child and that this concern outweighs any presumption favoring award of custody to a biological parent); *Comer v. Comer*, 61 N.C. App. 324, 328, 300 S.E.2d 457, 460 (1983) (stating that finding a natural parent unfit is not a prerequisite to awarding custody to a third person) (citing *In re Kowalzek*, 37 N.C. App. 364, 368, 246 S.E.2d 45, 47 (1978)). In *In re Jones*, 14 N.C. App. 334, 339, 188 S.E.2d 580, 582 (1972), the court noted that even if another person could provide "better care and greater comforts and protection," the child's best interest still lies with the parent. *Id.* at 339, 246 S.E.2d at 47. According to the court, parental rights can be overcome "only by misconduct or by other facts which substantially affect the child's welfare." *Id.*; *see also Brooks v. Brooks*, 12 N.C. App. 626, 630, 184 S.E.2d 417, 420 (1971) (noting that the paramount right of the father to custody is "a relic of the past," and that the best interest test is used by the courts and required by § 50-13.2); *Roberts v. Short*, 6 N.C. App. 419, 420-21, 169 S.E.2d 910, 912 (1969) (holding that in a contest between the father and the maternal grandparents, where the mother was unfit, the father alone had a natural right to custody absent reasons that the welfare of the child requires a denial of that right); *Greer v. Greer*, 5 N.C. App. 160, 163, 167 S.E.2d 782, 784 (1969) (upholding the trial court's award of custody to grandparents on the basis that the welfare of the children "at the present time would be served by leaving them with persons with whom they are familiar").

B. *Statutory Adoption and Codification of the Polar Star Test*

In 1967, the North Carolina General Assembly codified the best interest test and granted third parties the right to seek custody by court proceeding.⁸⁹ One of the statutes provides that "[a]ny parent, relative, or other person" who claims the right to custody of a minor child may institute an action for custody.⁹⁰ Another statute provides that in such custody actions, the court shall award custody to "such person, agency, organization or institution as will best promote the interest and welfare of the child."⁹¹ Courts have determined that the General Assembly's purpose was "to bring all of the statutes relating to child custody and support together into one act"⁹² and to codify the rule "which had been many times announced by the North Carolina Supreme Court to the effect that in custody cases the welfare of the child is the polar star by which the court's decision must ever be guided."⁹³ After 1967, several decisions of the court of appeals expressly relied on the new statutory best interest test as the basis, along with the polar star cases, for justifying an award of custody to a third party instead of to a fit parent.⁹⁴

C. *The Standing Issue: Who Can Seek Custody?*

Early North Carolina child custody cases did not expressly address the issue of third party standing.⁹⁵ The Brights, the third-party couple in *In re Gibbons*, were not related by blood to the child, yet they were permitted to bring an action for custody against the natural father.⁹⁶ Their interest in bringing the custody action—and their substantive argument that their continued custody of the child

89. See Act of July 6, 1967, ch. 1153, § 2, 1967 N.C. Sess. Laws 1772, 1772 (codified as amended at N.C. GEN. STAT. §§ 50-13.1 & 50-13.2(a) (1995 & Supp. 1997)).

90. N.C. GEN. STAT. § 50-13.1 (1995).

91. *Id.* § 50-13.2(a) (Supp. 1997).

92. *In re Holt*, 1 N.C. App. 108, 111, 160 S.E.2d 90, 93 (1968); see also *Johnson v. Johnson*, 14 N.C. App. 378, 379, 188 S.E.2d 711, 712 (1972) (describing the General Assembly's purposes in enacting § 50-13.1 and § 50-13.2).

93. *In re Custody of Pitts*, 2 N.C. App. 211, 212, 162 S.E.2d 524, 525 (1968).

94. See, e.g., *In re Custody of Cox*, 17 N.C. App. 687, 688-90, 195 S.E.2d 132, 134 (1973) (upholding an award of custody to the Department of Social Services based on the child's best interest); *In re Custody of Stancil*, 10 N.C. App. 545, 548, 179 S.E.2d 844, 847 (1971) (remanding for further determination of the child's best interest); *Greer v. Greer*, 5 N.C. App. 160, 162, 167 S.E.2d 782, 783 (1969) (determining that an award of custody to the grandparents was in the child's best interest).

95. See, e.g., *In re Gibbons*, 247 N.C. 273, 275-78, 101 S.E.2d 16, 17-20 (1957).

96. The North Carolina Supreme Court indicated that the Brights's substantial historical relationship could justify their custody claim over a fit father. See *id.* at 279-80, 101 S.E.2d at 21-22; *supra* notes 55-63 (discussing *Gibbons*).

was in the child's best interest—was based on the psychological relationship they had developed with the child during the several years the child had lived in their home.⁹⁷ The question facing the court was whether the Brights had standing to bring this action, given that they were not “factual” strangers to the child, but were “biological” strangers. *Gibbons* appears consistent with the interpretation that while “parents have a strict legal right to have the custody of their infant children as against strangers,” this right will not control “when circumstances connected with the present and prospective welfare of the child clearly exist to overcome it, or when to enforce such legal right will imperil the personal safety, morals, or health of the child.”⁹⁸ But *Gibbons*, and the other polar star cases in general, do not clearly indicate whether this matter is one of standing to bring the custody action in the first place or simply a significant set of facts to be considered in deciding what the child's best interest clearly requires.

Standing to bring an action is often addressed by statute.⁹⁹ In

97. See *Gibbons*, 247 N.C. at 274-76, 101 S.E.2d at 17-18.

98. *Id.* at 276-78, 101 S.E.2d at 18-20.

99. For examples of court interpretations of statutory standing, see *Hyde v. Abbott Lab.*, 123 N.C. App. 572, 575-84, 473 S.E.2d 680, 682-88 (1996) (regarding N.C. GEN. STAT. § 75-16 (1994) and standing in unfair and deceptive trade practices provisions); *Tucker v. City of Clinton*, 120 N.C. App. 776, 781, 463 S.E.2d 806, 810-11 (1995) (regarding N.C. GEN. STAT. § 49-10 (1984) and standing in legitimation cases); *Fleet Nat'l Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 388-91, 451 S.E.2d 325, 327-28 (1994) (regarding N.C. GEN. STAT. § 45-21.36 (1991) and standing in real estate foreclosure sales); *In re Carr*, 116 N.C. App. 403, 405, 448 S.E.2d 299, 301 (1994) (regarding N.C. GEN. STAT. § 7A-289.24(6) (1987) and standing in termination of guardian ad litem status).

In *Johnson v. Johnson*, 120 N.C. App. 1, 461 S.E.2d 369 (1995), *rev'd*, 343 N.C. 114, 468 S.E.2d 59 (1996), Judge Walker argued in dissent that § 8-50.1 of the North Carolina General Statutes did not confer standing upon an alleged natural parent to compel a presumed father to submit to a blood test to determine the paternity of a child born during the marriage of the presumed father to the natural mother. See *id.* at 14, 461 S.E.2d at 376 (Walker, J., dissenting). The supreme court subsequently reversed the *Johnson* majority and adopted Judge Walker's dissenting opinion. See *Johnson v. Johnson*, 343 N.C. 114, 115, 468 S.E.2d 59, 60 (1996).

Although the General Assembly has authority to limit those who have standing to pursue certain actions, there may be a constitutional or a prudential limitation on its authority to expand standing to persons with only tangential interests in the action. As several courts have noted: “The ‘gist of the question of standing’ is whether the party seeking relief has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))); see also *Love v. Tyson*, 119 N.C. App. 739, 744, 460 S.E.2d 204, 206 (1995) (defining standing as when a party has sufficient stake in an otherwise justiciable

North Carolina, the right to bring custody actions is addressed in § 50-13.1, which states that "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child."¹⁰⁰ This statute places no clear limitation on the right of biological or factual strangers to bring custody actions. In *Oxendine v. Catawba County Department of Social Services*,¹⁰¹ the supreme court held that § 50-13.1 was intended to cover a myriad of situations involving custody disputes, but that this broad statutory grant of standing to contest custody was limited in some cases by other, narrower statutes that address standing in specific situations.¹⁰²

However, in certain custody disputes between biological parents and third parties, no other narrower, applicable statute limits the broad grant of standing in § 50-13.1.¹⁰³ Two cases of the court of appeals, *Ray v. Ray*¹⁰⁴ and *In re Custody of Rooker*,¹⁰⁵ held that the

controversy to obtain judicial resolution of that controversy). The General Assembly's authority to confer standing upon a person who lacks a personal stake in the outcome of the controversy may be restricted by the North Carolina Constitution. See N.C. CONST. art. I, § 18 ("All courts shall be open; every person for an injury done him . . . shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay."). But see *Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").

100. N.C. GEN. STAT. § 50-13.1 (1995).

101. 303 N.C. 699, 281 S.E.2d 370 (1981).

102. See *id.* at 707, 281 S.E.2d at 375 (citing N.C. GEN. STAT. § 50-13.1 (1995)). For example, in connection with the release of children for adoption, the court stated that § 48-9.1 applied only when a natural parent surrenders custody of a child under § 48-9(a)(1). See *id.* Thus, the court concluded that the legislature had intended § 48-9.1 "as an exception to the general grant of standing to contest custody set forth in G.S. 50-13.1." *Id.* The court noted, however, that this grant of general standing conflicted with § 7A-289.33 (repealed in 1979), and it concluded that the legislature did not intend § 50-13.1 to apply in adoption proceedings. See *id.* The court of appeals held likewise in *Swing v. Garrison*, 112 N.C. App. 818, 436 S.E.2d 895 (1993), determining that § 50-13.1 did not apply in Chapter 7A proceedings regarding custody or visitation of children who had been surrendered for adoption and placed in the custody of the Department of Social Services. See *id.* at 821-22, 436 S.E.2d at 897-98 (citing *Oxendine*, 303 N.C. at 707, 281 S.E.2d at 375).

103. See *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995). In *McIntyre*, the court stated that § 50-13.1(a) contains no grant of standing to grandparents to ask for visitation with a child with an intact family and no custody dispute pending. See *id.* at 631, 461 S.E.2d at 747. Moreover, the court determined that such a right to sue for visitation exists only when the child is not in the custody of the parent. See *id.* (citing N.C. GEN. STAT. §§ 50-13.2(b)(1), 50-13.5, and 50-13.2A).

104. 103 N.C. App. 790, 793, 407 S.E.2d 592, 593 (1991) (holding that the step-grandmother qualified as an "other person" under § 50-13.1 with standing to bring an action seeking visitation).

105. 43 N.C. App. 397, 398, 258 S.E.2d 828, 829 (1979) (holding that although the

legislature intended § 50-13.1 to confer upon strangers the right to bring custody or visitation actions against the parents of children unrelated to them.¹⁰⁶ The *Ray* opinion noted, however, that this broad grant of standing might “involve constitutional issues relating to the substantive due process interests in the care and custody of one’s children,” but because neither party had raised the issue, the court did not address it.¹⁰⁷

D. Summary of North Carolina’s Third-Party Custody Law as It Stood Prior to Petersen

By early 1994, the case law, statutes, and treatises were unified in their understanding of the essential test for determining custody issues between natural parents and third parties. The absolute property rights of the common law had given way to considerations of the interest and welfare of the child. The courts still presumed that it was in the best interest of the child that the natural parent have the care, custody, and control of the child and the burden was on the third party to show facts to the contrary. This burden was greater than simply showing that the child would have more advantages in the custody of the third party. The third party had to bring forth exceptional or unusual circumstances sufficient to show that the child’s best interest *required* custody in the third party. These exceptional or unusual circumstances included the biological parent’s unfitness or unsuitability, other conduct by the biological parent that affected the welfare of the child, and other attachments or relationships of the child that affected the welfare of the child. Biological strangers to the child had standing to bring custody actions, but they would be unlikely to prevail on the merits of the action without a strong factual connection to the child that was directly relevant to the child’s interest and welfare.

This complicated but functional test—the product of 100 years of jurisprudence—balanced three important interests: (1) the natural parents’ interest in raising their child; (2) the state’s interest in ensuring that children are cared for properly; and (3) the child’s interest in being cared for properly. The test eschewed hard and fast rules for limited judicial discretion. In some cases, however, the test,

father’s consent to the adoption of his children rendered him a legal stranger to them, he did have rights as an “other person” to claim custody).

106. In *Ray*, the court described other visitation statutes as “merely supplemental,” and stated that these statutes—§§ 50-13.2A, 50-13.2(b)(1), and 50-13.5(j)—“do not in any way contradict § 50-13.1(a).” *Ray*, 103 N.C. App. at 793, 407 S.E.2d at 593.

107. *Id.* at 793, 407 S.E.2d at 593-94.

the courts' application of the test, and the legal process itself appeared subject to manipulation by determined third parties. This perception of manipulation led to a reconsideration of the balancing of these three interests in *Petersen v. Rogers*.¹⁰⁸

III. PETERSEN V. ROGERS

A. *The Legal Legacy of Baby Paul*

Baby Paul, referred to as "P.E.P.," was conceived in December 1987 in Michigan, where his mother, Pamela Rogers, was living with William Rowe, the biological father.¹⁰⁹ Rogers left Rowe in May 1988 at about the same time that she became involved with a religious organization known as "The Way International" ("The Way").¹¹⁰ Encouraged by friends in The Way, Rogers decided to place her child for adoption through other members.¹¹¹ She consulted with Douglas Hargrave, a North Carolina attorney and a member of The Way, about adoption by a North Carolina couple.¹¹²

On June 12, 1988, Rogers flew to North Carolina, where she stayed until Baby Paul was born on September 9, 1988.¹¹³ Hargrave paid for most, if not all, of Rogers's transportation to North Carolina and her living and medical expenses while in the state.¹¹⁴ Hargrave had been paid \$3500 by William and Patricia Petersen, also The Way members and North Carolina residents, to assist them in adopting Rogers's child.¹¹⁵ Immediately after the birth, Rogers signed a release and gave Baby Paul to the Petersens.¹¹⁶ Rogers then returned to Michigan.¹¹⁷ The Petersens filed a petition for adoption in Orange County, and the interlocutory adoption decree was entered on November 17, 1988.¹¹⁸

108. Manipulation does appear to have been a concern in *Petersen*. Cf. *Clausen v. DeBoer*, 501 N.W.2d 193, 198 (Mich. App. 1993) (noting that the Iowa court that removed custody from the adoptive parents and awarded custody to the natural parents also awarded costs and attorney's fees to the natural parents because of the adoptive parents' "reprehensible" conduct); *Bennett v. Jeffreys*, 356 N.E.2d 277, 284 (N.Y. 1976) (stating that "those who obtain custody of children unlawfully . . . must be deterred").

109. See *In re Adoption of P.E.P.*, 329 N.C. 692, 695, 407 S.E.2d 505, 506 (1991).

110. See *id.*

111. See *id.*

112. See *id.*

113. See *id.* at 695, 407 S.E.2d at 507.

114. See *id.* at 696, 407 S.E.2d at 507.

115. See *id.* at 695, 407 S.E.2d at 506.

116. See *id.* at 697, 407 S.E.2d at 508.

117. See *id.* at 698, 407 S.E.2d at 508.

118. See *id.* at 699, 407 S.E.2d at 509.

On December 27, 1988, Rogers and Rowe filed a motion in North Carolina for relief from the adoption decree, alleging fraud, undue influence, and various irregularities in the adoption procedures.¹¹⁹ They also stated that Rowe was the natural father whose rights had not been terminated.¹²⁰ On May 25, 1989, the trial court denied the motion, and Rogers and Rowe appealed.¹²¹ The trial court expressly found that it was "in the best interest of the child to remain in the care, custody and control of the [Petersens]."¹²²

1. State Policy Against Buying and Selling Babies: *In re Adoption of P.E.P.*

On appeal, Rogers and Rowe argued that the trial court erred in awarding the Petersens custody because the court had never declared Rogers and Rowe unfit.¹²³ The North Carolina Court of Appeals disagreed,¹²⁴ rejecting the argument by Rogers and Rowe that a court must declare the biological parents unfit in order to find adoption to be in the child's best interest.¹²⁵ Both the adoption statute and case law, the court said, "make it clear that while the trial court must be guided by a balancing of interests, these in turn must always be resolved in favor of what is in the best interest of the child under the circumstances of a particular case."¹²⁶

In addition, the court stated, "procedural defects" cannot overcome the best interest test, adding that any such defects "should be resolved in favor of the minor child."¹²⁷ The court took note of the North Carolina Supreme Court's opinion in *In re Adoption of Clark*¹²⁸ that held that an unwed biological father was not bound by an order terminating his parental rights.¹²⁹ The court of appeals

119. *See id.*

120. *See id.*

121. *See id.*

122. *In re Adoption of P.E.P.*, 100 N.C. App. 191, 199-200, 395 S.E.2d 133, 138 (1990), *rev'd*, 329 N.C. 692, 407 S.E.2d 505 (1991).

123. *See id.* at 201, 395 S.E.2d at 139.

124. *See id.*

125. *See id.*

126. *Id.* It is interesting to note that Justice Parker, the future author of the unanimous opinion in *Petersen*, concurred at the appellate level with Judge Wells's majority opinion in *In re Adoption of P.E.P.* *See id.* at 203, 395 S.E.2d at 140.

127. *Id.* The plaintiff had alleged that he was never served with notice of the adoption hearing as specified in Rule 4 of the North Carolina Rules of Civil Procedure. The court said he had *actual* notice, and that even if he should have received Rule 4 notice, the best interest of the child overrode this procedural defect. *See id.* at 201, 395 S.E.2d at 139.

128. 327 N.C. 61, 393 S.E.2d 791 (1990).

129. *See id.* at 68-69, 393 S.E.2d at 795-96.

distinguished *Clark* on the grounds that the father in that case, unlike Rowe, never had actual notice of the proceedings.¹³⁰

Judge Duncan's dissent in *P.E.P.* was not based on any paramount right of a biological parent. Judge Duncan agreed that defects in procedure cannot overcome the child's best interest, but in her opinion, the defects in *P.E.P.* were "serious enough that we set a dangerous precedent by holding that this adoption may stand in spite of them."¹³¹ In particular, Judge Duncan thought this case involved "conduct that suggests a child was *purchased*."¹³²

On appeal, the North Carolina Supreme Court agreed with Judge Duncan and reversed the trial court and the court of appeals.¹³³ The supreme court held that North Carolina's policy was "to prevent the buying and selling of babies"¹³⁴ and that the evidence in the case would support an inference that baby-selling occurred.¹³⁵ Justice Frye, writing for the majority, expressly agreed with the language from Judge Duncan's dissent.¹³⁶

Justice Webb dissented, stating that "[t]he controlling, salient consideration in adoption cases is the interest of the child."¹³⁷ He noted that the General Assembly had intended to protect the relationship of children with their adoptive parents from claims of natural parents based on some procedural defect in connection with the adoption.¹³⁸ Thus, the matter was remanded—four days before Baby Paul's third birthday—to Orange County District Court for another hearing to determine whether custody should remain with the Petersens or be transferred to Rogers and Rowe, the biological parents.¹³⁹

2. Cults and Freedom of Religion: *Petersen v. Rogers*

At the first district court hearing in 1989, Rogers and Rowe

130. See *In re Adoption of P.E.P.*, 100 N.C. App. at 203, 395 S.E.2d at 140 (citing *Clark*, 327 N.C. at 69, 393 S.E.2d at 795).

131. *Id.* at 206, 395 S.E.2d at 142 (Duncan, J., dissenting).

132. *Id.* (Duncan, J., dissenting) (emphasis added).

133. See *In re Adoption of P.E.P.*, 329 N.C. 692, 703-04, 407 S.E.2d. 505, 511-12 (1991).

134. *Id.* at 701, 407 S.E.2d at 509-10.

135. See *id.* at 701, 407 S.E.2d at 510.

136. See *id.* at 703, 407 S.E.2d at 511.

137. *Id.* at 704, 407 S.E.2d at 512 (Webb, J., dissenting).

138. See *id.* at 704-05, 407 S.E.2d at 512 (Webb, J., dissenting) (citing N.C. GEN. STAT. § 48-1-101(1)(2) (1984) (repealed 1996)).

139. See *id.* at 704, 407 S.E.2d at 511-12. The supreme court remanded for vacation of the adoption proceeding and to hear the newly-filed custody petitions of the Petersens and the Orange County Department of Social Services. See *Petersen v. Rogers*, 111 N.C. App. 712, 714, 433 S.E.2d 770, 772.

unsuccessfully sought to introduce the testimony of an expert on destructive religious cults and behavior modification, because both subjects related to the Petersens' involvement with The Way.¹⁴⁰ At the second hearing, which occurred in November of 1991, Cynthia S. Kisser, an expert on religious cults, was allowed to testify that: (1) The Way "did not follow 'traditional Christian beliefs' "; (2) The Way's "concept of the Trinity is 'heresy' "; (3) The Way's "practice of speaking in tongues [is] 'classic hypnosis' and 'an altered state of consciousness' "; and (4) "in her expert opinion [The Way] is a 'destructive cult.' "¹⁴¹ The district court permitted extensive inquiry into the Petersens' religious views and practices and, on November 15, 1991, denied the Petersens' custody request and ordered that Baby Paul be transferred immediately to his biological parents.¹⁴² The court found that both Rogers and Rowe and the Petersens were "fit and proper" persons to have custody of Baby Paul, that the child was not eligible for adoption because the biological father's parental rights had not been terminated, and that for other reasons it was in the child's best interest to live with his biological parents with no visitation rights granted to the Petersens.¹⁴³

The Petersens appealed.¹⁴⁴ The court of appeals acknowledged that "[a]s part of the best interests analysis" the trial court had correctly considered the child's physical, mental, and spiritual welfare, but stated that the inquiry into the child's spiritual welfare must be performed carefully so as not to infringe upon the parents' constitutionally-protected religious freedom.¹⁴⁵ The court held that the district court's "inquisition" of the Petersens' religious practices delved too deeply in the absence of evidence of any connection to present or future harm to the child.¹⁴⁶ The court of appeals reversed the district court and remanded the case for "proceedings free from unwarranted religious inquisition into the beliefs of the parties."¹⁴⁷ The court did not address any other issues in its opinion filed on

140. See *In re Adoption of P.E.P.*, 100 N.C. App. 191, 199, 395 S.E.2d 133, 138 (1990).

141. *Petersen v. Rogers*, 111 N.C. App. 712, 715, 433 S.E.2d 770, 773 (1993) (quoting Kisser's testimony), *rev'd*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994).

142. See *id.* at 714, 433 S.E.2d at 772.

143. See *id.* at 716-17, 433 S.E.2d at 773-74. The trial court was concerned that if it granted custody to the Petersens, Rogers and Rowe—because their parental rights could not be terminated—might bring subsequent motions for change of custody during Paul's minority, thus perpetuating the uncertainty and lack of finality that Paul had experienced up to that time.

144. See *id.* at 713-14, 433 S.E.2d at 772.

145. *Id.* at 717, 433 S.E.2d at 774.

146. See *id.* at 725, 433 S.E.2d at 778.

147. *Id.*

September 7, 1993—two days before Baby Paul celebrated his fifth birthday.¹⁴⁸ Rogers and Rowe appealed to the North Carolina Supreme Court.¹⁴⁹

3. The Paramount Right of Biological Parents: *Petersen v. Rogers*

On appeal, the supreme court did not discuss the freedom of religion analysis used by the court of appeals, holding that if the district court had committed error in this regard, it was harmless.¹⁵⁰ It was harmless, the court stated, because the district court had no authority to apply the best interest analysis or to award custody to anyone other than the biological parents,¹⁵¹ who had a "constitutionally-protected *paramount right* to custody, care, and control of their child."¹⁵² The court held that this paramount right is absolute "absent a finding that parents (i) are *unfit* or (ii) *have neglected the welfare of their children*."¹⁵³

The surprising holding of *Petersen v. Rogers* was that absent a finding of parental unfitness or child abuse or neglect, the best interest of the child was neither the polar star nor even properly considered. In other words, the best interest of the child was no longer relevant. Thus, a few months before his sixth birthday, Baby Paul was legally united with his biological parents.¹⁵⁴

The supreme court also resolved the Petersens' request for visitation. Although the district court had held that such visitation was not in the child's best interest, the supreme court held that § 50-13.1 "was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers" because "[s]uch a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children."¹⁵⁵ Thus, the Petersens, who were

148. See *id.* at 712, 433 S.E.2d at 770.

149. See *Petersen*, 337 N.C. at 398, 445 S.E.2d at 902.

150. See *id.* at 400, 445 S.E.2d at 903.

151. See *id.* at 404, S.E.2d at 905.

152. *Id.* at 400, 445 S.E.2d at 903 (emphasis added).

153. *Id.* at 403-04, 445 S.E.2d at 905 (emphasis added). This paramount right argument apparently had been raised by Rogers and Rowe at each previous hearing and appeal, but it either had been summarily rejected or ignored by each court in turn. See *id.* at 400, 445 S.E.2d at 903.

154. See *id.* at 406, 445 S.E.2d at 906. It should be noted that Baby Paul had been physically united with his biological parents two and one-half years earlier when the district judge ordered the child into their custody pending the appeal. See *id.* at 399, 445 S.E.2d at 902.

155. *Id.* at 406, 445 S.E.2d at 906. The court in *Petersen* also expressly disavowed any conflicting language in *Ray v. Ray*, 103 N.C. App. 790, 793, 407 S.E.2d 592, 593 (1991),

the only parents Baby Paul had known for the first three years of his life, became legal strangers to him because they lacked any biological connection. Whether or not it was in Baby Paul's interest to continue any relationship with them had become irrelevant.¹⁵⁶

B. *Analysis of the Petersen Decision*

Writing for the supreme court in *Petersen*, Justice Parker based her analysis on two United States Supreme Court cases—*Stanley v. Illinois*¹⁵⁷ and *Reno v. Flores*¹⁵⁸—that recognized some constitutional protection for the parental rights of unwed biological fathers,¹⁵⁹ and on her conclusion that “North Carolina’s recognition of the paramount right of parents to custody, care, and nurture of their children antedates the constitutional protections set forth in *Stanley* [in 1972].”¹⁶⁰ It is arguable, however, that Supreme Court cases after 1972 do not compel the *Petersen* decision and that the decision is in conflict with North Carolina case law prior to and after 1972. The *Petersen* court’s failure to explore Supreme Court cases other than *Stanley* and *Reno* and the North Carolina polar star cases discussed in Section I is perplexing. The phrase “polar star” appears nowhere in *Petersen*, and the opinion does not mention or consider the meaning or effect of § 50-13.2(a).

1. The United States Supreme Court’s Position on the Rights of Unwed Fathers

In *Stanley v. Illinois*, the Supreme Court held that a statute that presumed unwed fathers unfit to raise their children was unconstitutional.¹⁶¹ Although the decision was a victory for the rights of unwed fathers, *Stanley* arguably protected only “substantial contact” between the unwed father and his child by providing protection from termination of parental rights based on a

that “indicat[ed] that the statute changed the paramount right of parents.” *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906.

156. By the time the supreme court made this pronouncement, Baby Paul had long been in the custody of Rowe and Rogers in Michigan and the Petersens had not seen the child in more than two and one-half years, making the practical impact of this decision a bit more palatable.

157. 405 U.S. 645 (1972).

158. 507 U.S. 292 (1993).

159. See *Petersen*, 337 N.C. at 400-02, 445 S.E.2d at 903-04 (citing *Stanley*, 405 U.S. at 648-49, 651, 657-58; *Reno*, 507 U.S. at 303-04).

160. *Id.* at 402, 445 S.E.2d at 904.

161. See *Stanley*, 405 U.S. at 649.

presumption of unfitness.¹⁶² It did not mandate full custody and control.¹⁶³ Subsequent Supreme Court cases also appear to limit the validity of expansive interpretations of *Stanley*. In *Lehr v. Robertson*,¹⁶⁴ *Caban v. Mohammed*,¹⁶⁵ and *Quilloin v. Walcott*,¹⁶⁶ the Court arguably limited the unwed biological father's constitutional protection to cases in which he had established a significant parent-child relationship.¹⁶⁷ Some commentators have labeled this limitation a "biology-plus" test.¹⁶⁸

Additional questions concerning the Supreme Court's willingness to confer constitutional protection for unwed fathers were raised in 1989 by *Michael H. v. Gerald D.*,¹⁶⁹ in which the unwed biological father's rights were subordinated to the husband of the biological mother and the presumption of legitimacy.¹⁷⁰ The mother, while married, had an affair and lived with the biological father.¹⁷¹ When the child was born, the biological father lived with the mother and helped care for the child until the mother took the child and moved back in with her husband.¹⁷² When the mother denied the biological father visitation, he filed suit.¹⁷³ Justice Scalia's plurality opinion denied constitutional protection for the biological father.¹⁷⁴ Justice Brennan's dissent reiterated the biology-plus test, asserting that an unwed father's biological link to a child is not constitutionally protected unless combined with a substantial parent-child

162. See *id.* at 651.

163. See *id.* at 658; see also Jeffrey Thomas Skinner, Note, *Why the Best Interests Standard Should Survive* Petersen v. Rogers, 73 N.C. L. REV. 2451, 2459 (1995) (noting that the *Stanley* Court "did not adequately characterize 'substantial' contact, nor did it indicate how to protect this interest").

164. 463 U.S. 248 (1983).

165. 441 U.S. 380 (1979).

166. 434 U.S. 246 (1978).

167. See *Lehr*, 463 U.S. at 260-62, 266-67; *Caban*, 441 U.S. at 392-93; *Quilloin*, 434 U.S. at 256.

168. See Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363, 385 (1996) (identifying the "biology-plus" test and noting that to obtain constitutional protection for his parental rights, an "unwed father must establish a positive and substantial relationship with his child"); Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 975-77 (1992) (describing the "biology-plus" test and how *Quilloin* indicated that an unwed father must have a greater relationship than just a biological link with the child).

169. 491 U.S. 110 (1989).

170. See *id.* at 119-27.

171. See *id.* at 113-14.

172. See *id.* at 114-15.

173. See *id.* at 114.

174. See *id.* at 127.

relationship.¹⁷⁵

The Supreme Court's pronouncements since 1972 on the constitutional protection of the parental rights of unwed fathers are not definitive, but no Justice has argued for a lesser standard than "biology-plus." The biology-plus standard appears to contradict the *Petersen* interpretation of grounding constitutional protection on the biological link alone. Additionally, the Supreme Court has not yet addressed adoption cases in which the illegitimate child is released for adoption at or near birth with no opportunity for the biological parent to establish any relationship with the child.

This qualification of the Supreme Court's parental rights jurisprudence is also apparent in the language of *Reno*,¹⁷⁶ quoted by the *Petersen* court, where it is clear that the Supreme Court was referring to a situation in which the parent or parents already had custody of the child. In the *Reno* passage quoted in *Petersen*, the Supreme Court asserted that even if potential adoptive parents could prove that they could best provide for the child's welfare, the child would not be removed from the custody of its biological parents " 'so long as they were providing for the child *adequately*.' " ¹⁷⁷ The Court concluded that the best interest of the child is not the sole traditional or constitutional criterion that determines custody matters other than custody decisions between two parents¹⁷⁸—but only if minimum standards of child care are observed can " 'the interests of the child

175. See *id.* at 142-43 (Brennan, J., dissenting); cf. *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 570 (1996) (holding that conditioning the mother's civil appeal of the trial court's termination of her parental rights on her ability to pay for preparation of the appellate record violated due process and equal protection). The Court in *M.L.B.* stated that the parental relationship is an interest " 'far more precious than any property right.' " *Id.* at 565 (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982)). One commentator has noted that the Supreme Court's refusal to grant certiorari in the Baby Jessica case, *In re B.C.G.*, 496 N.W.2d 239 (Iowa 1992), shows the Court's continued unwillingness to consider the parental rights of an unwed father when "he has not yet had an opportunity to develop a relationship" with that child. Resnik, *supra* note 168, at 389. This commentator attributes this hesitancy "to a traditional and implicit understanding that the regulation of family matters is, whenever possible, better effectuated at the state level." *Id.*

176. In *Reno v. Flores*, 507 U.S. 292 (1993), the Supreme Court upheld the constitutionality of a federal regulation which allowed the government to detain alien juveniles pending deportation hearings when no parents, adult relatives, or legal guardians were available. See *id.* at 315. The Court held that a detained juvenile lacked a constitutional right to a hearing to determine whether release to another responsible adult was in the child's best interest. See *id.* 303-05; see also Gail Quick Goeke, Note, *Substantive and Procedural Due Process for Unaccompanied Alien Juveniles*, 60 MO. L. REV. 221, 227-33 (1995) (discussing *Reno*).

177. *Petersen*, 337 N.C. at 401, 445 S.E.2d at 904 (quoting *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

178. See *id.* at 401, 445 S.E.2d at 903 (quoting *Reno*, 507 U.S. at 303-04).

... be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.' ”¹⁷⁹ Thus, the language from *Reno* cited in *Petersen* does not adopt the analysis apparently attributed to it by the *Petersen* court, namely that the Constitution deems the best interest of the child irrelevant when the fit biological parent seeks custody from a third party who has cared for the child since birth.

2. North Carolina Law on the Rights of Unwed Fathers

In *Petersen*, Justice Parker stated that the North Carolina Supreme Court “has repeatedly emphasized the strength and importance” of the paramount right of parents to the custody and care of their children.¹⁸⁰ Whether Justice Parker correctly stated the court’s prior approach is debatable. Arguably, the supreme court had not applied the *Petersen* analysis in the prior 100 years. As discussed in Part I, an ample number of North Carolina cases de-emphasize the strength of the natural parents’ right to custody, establish the welfare of the child as the polar star in all custody cases, and give custody to third parties without any finding that the natural parent is unfit.¹⁸¹ The court in *Petersen* did not discuss or cite these cases.

Instead, Justice Parker cited just two cases, *Jolly v. Queen*¹⁸² and *In re Custody of Hughes*,¹⁸³ in support of the majority’s contention. Yet even these cases fail to support the *Petersen* analysis. One of the cases, *Jolly*, is clearly not on point. In *Jolly*, the court did not hold that an unwed biological father had a paramount right to custody, absent unfitness, as against a third party. Instead, it held that the mother of an illegitimate child had the legal right to custody as against the unwed biological father absent a finding of unfitness of the mother or legitimation by the father.¹⁸⁴ The *Jolly* court noted that at common law the right to custody of a legitimate child was the father’s and not the mother’s, but as between a putative father and mother of illegitimate children, the mother’s right of custody was superior.¹⁸⁵ Thus, *Jolly* had more to do with attitudes toward

179. *Id.* at 402, 445 S.E.2d at 904 (quoting *Reno*, 507 U.S. at 304).

180. *Id.*

181. See *supra* notes 27-108 and accompanying text.

182. 264 N.C. 711, 142 S.E.2d 592 (1965).

183. 254 N.C. 434, 119 S.E.2d 189 (1961).

184. See *Jolly*, 264 N.C. at 714, 142 S.E.2d at 595.

185. See *id.* (citing B. Finberg, Annotation, *Right of Mother to Custody of Illegitimate Child*, 98 A.L.R.2d 417, 431 (1964)).

illegitimacy than with the rights of unwed biological fathers.¹⁸⁶ Similarly, the other case relied on by Justice Parker—*In re Custody of Hughes*—provides only weak support for the majority's proposition. Although the *Hughes* court did award custody to the grandmother upon a finding that the mother was unfit, the opinion clearly indicated that parental unfitness was just one way of denying custody to the parent—not the only way, as the *Petersen* court claimed.¹⁸⁷

Also unaddressed by the *Petersen* opinion is the legislature's apparent adoption in § 50-13.2(a) of the polar star line of cases and the best interest test for all custody cases. A legislative requirement that courts base all custody decisions upon the best interest of the child is supported not only by the plain language of the statute but also by the supreme court's 1997 opinion in *Price v. Howard*.¹⁸⁸ In *Petersen*, however, the court held that the trial judge was not authorized to conduct a best interest inquiry into custody of Baby Paul.¹⁸⁹ Thus, it appears that the court in *Petersen* assumed that § 50-13.2(a) was unconstitutional as applied to custody disputes between natural parents and third parties.¹⁹⁰

3. Standing to Bring Custody or Visitation Actions

The polar star cases provide no indication that a third party seeking custody against the natural parent lacks standing to bring the action simply because the third party is unrelated to the child. For

186. See *id.*; see also *Finley v. Sapp*, 238 N.C. 114, 116-17, 76 S.E.2d 350, 352 (1953) (holding that in a custody battle between the husband and wife, the natural right of the father to custody did not limit the discretionary power of the court to award custody based upon the best interest and general welfare of the child); *Clegg v. Clegg*, 186 N.C. 28, 36-40, 118 S.E. 824, 827-30 (1923) (relying on the best interest and polar star principles to overcome the husband's common law paramount interest and to award the wife visitation). *Clegg*, *Finley*, and *Jolly* were all cases involving custody battles between parents that were complicated by issues of legitimacy and of old common law irrebuttable presumptions. In each case, the court abandoned or sought to weaken the old common law irrebuttable presumptions in favor of a rebuttable presumption/balancing/best interest test, which appears to have been the clear trend in the North Carolina courts until *Petersen*.

187. See *Hughes*, 254 N.C. at 436-37, 119 S.E.2d at 191 (referring to and quoting *In re Gibbons*, 247 N.C. 273, 101 S.E.2d 16 (1957)).

188. 346 N.C. 68, 484 S.E.2d 528 (1997). In *Price*, the court clearly stated the statutory requirement: "As in North Carolina, New York statutes required courts to base custody decisions solely upon the best interest of the child." *Id.* at 81, 484 S.E.2d at 535 (citing *Bennett v. Jeffreys*, 356 N.E.2d 277, 282 (N.Y. 1976)); see also *infra* notes 281-98 and accompanying text (discussing *Price*).

189. See *Petersen*, 337 N.C. at 404, 445 S.E.2d at 905-06.

190. See *id.* at 403-04, 445 S.E.2d at 905.

instance, in *In re Gibbons*, the Brights were biologically unrelated to the child, but the North Carolina Supreme Court indicated that their substantial historical relationship could justify their custody claim over a fit father.¹⁹¹ Additionally, the clear language of § 50-13.1 provides standing to both relatives and other persons, and the case law indicates that the statute was intended to codify the existing law and to confer a broad grant of standing in custody cases.¹⁹² Yet *Petersen* expressly held that § 50-13.1 “was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers.”¹⁹³

In *Petersen*, the court mentioned only two bases for its interpretation of § 50-13.1. First, the court agreed with the reasoning of the trial court in *Ray v. Ray*¹⁹⁴ that a literal interpretation of the “other person” language in § 50-13.1 “‘would nullify any need for § 50-13.2(b1) and § 50-13.2A, neither of which [has] been repealed.’”¹⁹⁵ Second, the supreme court asserted that a literal interpretation of the “other person” language in § 50-13.1 “would

191. See *In re Gibbons*, 247 N.C. at 279-80, 101 S.E.2d at 21-22; *supra* notes 55-63 and accompanying text (discussing *Gibbons*).

192. See *supra* notes 100-07 and accompanying text (discussing the purposes of N.C. GEN. STAT. § 50-13.1 (1995)).

193. *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906 (analyzing N.C. GEN. STAT. § 50-13.1 (1995)).

194. 103 N.C. App. 790, 407 S.E.2d 592 (1991).

195. *Petersen*, 337 N.C. at 405-06, 445 S.E.2d at 906 (quoting *Ray*, 103 N.C. App. at 792, 407 S.E.2d at 593) (alteration in original). North Carolina General Statutes § 50-13.2(b1) (Supp. 1997) provides that:

An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, “grandparent” includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

Id. North Carolina General Statutes § 50-13.2A (1995) provides that:

A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. A court may award visitation rights if it determines that visitation is in the best interest of the child. An order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child. Procedure, venue, and jurisdiction shall be as in an action for custody.

Id.

conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children.”¹⁹⁶

Regarding the first basis, it is reasonable to conclude, as the North Carolina Court of Appeals did in *Ray*, that the “[o]ther statutes which allow actions for visitation (i.e. N.C.G.S. §§ 50-13.2A, 50-13.2(b1) and 50-13.5(j)) are merely supplemental. . . . [and] do not in any way contradict § N.C.G.S. 50-13.1(a).”¹⁹⁷ Both § 50-13.2(b1) and § 50-13.2A concern only *visitation* for grandparents in certain limited situations. At the time the last two sentences of § 50-13.2(b1) were added in 1985¹⁹⁸ and § 50-13.2A was adopted,¹⁹⁹ § 50-13.1(a) conferred standing only to bring “an action or proceeding for . . . custody” and did not clearly pertain to actions for visitation.²⁰⁰ In 1989, the General Assembly resolved this matter by adding a second sentence to § 50-13.1(a) to provide that “custody” means “custody or visitation or both.”²⁰¹ It is difficult to agree with the conclusion in *Petersen* that the unambiguous language of § 50-13.1(a) broadly granting standing to “[a]ny parent, relative, or other person” to bring *custody* actions is subject to reinterpretation, given that § 50-13.2(b1) and § 50-13.2A were adopted to address *visitation* rights of grandparents and that § 50-13.1(a) originally did not grant standing to anyone to bring *visitation* actions.

Furthermore, even if § 50-13.1(a) had clearly given parents, relatives, and other persons standing to bring both custody and visitation actions when § 50-13.2(b1) and § 50-13.2A were adopted, the effect of § 50-13.2(b1) and § 50-13.2A, consistent with the court’s holding in *Oxendine v. Catawba County Department of Social Services*,²⁰² is only to limit the applicability of the broad grant of

196. *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906.

197. *Ray*, 103 N.C. App. at 793, 407 S.E.2d at 593.

198. See Act of July 3, 1985, ch. 575, § 3, 1985 N.C. Sess. Laws 660, 660 (codified at N.C. GEN. STAT. § 50-13.2(b1) (Supp. 1997)). The last two sentences of North Carolina General Statutes § 50-13.2(b1) read as follows:

As used in this subsection, “grandparent” includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

Id.

199. See Act of July 3, 1985, ch. 575, § 2, 1985 N.C. Sess. Laws 660, 660 (codified at N.C. GEN. STAT. § 50-13.2A (1995)).

200. N.C. GEN. STAT. § 50-13.1 (1984) (emphasis added).

201. See Act of Aug. 12, 1989, ch. 795, § 15(b), 1989 N.C. Sess. Laws 2912, 2916-17 (codified at N.C. GEN. STAT. § 50-13.1(a) (1995)).

202. 303 N.C. 699, 281 S.E.2d 370 (1981).

standing of § 50-13.1(a) in cases involving grandparent actions for visitation, and not in those situations not expressly addressed in § 50-13.2(b1) and § 50-13.2A.²⁰³ Under *Oxendine*, § 50-13.1(a) is subject to other, more specific statutes that expressly limit or condition standing in certain situations or for certain categories of plaintiffs.²⁰⁴ The limitations on § 50-13.1(a) standing created by § 50-13.2(b1) and § 50-13.2A are only limitations on the use of § 50-13.1 by those persons to whom the more specific statutes apply—foster parents in *Oxendine* and grandparents in the case of § 50-13.2(b1) and § 50-13.2A. The more specific statutes do not limit the broad grant of standing of § 50-13.1 to those “other persons” not expressly provided for in the more specific statutes. As to those, § 50-13.1(a) must still be held to mean what it clearly says.²⁰⁵

The second basis offered by the *Petersen* court is also inadequate to support a reinterpretation. The court’s claim that a literal interpretation of § 50-13.1 “would conflict with the constitutionally-protected paramount right of parents to custody”²⁰⁶ may be a basis for holding the statute unconstitutional, but it is not a basis for reinterpreting an unambiguous statute.²⁰⁷ As discussed in Part IV.B., this conclusion is dicta by the court that may not stand up to the rigorous analysis expected if the constitutionality of § 50-13.1(a) and § 50-13.2(a) is directly at issue and expressly addressed.

The importance of this issue is not obvious initially because of its placement toward the end in the *Petersen* opinion.²⁰⁸ But, if the language used in *Petersen* is indeed controlling—that § 50-13.1 “was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers”²⁰⁹—then it would appear that the Petersens, as biological

203. See *id.* at 705-06, 281 S.E.2d at 374-75.

204. See *id.* at 707, 281 S.E.2d at 375.

205. See *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995); *infra* notes 337-46 and accompanying text (discussing *McIntyre*).

206. *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906.

207. See *Yates v. Dowless*, 93 N.C. App. 787, 788, 379 S.E.2d 79, 80 (1989) (“When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” (quoting *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978))); see also *Pennsylvania Dep’t of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998), (noting that the doctrine of constitutional doubt, which requires the Court to interpret statutes to avoid “grave and constitutional questions,” applies only “where a statute is susceptible of two constructions” (quoting *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909))).

208. See *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906.

209. *Id.*

strangers to the child, were themselves not authorized to bring their custody action after the adoption was nullified. Even without concluding that such a result is constitutionally required, *Petersen* implied that by adopting § 50-13.1, the General Assembly intended to prevent *all* unrelated parties from ever seeking custody, even if lengthy de facto custody of the child with the third parties had clearly created a psychological family. If this is indeed the law, unrelated third parties like the Petersens²¹⁰ may be deprived of any opportunity to raise the issues of the natural parent's fitness or suitability or the best interest of the child.

IV. AFTER *PETERSEN*: LIMITATIONS ON THE PARAMOUNT RIGHT?

Although the *Petersen* court's focus on the biological link may appear overly simplistic and too absolute when applied to certain situations,²¹¹ there are arguable benefits from the decision. For instance, although it took almost six years to resolve the custody of Baby Paul, in similar cases after *Petersen*, the custody issue may often be resolved more promptly. After *Petersen*, prospective adoptive parents will be discouraged from prolonging litigation in the hopes that their continued custody of the child during litigation will tilt the best interest of the child determination in their favor because there is no longer any best interest determination.²¹²

Nevertheless, there is reason to be concerned with the broad impact of the basic holding in *Petersen*—that absent a finding that parents either are unfit or have neglected the welfare of their children, “the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.”²¹³ This rule allows no exceptions for situations in which the child has spent several years in the custody of third parties with whom the child has formed significant emotional attachment and where the biological parents are, in fact, practically strangers to the child. Thus, in certain

210. Or Stacy Price in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), discussed *infra* at notes 281-98 and accompanying text. See also *infra* note 367 (discussing *Ellison v. Ramos*, 1998 WL 436057, No. COA97-1417, at *1 (N.C. App. Aug. 4, 1998)).

211. See *infra* notes 217-280 (citing cases where this may occur).

212. The best interest test appears to intrinsically favor the status quo, i.e., to reward the one who can successfully care for the child in the years or months preceding the hearing. Because custody is sometimes gained through the misbehavior or wrongdoing of the custodians or through significant mistreatment of the rights of the natural parents, application of the true best interest test, which would ignore the guilt or the rights of the parties, appears to encourage any behavior, even if improper, that would result in custody or lengthen the time in custody prior to the hearing.

213. *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905.

circumstances, *Petersen* can require the trial judge to disregard the child's special "sense of time" and basic need for continuity of relationships and surroundings necessary for normal development.²¹⁴ As one commentator has noted, "the psychological well-being of a child is . . . enhanced when the continuity of some emotional attachment or bonding to an adult or caretaker is maintained."²¹⁵ Responding in part to this inflexibility, the North Carolina Court of Appeals has considered ways to limit or distinguish the holding in *Petersen*, thus answering questions arguably left unresolved in *Petersen*.

A. Will *Petersen* Apply Only to Intact Families?²¹⁶

In the dissenting opinion in *Lambert v. Riddick*,²¹⁷ Judge Greene argued for a narrow interpretation of *Petersen* analogous to the United States Supreme Court's biology-plus requirement.²¹⁸ Although acknowledging *Petersen*'s "broad language" describing parents' rights to the custody of their children, Judge Greene asserted that *Petersen* requires proof of parental unfitness to overcome the parent's right only when the other party seeks to break up an *existing family unit*.²¹⁹ He cited Supreme Court decisions that used the same requirement.²²⁰ Judge Greene contrasted this situation with those in which the contestants are parents without legal custody

214. See GOLDSTEIN ET AL., *supra* note 19, at 42 (discussing the need to consider a child's "sense of time" in placement decisions). Incorporating a child's sense of time into a best interest framework would require decisionmakers to act quickly to restore stability and to limit the loss and uncertainty in the child's life. See CHILDREN AND THE LAW: A CASEBOOK FOR PRACTICE, *supra* note 1, at 4.

215. CHILDREN AND THE LAW: A CASEBOOK FOR PRACTICE, *supra* note 1, at 4.

216. Intact families are those living together with the child at the time of the custody trial or families from which the child has been removed unlawfully. See *infra* note 223 and accompanying text (discussing what constitutes an intact family).

217. 120 N.C. App. 480, 462 S.E.2d 835 (1995).

218. See *supra* notes 164-75 and accompanying text (discussing the "biology-plus" test).

219. See *Lambert*, 120 N.C. App. at 483-84, 462 S.E.2d at 837 (Greene, J., dissenting).

220. See *id.* at 483, 462 S.E.2d at 837 (Greene, J., dissenting) (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993) (stating that parental unfitness is required to remove a child from the custody of her parents); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (indicating that due process likely would be violated if a state attempted to break up a natural family absent unfitness)). Judge Greene also cited two North Carolina Supreme Court cases, *McIntyre v. McIntyre*, 341 N.C. 629, 633-35, 461 S.E.2d 745, 749-50 (1995) (stating that grandparents seeking visitation with children in an intact family must show parental unfitness) and *Petersen*, 337 N.C. at 405-06, 445 S.E.2d at 906 (1994) (stating the principle that parents with legal custody of their children should be protected from the claims of others), to support his argument. See *Lambert*, 120 N.C. App. at 483-84, 462 S.E.2d at 837 (Greene, J., dissenting).

and third parties have physical custody of the child.²²¹ In these situations, he said, the standard is the best interest of the child.²²² Accordingly, on the facts of *Lambert*, Judge Greene concluded that there was no intact family and that the father seeking custody had allowed the child to live with the third party contestant, consequently, he would have decided the case under the best interests of the child standard.²²³

In *Petersen*, however, the natural parents had never lived with their child in "an intact family unit."²²⁴ *Petersen* could have specified that the constitutional paramount right applied only to intact families²²⁵ or to families that would have been intact except for the illegal acts of third parties²²⁶ because the determination that the Petersens illegally bought Baby Paul would have sufficed. The court noted no such limitation. Rather, *Petersen*'s directive was simple and inescapable: In a custody proceeding, a fit natural parent not found to have neglected the child has a right to custody superior to third persons.²²⁷ Thus, the natural parent's constitutionally-based paramount right to custody as defined in *Petersen* is not dependent, as Judge Greene argued, on the existence of a "family unit."

221. See *Lambert*, 120 N.C. App. at 484, 462 S.E.2d at 837 (Greene, J., dissenting).

222. See *id.* (Greene, J., dissenting) (citing N.C. GEN. STAT. § 50-13.2(a)).

223. See *id.* at 484-85, 462 S.E.2d at 837 (Greene, J., dissenting) (citing N.C. GEN. STAT. § 50-13.2(a)); see also *Fisher v. Gaydon*, 124 N.C. App. 442, 445, 477 S.E.2d 251, 253 (1996) (stating that a single parent living with her children can constitute an intact family) (note that this is the case name as it appears in the North Carolina Reporter; it is entitled *Fisher v. Fisher* in the South Eastern Reporter), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997); *Price v. Howard*, 122 N.C. App. 674, 677-78, 471 S.E.2d 673, 675 (Greene, J., dissenting) (stating that *Petersen* protects only intact families), *rev'd*, 346 N.C. 68, 484 S.E.2d 528 (1996); *Bivens v. Cottle*, 120 N.C. App. 467, 470, 462 S.E.2d 829, 831-32 (1995) (Greene, J., concurring in the result) (stating that the *Petersen* parental preference rule does not extend to a parent not living with the child in an intact family unit), *appeal dismissed*, 346 N.C. 270, 270, 485 S.E.2d 296, 296 (1997). But see *Bivens*, 120 N.C. App. at 469-70, 462 S.E.2d at 831 (rejecting in particular Judge Greene's interpretation of *Petersen*).

224. See *In re Adoption of P.E.P.*, 329 N.C. 692, 697, 407 S.E.2d 505, 508 (1991) (noting that the natural parents immediately gave the child away after his birth).

225. Cf. *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750 (stating that N.C. GEN. STAT. § 50-13.1(a) does not allow grandparents to sue for visitation with children living in an intact family).

226. See *Price*, 122 N.C. App. at 677, 471 S.E.2d at 675 (Greene, J., dissenting); *Lambert*, 120 N.C. App. at 484, 462 S.E.2d at 837 (Greene, J., dissenting).

227. See *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905.

B. Under Petersen, What Set of Facts Will Be Sufficient to Prove That a Parent Is Unfit or Has Neglected the Child's Welfare?

In *Raynor v. Odom*,²²⁸ the custody contest between a mother and the grandmother was won by the grandmother based on the conclusion that the mother was unfit to have custody of the minor child.²²⁹ The mother appealed, arguing that the findings of fact did not support the conclusion of law that she was unfit.²³⁰ After first noting that no appellate decision had defined with precision the findings necessary to establish a natural parent's unfitness under *Petersen*, the *Raynor* court held that, in any event, appellate review should be de novo and that a court should consider "the totality of the circumstances."²³¹

The trial court in *Raynor* based its determination that the mother was unfit on a variety of facts, some of which appeared to be more directly related to the child's best interest than to the mother's fitness as a parent. For instance, the trial court found as fact that: (1) the grandmother had properly arranged for medical treatment of the child;²³² (2) the child had special treatment needs;²³³ and (3) "the fact that the child was not as advanced or mature as many of his contemporaries as indicated by the pre-school screening indicates that plaintiff was not providing for the child the motivation, opportunity and encouragement for normal and healthy development."²³⁴ Additionally, the trial court found that: (1) the mother had been found in contempt of court for "failing to submit to a timely drug screening and substance abuse counseling,"²³⁵ "failing to complete and submit to a home study,"²³⁶ and "failing to authorize the release of her military and medical records";²³⁷ (2) the mother suffered blackouts and had a quick temper;²³⁸ (3) the mother had DWI convictions;²³⁹ (4) the mother's "willful violation of the court's orders indicate[d] a lack of respect for authority that could be imparted upon the child, and indicate[d] a lack of sincere desire to

228. 124 N.C. App. 724, 478 S.E.2d 655 (1996).

229. See *id.* at 727, 478 S.E.2d at 657.

230. See *id.*

231. *Id.* at 731, 478 S.E.2d at 659.

232. See *id.* at 729-30, 478 S.E.2d at 658.

233. See *id.* at 729-30, 478 S.E.2d at 658-59.

234. *Id.* at 730, 478 S.E.2d at 658 (quoting the trial court's findings of fact).

235. *Id.* at 731-32, 478 S.E.2d at 659.

236. *Id.* at 732, 478 S.E.2d at 659.

237. *Id.*

238. See *id.*

239. See *id.* at 731, 478 S.E.2d at 659.

have custody of the child";²⁴⁰ (5) the mother's "failure to visit the child unless [the grandmother] provide[d] transportation indicate[d] a lack of true concern for the child";²⁴¹ (6) the mother "had been openly hostile and rude to [the grandmother]";²⁴² and (7) the mother "failed to provide [the grandmother] with information concerning the child's medical insurance."²⁴³ In rejecting the mother's appeal, the court of appeals held that such findings "paint a picture of a person who has had substance abuse problems, does not respect authority, is unable to recognize her child's developmental problems, and is incapable of caring for the child's welfare," providing "ample support for the legal conclusion that plaintiff is an unfit parent."²⁴⁴

While the court of appeals in *Raynor* expressly agreed that the socioeconomic status of the grandmother was irrelevant to the fitness determination of the mother,²⁴⁵ it approved the use of other evidence generally associated with the best interest of the child standard.²⁴⁶ To the extent that evidence of the special needs of the child, the special relationship with the third party, and various negative aspects of the parent's character or life are allowed as sufficiently related to the parent's fitness as a parent, then the fitness test may be broad enough to allow at least indirect consideration of the child's best interest by the trial judge.²⁴⁷

C. Will Petersen Apply Only to Initial Custody Decisions?

In *Bivens v. Cottle*,²⁴⁸ the district court had entered a pre-*Petersen* decree in 1992 awarding custody to the maternal grandparents despite expressly finding that the mother was a fit parent.²⁴⁹ Following the *Petersen* opinion in 1994, the mother filed a

240. *Id.* at 732, 478 S.E.2d at 659-60.

241. *Id.* at 732, 478 S.E.2d at 660.

242. *Id.*

243. *Id.*

244. *Id.*

245. *See id.* at 731, 478 S.E.2d at 659.

246. *See id.* at 731-32.

247. *See id.* at 730-32; *see also* Sharp v. Sharp, 124 N.C. App. 357, 360, 477 S.E.2d 258, 260 (1996) (noting that in custody suits between parents, the standard is the best interest of the child, but between parents and grandparents, the parent must be found to be unfit). In *Sharp*, the grandparents alleged that the mother had not provided a suitable home and that the father had been uninvolved, *see id.* at 361, 477 S.E.2d at 260, and the court stated that the best interest of the children required a hearing on parental fitness, *see id.* at 361, 363, 477 S.E.2d at 261.

248. 120 N.C. App. 467, 462 S.E.2d 829 (1995).

249. *See id.* at 468, 462 S.E.2d at 830.

motion to modify the custody order.²⁵⁰ The mother argued that the best interest inquiry at the first hearing was improper and that she was entitled to custody without the necessity of showing any change of circumstance.²⁵¹ The trial judge agreed and awarded custody to the mother without conducting a hearing on changed circumstances.²⁵²

The court of appeals reversed, holding that the statutory procedure for a change of a custody order requires that there be "a substantial change in circumstances affecting the welfare of the child" and that the proposed change be "in the best interest of the child."²⁵³ The court noted that state law provides "no exceptions . . . to the requirement that a change in circumstances be shown before a custody decree may be modified."²⁵⁴ Having failed to appeal the 1992 custody order on *Petersen* grounds, the mother instead sought to apply the *Petersen* standard to the modification proceeding.²⁵⁵ The court held that *Petersen* applied only to the initial custody determination and not to modifications.²⁵⁶ The North Carolina Supreme Court heard oral arguments on the matter, but subsequently ruled that discretionary review had been improvidently granted and allowed the decision of the court of appeals to stand.²⁵⁷

*D. Will the Inaction of a Parent or Other Equitable Consideration Be Sufficient to Waive or Overcome the Paramount Right?*²⁵⁸

It remains to be seen how tolerant the courts will be with regard to biological parents who do not quickly, effectively, or successfully enforce their paramount right to custody or to a significant relationship. In *Petersen*, the biological father began legal

250. *See id.*

251. *See id.*

252. *See id.*

253. *Id.* at 469, 462 S.E.2d at 831.

254. *Id.* (referring to N.C. GEN. STAT. § 50-13.7(a) (1987)).

255. *See id.*

256. *See id.*

257. *See Bivens v. Cottle*, 346 N.C. 270, 270, 485 S.E.2d 296, 296 (1997); *see also Raynor v. Odom*, 124 N.C. App. 724, 733-34, 478 S.E.2d 655, 660-61 (1996) (holding that a determination that the parent was unfit was enough of a change of circumstances to warrant a modification of custody under the change of custody statute, § 50-13.7 (1995)); *Speaks v. Fanek*, 122 N.C. App. 389, 390, 470 S.E.2d 82, 83 (1996) (stating a narrow interpretation of *Petersen* and applying it to initial custody determinations only, not to consideration of change in a custody order "based on changed circumstances"); *Lambert v. Riddick*, 120 N.C. App. 480, 483, 462 S.E.2d 835, 836 (1995) (holding that the trial court's award of custody to a third party found to be fit and proper applied an improper standard in determining custody between the biological father and a third party).

258. Others with arguably protectable interests include spouses, step-spouses, grandparents, and psychological parents.

proceedings to enforce his right within months of Baby Paul's birth.²⁵⁹ At some point, however, the courts may conclude that a biological father did not do enough to enforce his paramount right and therefore waived the right or was barred by laches or by his inaction had neglected the welfare of the child.²⁶⁰ North Carolina cases do not appear to have explored this equitable approach to third-party custody disputes, but other jurisdictions have recognized the applicability of equitable principles and the possibility of equitable parenthood.²⁶¹ For instance, if the natural mother falsely represented that a third party was the natural father, intending for the third party to rely on the representation and the third party did so rely, the court might equitably estop the mother from asserting that the third party was not the father and find that the third party was an equitable parent with corresponding rights.²⁶²

The court of appeals found another creative way to support a de facto parent²⁶³ in *Jones v. Patience*.²⁶⁴ In *Jones*, the North Carolina Court of Appeals protected a de facto father's custody interest because he was also the husband of the mother at the birth of the

259. See *In re Adoption of P.E.P.*, 329 N.C. 692, 694, 407 S.E.2d 505, 506 (1991).

260. See *infra* note 382 and accompanying text.

261. For instance, in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), the elements of equitable estoppel—false representation or concealment of material fact, intention that the representation or concealment be acted upon, and actual reliance—were present. See *id.* at 70-71, 484 S.E.2d at 529-30. In some states, courts have found such facts to justify a finding of equitable parenthood. For example, the Iowa Supreme Court implied that equitable parenthood could be established by a man because he was married to the child's mother at the time of conception, he reasonably believed that he was the child's father, and he had established a parental relationship with the child, with the additional factor that a parental relationship with him may be in the child's best interest. See *In re Marriage of Gallagher*, 539 N.W.2d 479, 480 (Iowa 1995). The Michigan Supreme Court also upheld the equitable parent doctrine involving the mother's husband—who was not the biological father—when both the equitable parent and the child acknowledged the relationship and the mother had cooperated in the development of that relationship. See *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. 1987). The South Dakota Supreme Court said, however, that such equitable relief may not be available to a third party who has no legal relationship to the child but is simply an interested third party who at one time lived with the mother, was sole caretaker of the child for several years, and who cared for the child. See *D.G. v. D.M.K.*, 557 N.W.2d 235, 242-43 (S.D. 1996).

262. See *supra* note 261 (discussing cases applying the equitable parent doctrine).

263. See *supra* note 19 (discussing the de facto parent concept).

264. 121 N.C. App. 434, 466 S.E.2d 720, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996). See generally Alan Stephens, Annotation, *Parental Rights of Man Who Is Not Biological or Adoptive Father of Child But Was Husband or Cohabitant of Mother When Child Was Conceived or Born*, 84 A.L.R.4TH 655, 679-84 (1991) (discussing cases in which "[t]he presumption of legitimacy of a child born during wedlock was applied . . . to protect the parental rights of a husband who was shown not to be the child's biological father").

child.²⁶⁵ The couple was married in 1981, and the child was born in 1989.²⁶⁶ They lived together as a family until late 1991, when the couple separated.²⁶⁷ Until early 1992, the husband believed he was the biological father of the child.²⁶⁸ He had been at the mother's side during the birth of the child, he was involved in the daily care and nurture of the child, and he had continued his relationship with the child after the separation.²⁶⁹ In early 1992, when the child was two and one-half years old, the mother told her husband that he was not the father and terminated his visits with the child.²⁷⁰ The husband filed suit seeking visitation,²⁷¹ but voluntary blood tests excluded him as the biological father.²⁷² In a pre-*Petersen* decision, the trial court allowed the husband visitation with the child, using the best interest standard.²⁷³

On appeal, however, the mother argued that awarding visitation rights to her former husband, whom the trial court had found was not the biological father, in the absence of a finding that she was unfit to have custody of the child, violated *Petersen*.²⁷⁴ Bothered by a result that would exclude even visitation between the toddler and her psychological father, the court of appeals finessed *Petersen* by holding that the marital presumption (that is, that the husband is the father of a child born to the wife during the marriage) had not been rebutted in this case despite the trial court's finding that the plaintiff was not the biological father.²⁷⁵ The court of appeals held that the presumption could be rebutted only if "another man has formally acknowledged paternity . . . or has been adjudicated to be the father of the child."²⁷⁶ This method of avoiding the consequences of *Petersen* will not, however, necessarily help the husband in the long run because the biological father could come forward, acknowledge paternity, and possibly rebut the presumption that permitted the husband visitation.²⁷⁷

265. See *Jones*, 121 N.C. App. at 440, 466 S.E.2d at 723.

266. See *id.* at 436, 466 S.E.2d at 721.

267. See *id.*

268. See *id.*

269. See *id.*

270. See *id.*

271. See *id.* at 436-37, 466 S.E.2d at 721.

272. See *id.* at 437, 466 S.E.2d at 721.

273. See *id.* at 437, 466 S.E.2d at 722. In a 1994 review hearing, the trial court found that he had not missed a scheduled visitation in the preceding twelve months. See *id.*

274. See *id.*

275. See *id.* at 439-40, 466 S.E.2d at 723.

276. *Id.* at 439, 466 S.E.2d at 723.

277. A related question involves whether or not an alleged biological father can

Despite the supreme court's ruling in *McIntyre v. McIntyre*²⁷⁸ that grandparents may not bring an independent action for visitation except as allowed by § 50-13.2A and § 50-13.5(j),²⁷⁹ the court of appeals has stated that grandparents may bring an initial suit for custody so long as they allege the parents' unfitness and overcome the constitutionally protected paramount right of parents established in *Petersen*.²⁸⁰ It appears that the compelling facts of certain cases involving particularly sympathetic spouses, grandparents, or other psychological parents will continue to motivate the appellate courts to search for exceptions to the *Petersen* fiat.

V. PRICE V. HOWARD AND REVISITING THE PETERSEN STANDARD

A. A Psychological Parent

Several years after *Petersen*, the North Carolina Supreme Court heard another difficult child custody case. In *Price v. Howard*,²⁸¹ Stacy Price and Robin Howard lived together from 1985 until 1989 but never married.²⁸² Howard had a child in 1986, and from the time of birth, Price held out the child as his biological daughter and the child believed he was her biological father.²⁸³ Price and Howard separated in 1989, with Price remaining an equal caretaker of the

compel the mother, her husband, and the child to submit to blood tests in order to establish the alleged biological father's paternity. Such questions force the courts to wrestle with the paramount right of biological parents as proclaimed by *Petersen*, balanced against the law's preference for legitimacy and the integrity of the family, "the seminal unit of society as we know it." *State v. White*, 300 N.C. 494, 508, 268 S.E.2d 481, 490 (1980). These issues are discussed at length in the majority opinion and dissent in a case in which the blood test was allowed. See *Johnson v. Johnson*, 120 N.C. App. 1, 461 S.E.2d 369 (1995), *rev'd*, 343 N.C. 114, 468 S.E.2d 59 (1996). On appeal, the supreme court reversed the court of appeals, agreeing with the dissent of the court of appeals that the alleged natural parent lacked standing to compel the presumed father (the mother's husband) to submit to a blood test to determine paternity of the child born during the marriage. See *Johnson v. Johnson*, 343 N.C. 114, 114-15, 468 S.E.2d 59, 59-60 (1996).

278. 341 N.C. 629, 461 S.E.2d 745 (1995).

279. See *id.* at 633-35, 461 S.E.2d at 748-50; see also *Fisher v. Gaydon*, 124 N.C. App. 442, 444, 477 S.E.2d 251, 253 (1996) (holding that it followed from *McIntyre* that "under the broad grant of section 50-13.1(a), grandparents have standing to seek visitation with their grandchildren when those children are *not* living in a *McIntyre* 'intact family' " (quoting *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749)) (note that this is the case name as it appears in the North Carolina Reporter; it is entitled *Fisher v. Fisher* in the South Eastern Reporter)), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997).

280. See *Sharp v. Sharp*, 124 N.C. App. 357, 359-61, 477 S.E.2d 258, 259-61 (1996).

281. 122 N.C. App. 674, 471 S.E.2d 673 (1996), *rev'd*, 346 N.C. 68, 484 S.E.2d 528 (1997).

282. See *id.*

283. See *id.* at 674-75, 471 S.E.2d at 673.

child and at times the primary caretaker.²⁸⁴ When Howard moved to Eden, North Carolina in 1991, the child remained with Price in Durham.²⁸⁵ Price sought sole custody of the child the following year, at which time Howard denied that Price was the child's biological father.²⁸⁶ A court-ordered paternity test confirmed that Price was not the father.²⁸⁷ After a hearing in 1995 (when the child was nine), the trial court entered its final order in the action, concluding that although both Howard and Price were fit to exercise exclusive care and custody of the child, it was in the child's best interest to remain in the primary physical custody of Price.²⁸⁸ Nevertheless, the trial court concluded that *Petersen* did not allow an award of custody to Price because Price was not the biological father and there was no evidence Howard was an unfit mother or had neglected the child.²⁸⁹ The trial court awarded Howard the exclusive care, custody, and control of the child.²⁹⁰

Relying on *Petersen*, the court of appeals upheld the trial court, finding that in a custody dispute between a natural parent and a third party—even one who receives a minor child into his home and openly holds out that child as his biological child—the natural parent is entitled to custody as long as she is fit, and the “best interest of the child” standard is not considered.²⁹¹ Because Howard was entitled, as the natural parent, to the exclusive custody and control of the child, Price was left with no right to visitation or standing to seek visitation with the child.²⁹² As a result, Price, the undisputed psychological father, appealed the determination that he might legally be prevented from ever seeing the nine-year-old girl he considered his daughter.²⁹³

Without purporting to overturn or modify *Petersen*, the North Carolina Supreme Court found what had eluded the scrutiny of the trial judge and the court of appeals panel: a third exception to the natural parent's paramount right to custody. In *Price*, the supreme court held that even if there is no showing of the natural parent's unfitness or neglect, there may be “other circumstances” that require the paramount right to yield to the best interest of the child

284. *See id.* at 675, 471 S.E.2d at 673.

285. *See id.*

286. *See id.*

287. *See id.*

288. *See id.* at 675, 471 S.E.2d at 674.

289. *See id.*

290. *See id.*

291. *See id.* at 675-76, 471 S.E.2d at 674.

292. *See id.* at 676, 471 S.E.2d at 674.

293. *See Price v. Howard*, 346 N.C. 68, 70, 484 S.E.2d 528, 529 (1997).

standard.²⁹⁴ The court held that conduct by the natural parent inconsistent with the presumption that he or she will act in the best interest of the child can be sufficient to withdraw the constitutional protection normally due the natural parent's custody right.²⁹⁵ The supreme court indicated that such inconsistent conduct would include not only unfitness, neglect, and abandonment, but also other conduct considered on a case-by-case basis.²⁹⁶ If inconsistent conduct is shown, the analysis properly proceeds using the best interest of the child test mandated by § 50-13.2(a).²⁹⁷ The matter was remanded to the district court for a determination of whether the natural mother's conduct—including her actions over several years that "created the existing family unit that includes [Stacy Price] and the child, but not herself"—was inconsistent with the constitutionally-protected status of a natural parent.²⁹⁸

B. *Analysis of the Price Decision*

Price certainly modified *Petersen* and arguably has begun the process by which North Carolina could effectively return to the law as enunciated in the polar star line of cases discussed in Part I.²⁹⁹ However, the court in *Price* was also careful not to admit any modification of *Petersen*, leaving some question as to how *Price* should be applied in subsequent cases.

Significant differences between *Petersen* and *Price* exist. *Petersen* consistently referred to the natural parent's paramount "right" to custody,³⁰⁰ while *Price* consistently refers to this "right" as an "interest."³⁰¹ *Petersen* ignored § 50-13.2(a) and its express mandate to apply a best interest of the child test to all custody proceedings,³⁰² while *Price* acknowledged that in § 50-13.2(a) the "General Assembly has prescribed the standard to be applied in a custody proceeding in North Carolina" and that it is a best interest of the child test.³⁰³ *Price* found § 50-13.2 constitutional so long as it is

294. *Id.* at 72, 79, 484 S.E.2d at 530, 534-55.

295. *See id.*

296. *See id.*

297. *See id.* at 84, 484 S.E.2d at 537 (citing N.C. GEN. STAT. § 50-13.2(a) (1995)).

298. *Id.* at 83, 484 S.E.2d at 537.

299. *See supra* notes 38-77 and accompanying text (discussing the polar star line of cases).

300. *Petersen*, 337 N.C. at 400-06, 445 S.E.2d at 903-06.

301. *Price*, 346 N.C. at 72-84, 484 S.E.2d at 530-37.

302. *See Petersen*, 337 N.C. at 399-406, 445 S.E.2d at 902-06.

303. *Price*, 346 N.C. at 72, 484 S.E.2d at 530 (citing N.C. GEN. STAT. § 50-13-2(a) (1995 & Supp. 1997)).

applied consistently with the conduct test as set out in the opinion; presumably, § 50-13.2(a) is unconstitutional as applied to disputes between a natural parent and a third party without first applying the conduct test.³⁰⁴

Whereas the phrase "polar star" appears in neither *Petersen* nor *Price*, *Price* does, unlike *Petersen*, cite some of the polar star line of cases mentioned in Section I,³⁰⁵ and it acknowledges that "North Carolina law traditionally has protected the interests of natural parents in the companionship, custody, care, and control of their children, *with similar recognition that some facts and circumstances, typically those created by the parent, may warrant abrogation of those interests.*"³⁰⁶ Additionally, *Price*'s constitutional analysis includes the United States Supreme Court cases that were not mentioned in *Petersen*, which indicate that a biological connection alone does not mandate a constitutional entitlement of the natural parent to custody.³⁰⁷ Finally, although the trial court in *Price* denied visitation to the man the child thought was her father, the supreme court did not discuss his standing, as a biological stranger under § 50-13.1, to seek either visitation or custody.

A clear holding in *Petersen*, despite apparent claims to the contrary in *Price*, was that in custody disputes between natural parents and third parties, it is unconstitutional to determine custody pursuant to a best interest test absent a finding that the natural parent was either unfit or had neglected the child.³⁰⁸ *Price* overruled this holding by determining that there were indeed "other circumstances" that could "require [the natural parent's constitutionally-protected interest in custody] to yield to the 'best interest of the child' test prescribed by N.C.G.S. § 50-13.2(a)."³⁰⁹ These other circumstances were instances of conduct of the natural parent that were inconsistent with the parent-child relationship but

304. See *id.* at 79, 484 S.E.2d at 534-35.

305. See *id.* at 75, 484 S.E.2d at 532 (citing *Wilson v. Wilson*, 269 N.C. 676, 153 S.E.2d 349 (1967); *In re Gibbons* 247 N.C. 273, 101 S.E.2d 16 (1957)).

306. *Id.* (emphasis added).

307. See *id.* at 74-79, 484 S.E.2d at 531-34; *supra* notes 161-79.

308. Although *Petersen* does not mention the best interest test mandated by § 50-13.2(a), the trial court had applied the best interest test, and the court in *Petersen* expressly stated that regardless of the best interest inquiry, "the trial court could not award custody to anyone other than" the natural parents as a matter of law because there was no showing of unfitness. *Petersen*, 337 N.C. at 404, 445 S.E.2d at 905. Despite this language, the court in *Price* claimed that the *Petersen* court "did not discuss whether a 'best interest of the child' test violated" the natural parent's constitutional paramount right. *Price*, 346 N.C. at 74, 484 S.E.2d at 531.

309. *Price*, 346 N.C. at 72, 484 S.E.2d at 530.

that nevertheless did not amount to unfitness or neglect of the child.

The rule announced in *Price* effectively swallows the *Petersen* rule. Unfitness and neglect of the child's welfare are no longer independent grounds for avoiding the natural parent's paramount right or interest. Instead, they are simply examples of the kind of conduct that is inconsistent with that right or interest and sufficient to overcome the paramount right. After *Price*, the sole basis for overcoming the paramount right is inconsistent conduct of the natural parent.

By focusing on the natural parent's conduct, as opposed to the interest or welfare of the child, the *Price* rule initially appears to confirm *Petersen's* rejection of the polar star cases. Indeed, Justice Orr, writing for the court in *Price*, stated that the due process issue was to be resolved by balancing only two interests: (1) the natural parent's paramount interest in the custody of the child; and (2) "the state's well-established interest in protecting the welfare of children"—the *parens patriae* power.³¹⁰ The child's own interest and the interest of the members of an intact "psychological" family were not deemed factors in this equation.³¹¹ Yet, *Price's* own formulation

310. *Id.*

311. It can reasonably be argued that due process should also protect the interests of the child and the person in the role of parent in continuing an established psychological or de facto family. Thus, Stacy Price might have argued that he had a constitutionally protected right (under the Due Process Clause of the Fourteenth Amendment) to continue his de facto parent-child relationship with the little girl he thought was his daughter. Dicta in several Supreme Court cases support this argument. For instance, in *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), the Court stated that "a deeply loving and interdependent relationship between an adult and a child in his or her care" depends on "the intimacy of daily association," and that it "may exist even in the absence of blood relationship." *Id.* at 844.

The cases cited in *Price*—*Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); and *Stanley v. Illinois*, 405 U.S. 645 (1972)—also are not inconsistent with the conclusion that constitutional protection (at least at levels beyond termination of parental rights) is dependent not only on the biological connection, but also on the day-to-day, emotional and custodial relationship that a child needs with an adult—the relationship generally referred to as the parental relationship. See generally GOLDSTEIN ET AL., *supra* note 19, at 98 (defining the role in the child's life of the psychological parent—which may or may not be the biological parent). One student commentator has argued that the "parental rights standard" based on biology is unconstitutional because the parental relationship protected by Supreme Court decisions is not based on biology. See Haynie, *supra* note 6, at 744. Likewise, the commentator continued, the "parental presumption standard" is not constitutional because it means that a third party could not "compet[e] equally for custody." *Id.* As a result, the commentator concluded, the best interest standard is "most consistent with constitutional mandate[s]" because it "focus[es] on the child's needs and welfare, [and] considers the interest of all the parties to the dispute." *Id.* See also Thompson, *supra* note 4, at 572

of the test expressly allows for indirect consideration of these other interests if the natural parent's conduct helped to create those other interests. In *Price*, the natural mother, Howard, had left the child with Price, the putative father, thus "creat[ing] the existing family unit" that included only Price and the little girl.³¹² In addition, even though the mother knew Price was not the girl's father, she told the child and others that he was the father.³¹³ The supreme court also thought it was important that there was some dispute as to whether Howard intended to leave the girl with Price temporarily or permanently.³¹⁴ The court reasoned that if Howard had left her daughter with Price without specifying that it was only temporary, she would have "induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated."³¹⁵

Under *Price*, then, the existence of a de facto or psychological parent-child relationship must be considered by the trial court in evaluating the natural parent's paramount right to custody, because in most cases the conduct of the natural parents will have contributed to the creation of the de facto relationship. Such conduct may be inconsistent with the natural parent's paramount interest in custody.³¹⁶ Thus, evidence of the child's interest and welfare, although not the ultimate focus of the *Price* test, is nevertheless relevant to evaluate the parent's conduct.

The legal analysis in *Price* supports the conclusion that the supreme court intends the inconsistent conduct test to allow

("The fourteenth amendment to the United States Constitution has been read by the Court to allow the use of the best-interests standard to award custody to a non-parent, where doing so recognizes a developed adult-child relationship.").

312. 346 N.C. at 83, 484 S.E.2d at 537.

313. *See id.*

314. *See id.*

315. *Id.*

316. *Price* provides some guidance as to when leaving a child in the custody of a third party for an extended period of time is not conduct inconsistent with the parental right. The court indicated that Howard's conduct would not be inconsistent with the parental right if Howard and Price had agreed that Price's custody of the child was for a limited period of time only, Howard's circumstances made such an arrangement necessary, Howard maintained personal contact with the child, and Howard sought to resume custody when she was able. *See id.* at 83-84, 484 S.E.2d at 537. It appears that the basis for this result is not so much the blamelessness of the parent's conduct as the fact that such conduct should not have led to the creation of a de facto parent-child relationship between the custodian and the child. Presumably, if the temporary custody becomes lengthy or of indefinite duration, the development of a de facto parent-child relationship becomes more likely and the natural parent's conduct in allowing such custody is more inconsistent.

consideration of related aspects of the child's interest and welfare. For example, *Price* cited with apparent approval several of the polar star cases, in particular *In re Custody of Hughes* and *In re Gibbons*,³¹⁷ and it summarized the rule that "some facts and circumstances, typically those created by the parent, may warrant abrogation" of the natural parent's custody interest.³¹⁸ *Price* also cited the portions of *Lehr v. Robertson* and *Smith v. Organization of Foster Families for Equality & Reform* that establish the "biology-plus" test providing that the biological link alone does not create substantial constitutional protection of a natural parent's right to contact with his child.³¹⁹ It also quoted a portion of *Quilloin v. Walcott* that suggests the intact family exception (proposed by Judge Greene in *Lambert v. Riddick*)³²⁰ as a limitation on the *Petersen* rule.³²¹ As *Price* noted, *Quilloin* upheld a state's procedure that allowed a stepfather to adopt a child if such adoption was determined to be in the child's best interest with no requirement that the natural father, who opposed the adoption, be found unfit.³²² Finally, *Price* quoted at length from a 1976 opinion of the New York Court of Appeals, *Bennett v. Jeffreys*,³²³ for guidance as to the proper limitations on natural parents' due process right to custody and control of their child's adoption vis-à-vis third parties.³²⁴ *Price* appears to have accepted the *Bennett* court's basic analysis that parental rights can be defeated by "exceptions created by extraordinary circumstances."³²⁵ In such circumstances, the *Bennett* court reasoned, "the best interest of the child has always been regarded as superior to the right of parental custody."³²⁶ The *Bennett* court concluded that the case law "reveals a shifting of emphasis rather than a remaking of substance" to reflect that "[a] child has rights too, some of which are of a constitutional

317. See *id.* at 75, 484 S.E.2d at 532.

318. *Price*, 346 N.C. at 75, 484 S.E.2d at 532.

319. See *id.* at 77, 484 S.E.2d at 533 (citing *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977)).

320. See *supra* notes 217-23 and accompanying text (discussing Judge Greene's interpretation of *Petersen* in *Lambert*).

321. See *id.* at 78, 484 S.E.2d at 534 (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

322. See *id.* (citing *Quilloin*, 434 U.S. at 255).

323. 356 N.E.2d 277 (N.Y. 1976).

324. See *Price*, 346 N.C. at 80-82, 484 S.E.2d at 535-36 (citing *Bennett*, 356 N.E.2d at 281-85).

325. *Id.* at 80-83, 484 S.E.2d at 535-36 (citing *Bennett*, 356 N.E.2d at 281).

326. *Bennett*, 356 N.E.2d at 281.

magnitude."³²⁷

Price thus appears to mark the swing of the legal pendulum from *Petersen* back toward the polar star cases. It remains to be seen, however, whether the conduct test stated in *Price* will accommodate further movement toward the polar star cases, or if the details of the *Price* analysis indicate the supreme court is inclined to expand the conduct test in future cases where consideration of the child's welfare appears to be unduly restricted.³²⁸

The final issue implicated by the facts of *Price*—though not specifically addressed in the opinion—is standing. The custody action was brought by Stacy Price, the biologically unrelated but de facto father.³²⁹ Because he was undeniably unrelated to the little girl, he was an "other person . . . claiming the right to custody" under § 50-13.1.³³⁰ *Petersen* unequivocally stated that "G.S. § 50-13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers."³³¹ Under *Petersen*, a de facto parent is nevertheless a stranger if not biologically related to the child, and such a stranger has no standing under § 50-13.1 to seek custody or visitation. Thus, it is arguable that the courts lacked subject matter jurisdiction to consider Price's claim for custody because he lacked standing to raise the issue. But none of the courts that heard the matter dismissed Price's action. The question remains whether *Price* overruled *Petersen* on the standing issue or whether *Price* was subject to dismissal upon remand to the trial court.³³²

327. *Id.*

328. Excluding *Petersen*, all the cases cited in *Price* are consistent with the polar star cases. The cases indicate that a third party must cite exceptional or unusual circumstances sufficient to show that the child's best interest requires custody in the third party, and that these exceptional or unusual circumstances include the biological parent's unfitness or unsuitability, other conduct by the biological parent that affected the welfare of the child, and other attachments or relationships that affect the welfare of the child.

329. *See Price*, 346 N.C. at 71, 484 S.E.2d at 529.

330. N.C. GEN. STAT. § 50-13.1(a) (1995).

331. *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906.

332. "Standing is a question of subject matter jurisdiction and as such, this Court may raise the issue on its own motion." *Sotelo v. Drew*, 123 N.C. App. 464, 468, 473 S.E.2d 379, 381 (1996) (citing *Union Grove Milling & Mfg. Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478, *aff'd*, 335 N.C. 165, 436 S.E.2d 131 (1993)), *aff'd per curiam*, 345 N.C. 750, 483 S.E.2d 439 (1997). A proper party plaintiff is required to confer jurisdiction on a court because a plaintiff with a personal stake in the outcome of the claim is necessary to create the controversy and sharpen the issues. *See* 59 AM. JUR. 2D *Parties* §§ 1, 19 & 30 (1987); *see also Dunn v. Pate*, 334 N.C. 115, 119-20, 431 S.E.2d 178, 180-81 (1993) (holding that defendants had sufficient interest in the outcome of the controversy to raise a constitutional claim). Thus, standing is an element of subject matter jurisdiction, and

As discussed above, it appears that *Price* modified *Petersen's* definition of the due process right of natural parents to the custody and control of their children. Such a revision of the constitutional right, however, does not affect the *Petersen* ruling on standing because that ruling was based on statutory interpretation of § 50-13.1 rather than on the statute's constitutionality.³³³ Even if a broader reading of § 50-13.1 is now constitutional under *Price*, *Petersen's* conclusion that the legislature did not intend § 50-13.1 to provide standing to biological strangers to bring custody or visitation actions against parents may still be controlling. Yet, it can also be argued that *Petersen's* interpretation of § 50-13.1 is no longer controlling. *Price's* failure to address the standing issue raised by *Petersen* may indicate either that *Petersen's* statutory interpretation of § 50-13.1 was implicitly overruled by *McIntyre v. McIntyre*,³³⁴ or that *Petersen's* statutory interpretation of § 50-13.1 may be binding as to visitation actions but dictum as to custody actions.

In *Petersen*, the supreme court stated that § 50-13.1 was not intended to allow biological strangers to sue for visitation or custody because a contrary conclusion would render purposeless two other statutes that dealt solely with grandparent visitation.³³⁵ While this conclusion itself is questionable,³³⁶ it is presumably the law until the supreme court revisits the matter. After *McIntyre*, however, it may be the law only as applied to visitation actions.

In *McIntyre*, grandparents filed a complaint against the natural parents seeking visitation.³³⁷ The natural parents were married to each other and lived together with their children. No custody action was then pending.³³⁸ The parents moved to dismiss the visitation action on the basis that either § 50-13.1(a) did not give grandparents standing to bring the action for visitation or that, if it did give such standing, § 50-13.1(a) was unconstitutional as applied.³³⁹

parties cannot consent to or waive an absence of subject matter jurisdiction. See *Waters v. McBee*, 244 N.C. 540, 547-48, 94 S.E.2d 640, 645 (1956); *Hart v. Thomasville Motors*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956); 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.15 n.10 (2d ed. 1984) ("Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III." (quoting *Juidice v. Vail*, 430 U.S. 327, 331-32 (1977))).

333. See *Petersen*, 337 N.C. at 405-06, 445 S.E.2d at 905-06.

334. 341 N.C. 629, 461 S.E.2d 745 (1995).

335. See *Petersen*, 337 N.C. at 405-06, 445 S.E.2d at 906.

336. See *supra* notes 199-205.

337. See *McIntyre*, 341 N.C. at 629, 461 S.E.2d at 746.

338. See *id.* at 629, 461 S.E.2d at 747.

339. See *id.* at 630, 461 S.E.2d at 747.

The trial court held that § 50-13.1(a) was unconstitutional as applied, but the supreme court resolved the matter through statutory interpretation.³⁴⁰ As in *Oxendine v. Catawba County Department of Social Services*,³⁴¹ the *McIntyre* court acknowledged the broad grant of standing inherent in the language of § 50-13.1(a), but noted that subsequent, more specific statutes could limit the applicability of the broad grant.³⁴² *McIntyre* expressly determined that § 50-13.2(b1), § 50-13.5(j), and § 50-13.2A were special statutes intended to provide for "one aspect of a determination of legal custody, that of physical custody, here in the form of visitation rights of grandparents," and that these statutes pre-empted the general grant of standing to relatives in § 50-13.1(a).³⁴³ Additionally, *McIntyre* held that the 1989 amendment to § 50-13.1(a) defining "custody" to include "custody or visitation or both" was not meant to expand grandparent visitation beyond what was expressly provided in § 50-13.2(b1), § 50-13.5(j), and § 50-13.2A.³⁴⁴ This analysis is incompatible with the *Petersen* conclusion that § 50-13.2(b1), § 50-13.5(j), and § 50-13.2A are nullities if "other persons" as used in § 50-13.1(a) actually means "other persons."³⁴⁵ Instead, as was the case for § 48-9.1(1) in *Oxendine*, these statutes are intended as specific exceptions to the general grant of standing provided in § 50-13.1.³⁴⁶

340. See *id.* at 629, 634, 461 S.E.2d at 747, 749-50.

341. 303 N.C. 699, 707, 281 S.E.2d 370, 375 (1981) (stating that when § 48-9.1 and § 50-13.1 are construed together, "it is apparent that G.S. 50-13.1 was intended as a broad statute, covering a myriad of situations in which custody disputes are involved, while G.S. 48-9.1 is a narrow statute, applicable only to custody of a minor child surrendered by its natural parents pursuant to G.S. 48-9(a)(1)" and concluding that "G.S. 48-9.1(1) was intended as an exception to the general grant of standing to contest custody set forth in G.S. 50-13.1").

342. See *McIntyre*, 341 N.C. at 634-35, 461 S.E.2d at 749-50.

343. *Id.* at 632, 461 S.E.2d at 748.

344. *Id.* at 634-35, 461 S.E.2d at 747-48 (citing N.C. GEN. STAT. § 50-13.1(a) (1995)).

345. See *Petersen*, 337 N.C. at 405-06, 445 S.E.2d at 906.

346. See *supra* notes 101-02 and accompanying text. For an analogous example, see *Krauss v. Wayne County Department of Social Services*, 347 N.C. 371, 493 S.E.2d 428, (1997), in which a father whose parental rights had been terminated was found to lack standing to bring a custody action as an "other person" pursuant to § 50-13.1(a) because § 7A-289.33 (the termination statute) was intended as an exception to the general grant of standing set forth in § 50-13.1. See *id.* at 375-79, 493 S.E.2d at 431-33. The court in *Krauss* expressly followed the rationale adopted in *Oxendine*—that § 7A-289.3 is, like § 48-9(a)(1), "narrowly drawn to address a specific custody situation and is therefore intended to be an exception to the general grant of standing provided in N.C.G.S. § 50-13.1(a)." *Id.* at 377, 493 S.E.2d at 432. Despite this express holding, *Krauss* affirms *Petersen*'s language that § 50-13.1 "'was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers [because] [s]uch a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children.'" *Id.* at 379,

McIntyre and *Sharp v. Sharp*³⁴⁷ also suggest that the *Petersen* conclusion—that § 50-13.1 was not intended to give standing to strangers bringing visitation or custody actions against biological parents—is dictum with regard to standing to bring custody actions. Traditionally, visitation has been viewed as “but a lesser degree of custody.”³⁴⁸ The court in *McIntyre*, however, found that the legislature intended to treat grandparents’ visitation actions differently than custody actions, despite the 1989 amendment to § 50-13.1(a).³⁴⁹ In *Sharp*, the maternal grandparents brought a custody action under § 50-13.1 against the mother who had custody.³⁵⁰ The mother argued that the *McIntyre* court held that § 50-13.1(a) did not give grandparents standing to sue for visitation when no custody proceeding was ongoing and the minor children’s family was intact, and that *McIntyre* applied to custody cases initiated by grandparents as well.³⁵¹ The trial court agreed and dismissed the suit for lack of subject matter jurisdiction.³⁵²

The North Carolina Court of Appeals reversed, holding that *McIntyre* was “narrowly limited to suits initiated by grandparents for visitation and does not apply to suits for custody” involving allegations that the parents were unfit.³⁵³ The court held that although grandparents could “bring an initial suit for custody,” the grandparents still had to overcome the “‘constitutionally-protected paramount right of parents to custody.’”³⁵⁴ Thus, the court of appeals held that because § 50-13.2(b1), § 50-13.5(j), and § 50-13.2A addressed only visitation actions, § 50-13.1(a) was affected only as it applied to visitation actions and not custody actions.³⁵⁵ *Sharp’s*

493 S.E.2d at 433 (quoting *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906); see also *Kelly v. Blackwell*, 121 N.C. App. 621, 622, 468 S.E.2d 400, 400-01, disc. review denied, 343 N.C. 123, 468 S.E.2d 782 (1996) (holding that a natural parent who has consented to the adoption of his children lacks standing under § 50-13.1(a) to bring thereafter an action against the natural parent and adoptive parent for custody or visitation of the children).

347. 124 N.C. App. 357, 477 S.E.2d 258 (1996).

348. *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978).

349. See *McIntyre*, 341 N.C. at 634-35, 461 S.E.2d at 749.

350. See *Sharp*, 124 N.C. App. at 357-61, 477 S.E.2d at 258-60.

351. See *id.* at 357, 477 S.E.2d at 260.

352. See *id.* at 358, 477 S.E.2d at 259.

353. *Id.* at 360, 477 S.E.2d at 260.

354. *Id.* at 361, 477 S.E.2d at 260 (quoting *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905).

355. See *id.* at 360-61, 363, 477 S.E.2d 260-62; see also *Fisher v. Gaydon*, 124 N.C. App. 442, 444, 477 S.E.2d 251, 253 (1996) (holding that it followed from *McIntyre* that “under the broad grant of section 50-13.1(a), grandparents have standing to seek visitation with their grandchildren when those children are not living in a *McIntyre* ‘intact family’”) (note that this is the case name as it appears in the North Carolina Reporter; it is entitled

conclusion is that the legislature intended for the standing provisions of § 50-13.1 to apply differently depending on whether the cause of action was for visitation or for custody.³⁵⁶ This conclusion, coupled with the precise issue before the *McIntyre* court—whether, once custody was returned to the natural parents, the grandparents had standing to seek visitation under § 50-13.1—indicates that the statement in *Petersen* that § 50-13.1 does not confer standing upon strangers to bring a custody action against natural parents was unnecessary to resolve the visitation issue before the court and, therefore, dictum.

Perhaps *Price*'s failure to address the standing issue for custody actions as raised by *Petersen* is explained by a determination of the supreme court that *McIntyre* implicitly overruled *Petersen*'s statutory interpretation of § 50-13.1. Another possibility is that the conclusion in *Petersen* concerning standing created by § 50-13.1 was dictum as applied to custody actions. Either way, trial courts apparently are free to interpret § 50-13.1 to confer standing to non-related third parties to bring custody actions against parents. At this point, however, both *Petersen* and *McIntyre* suggest that such a statutory grant of standing would violate the natural parent's paramount right to custody and control.³⁵⁷ Although this suggestion may have been true for the paramount right as defined by *Petersen*, the relaxed paramount interest as defined by *Price* is more accommodating.

If § 50-13.1 is interpreted to confer standing on any unrelated third party to bring a custody action against a natural parent,³⁵⁸ a trial court will nevertheless lack subject matter jurisdiction to proceed unless the complaint alleges facts sufficient to overcome the natural parent's paramount right to custody.³⁵⁹ Under *Petersen*, such facts

Fisher v. Fisher in the South Eastern Reporter) *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997).

356. See *Sharp*, 124 N.C. App. at 360, 477 S.E.2d at 260.

357. See *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906; *McIntyre*, 341 N.C. at 634-35, 461 S.E.2d at 749-50.

358. Under this broad interpretation of § 50-13.1, biological strangers to the child would have standing to bring custody actions, but they would be unlikely to prevail on the merits of the action without a strong factual connection to the child which is directly relevant to the child's interests and welfare. They also might have difficulty making the initial showing of the natural parent's inconsistent conduct.

359. The court in *McIntyre* held that under § 50-13.1(a) a trial court has jurisdiction in custody matters when the paramount right of parents can be overcome by unfitness, abandonment, neglect, or death. See *McIntyre*, 341 N.C. at 632, 461 S.E.2d at 748 (citing *Oxendine v. Catawba County Dep't of Soc. Servs.*, 303 N.C. 699, 706, 281 S.E.2d 370, 374 (1981)); see also *Sharp*, 124 N.C. App. at 363, 477 S.E.2d at 261-62 (stating that because the grandparents claimed unfitness on the part of the parents, the district court had jurisdiction to hold a hearing).

had to relate to the natural parent's unfitness or neglect. Under *Price*, however, the facts sufficient to overcome the paramount right must relate to the parent's conduct and should include allegations concerning the child's interest and welfare insofar as the parent's conduct contributed to these matters.³⁶⁰ As discussed earlier, a third-party plaintiff has stated a claim sufficient to confer subject matter jurisdiction under *Price* if he alleges that he has had custody of the child for a significant period of time, that he is a de facto or psychological parent, that his special relationship with the child was caused by conduct of the natural parent that was inconsistent with her paramount interest in custody, and that the best interest of the child requires custody by the third party.³⁶¹ Such an interpretation of § 50-13.1 would appear under *Price* to protect adequately the due process interest of the natural parent and would be constitutional—even when applied to situations in which the defendants are natural parents in an intact family. Otherwise, the matter would not proceed unless the plaintiff could make sufficient allegations of inconsistent conduct by the parents.³⁶²

VI. THIRD-PARTY PROCEEDINGS AFTER *PRICE*

Consider the following hypothetical custody action filed subsequent to *Price*. The plaintiff, Alice, filed a custody action against Gertrude for the custody of the minor child, Scott. The complaint alleges that Scott was born in June 1989 to the unmarried

360. See *supra* notes 294-97 and accompanying text.

361. See *supra* notes 282-358 and accompanying text.

362. This approach should also satisfy the general prudential concern that standing requires a party to have a personal stake in the outcome of the proceeding (i.e., a third party ought not to have standing to initiate a custody proceeding if the third party has no conceivable claim for custody). See *supra* note 332; see also OR. REV. STAT. § 109.119 (1) & (5)(a) (1997) (granting standing to seek custody or visitation to anyone, related or not, "who has established emotional ties creating a child-parent relationship"; defining a child-parent relationship as one that meets "the child's psychological needs for a parent," in addition to meeting physical needs; establishing minimum time requirements; and establishing that the person must have physical custody of the child or live in the same household); *In re Marriage of Sorensen*, 906 P.2d 838, 841 (Or. Ct. App. 1995) (stating that even where the child is in the custody of two fit biological parents, a third party may allege that he or she "has established a psychological 'child-parent relationship'"); Bryce Levine, Note, *Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315 (1996) (arguing that stepparents found to be in loco parentis with their stepchildren should have the right to petition the court for custody during a dissolution proceeding); cf. UNIF. MARRIAGE AND DIVORCE ACT § 401(d)(2), 9A U.L.A. 147, 550 (1987) (providing that if the biological parents have physical custody of the child, a non-parent lacks standing to seek custody of the child).

Gertrude and an unknown father. In early 1990, Alice and Gertrude met and became friends. At that time, Alice had custody of Ernest, her two-year-old child from a previous marriage.

In June 1990, Gertrude and Scott moved in with Alice and Ernest. Alice, Gertrude, Ernest, and Scott lived together as a family in Morganton until June 1995, when Gertrude moved to Charlotte to accept a particularly lucrative job offer and to be closer to her ailing parents. Alice and Gertrude agreed that the children would stay with Alice in Morganton for the 1995-96 school year and stay with Gertrude during the summer of 1996. Because the health problems of Gertrude's parents required her time and attention, the children did not spend that summer with Gertrude but remained with Alice for the summer and for the following school year. Gertrude told Alice that she wanted the children to stay with her for the summer of 1997 but that her travel schedule for work would not allow it. The children remained with Alice and began school in the fall of 1997.

After visiting with the family in Morganton during Thanksgiving, 1997, Gertrude returned to Charlotte with eight-year-old Scott against the wishes of Alice. Gertrude enrolled Scott in school in Charlotte, and Alice filed a custody action. Alice admits that Gertrude is fit to have custody, but that her job requires extensive travel and that Scott will be left in the care of a babysitter for long periods of time. Alice also alleges that it is in Scott's best interest to remain in the de facto family unit which exists in Alice's home. Alice alleges that Gertrude's conduct is inconsistent with her interest in the care and custody of Scott and that such conduct created the de facto family within which Scott's best interest requires that he stay.

A. *Standing*

Should the trial judge grant Gertrude's motion to dismiss Alice's custody action based upon Alice's lack of standing as a biological stranger? The trial judge should deny Gertrude's motion to dismiss. The contrary language in *Petersen*³⁶³ is dictum and in any event was implicitly discredited by *McIntyre*³⁶⁴ and *Price*.³⁶⁵ As in *Price*,³⁶⁶ Alice

363. See *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906.

364. See *McIntyre*, 341 N.C. at 634-35, 461 S.E.2d at 749-50; *supra* notes 335-46 and accompanying text.

365. See *Price*, 346 N.C. at 79, 82-84, 484 S.E.2d at 535-57; *supra* notes 299-332 and accompanying text.

366. In *Price*, the plaintiff was the psychological father because he was an equal caretaker—and at times, the primary caretaker—of the child since birth, both he and the child thought he was her father, and the child's mother represented that he was the father.

is a psychological parent whose special relationship with the child was created by the allegedly inconsistent conduct of the defendant mother. If Alice lacks standing to bring this custody action, there is no one to bring the action that *Price* expressly allows. *Price* implicitly holds that § 50-13.1 does not exclude all biological strangers from its grant of standing to bring custody actions.³⁶⁷

B. Conduct Inconsistent with the Personal Interest

Should the trial judge grant Gertrude's motion to dismiss Alice's custody action based on Alice's failure to demonstrate conduct inconsistent with Gertrude's paramount interest in the custody and

See supra notes 281-85 and accompanying text. The mother's conduct in representing that the plaintiff was the father and allowing the plaintiff to have primary custody even when she moved to another city created the special relationship between the plaintiff and the child. *See supra* notes 281-98 and accompanying text.

367. *See Price*, 346 N.C. at 79, 82-84, 484 S.E.2d at 535-57. In an opinion filed as this article was going to print, the North Carolina Court of Appeals held that "a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing" under § 50-13.1. *See Ellison v. Ramos*, 1998 WL 436057, No. COA97-1417, at *4 (N.C. App. Aug. 4, 1998). In *Ellison*, the plaintiff sought custody of the minor child of Ramos, the biological father. The plaintiff, who was not the biological mother, alleged that she and Ramos had never married, but that they were "intimate companions" for five years, and that during these five years, the plaintiff had "mothered the child." *Id.* at *1. The child's biological mother had been in a comatose and vegetative state since the child's birth. *See id.* The plaintiff alleged that after the parties separated, the child lived with the plaintiff until Ramos removed her from the plaintiff's home and took the child to Puerto Rico to live with her grandparents. *See id.* The plaintiff also alleged that the child was a Type I diabetic who was not receiving proper care, whose grandparents did not know how to provide the appropriate care for a diabetic child, and who had to be "hospitalized in Puerto Rico as a result of not receiving proper care." *Id.* The trial court dismissed the complaint as a matter of law, holding that the plaintiff lacked standing to proceed under the holdings in *Petersen* and *Price*. *See id.* at *2. The court of appeals reversed the trial court, holding that the plaintiff had sufficiently alleged "a relationship in the nature of a parent-child relationship" to give her standing to bring the action. *See id.* at *4. The court noted that some lesser relationship also may suffice to give a third party standing as an "other person" under § 50-13.1(a) to seek custody, but it declined to answer that question "given the relative newness of the application of the standing doctrine in this area ... [and the] potentially vast number of unexplored fact patterns which could underlie such cases." *Id.*

Although the *Ellison* standard presents a workable and arguably constitutional test, *see supra* notes 358-63, its analysis is superficial. The court in *Ellison* based its holding in part on its conclusion that *Petersen* used the term "stranger" to mean a social stranger, when it is clear that the Petersens were strangers to the child *only* in the biological sense. *See Ellison*, 1998 WL 436057, at *4. The *Ellison* court also asserted that the absence of discussion of the standing issue in *Price* "would ... indicate that if the issue had come up the relationship would have been sufficient to support standing." *Id.* Matters of subject matter jurisdiction, like standing, can be raised at any time, however, and are not waived or held to be resolved conclusively simply because a court proceeded as if it had subject matter jurisdiction.

control of Scott? As in *Price*,³⁶⁸ Gertrude's conduct created, or at least allowed, the psychological familial relationships that developed between Scott, Alice, and Ernest. The courts apparently will presume the strength or significance of these relationships from the length of time that the de facto family has existed.³⁶⁹ Such allegations should be sufficient under *Price* to give the court subject matter jurisdiction and to entitle Alice to a hearing.

C. *Evidence of Parental Conduct/Bifurcation*

Assuming the custody action survives the motion to dismiss, how should the judge consider the evidence that may be presented on standing and on issues involving the conduct of the parent and the best interest of the child? The issues are whether the trial judge should bifurcate the hearing or simply hear all evidence at once. If the court hears all the evidence together, including evidence related to the child's interest and welfare, then the court would, in sequential order, determine Alice's standing, the court's subject matter jurisdiction, whether the mother's conduct was inconsistent with her parental paramount interest, and the best interest of the child.

Although the trial court must bear in mind each stage in the process, it is not expected that district judges will bifurcate the hearing or that the appellate courts will require such bifurcation. Evidence of the de facto parent-child relationship is relevant and, indeed, is probably required to establish standing, subject matter jurisdiction, and ultimately the best interest of the child. Judicial economy would be poorly served by hearing similar, if not identical, evidence in three separate stages. If the pleading contains the proper allegations, a full best interest hearing seems almost inevitable, but the trial court will need to take special care in drafting its judgment to resolve each stage properly and in the proper order. This practice, bifurcating the decisionmaking process but not the hearing, is already the standard procedure in termination of parental rights proceedings.³⁷⁰

368. See *supra* notes 281-85 and accompanying text.

369. See *supra* notes 311-15 and accompanying text (discussing *Price*).

370. In *In re White*, 81 N.C. App. 82, 344 S.E.2d 36 (1986), the court of appeals held that although the courts are required to apply different evidentiary standards at each of the two stages of adjudication and disposition in a termination of parental rights proceeding, there is no requirement that the courts conduct the stages at separate hearings. See *id.* at 85, 344 S.E.2d at 38. The court stated that because proceedings regarding parental rights are decided by a judge, the judge should "consider the evidence in light of the applicable legal standard and . . . determine whether grounds for termination exist before proceeding to consider evidence relevant only to the

D. Best Interest Test Under the Polar Star Cases

Under the polar star line of cases, would the North Carolina Supreme Court uphold the trial court's conclusion that the best interest of Scott required that he return to the custody of Alice? It is arguable that these facts would permit but not compel a trial court to conclude that the best interest of Scott required that he be in Alice's custody. The polar star cases have few absolute rules, but *In re Custody of Hughes*³⁷¹ and *In re Gibbons*³⁷² appear to provide support.

E. Price Analysis

Under *Price*, would the North Carolina Supreme Court uphold the trial court's conclusion that Gertrude's conduct was sufficient to waive her paramount right to custody and that Scott's best interest would be served by returning him to Alice's custody? Much would depend on the precise evidence produced at the hearing. Such evidence could include more details on why Gertrude moved to Charlotte, what kind of relationship Gertrude maintained with Scott after she moved out of the family home, the strength of Scott's attachment to Alice and Ernest, and the precise understanding of Gertrude and Alice as to the care and custody of Scott. *Price* seems to indicate that it is the result of Gertrude's conduct and not the motivation for such conduct that is significant.³⁷³ In other words, Gertrude's conduct is inconsistent if it created the de facto family regardless of whether her conduct was motivated by irresponsibility or by the very best of motives, such as caring for ill parents and providing more for her family by pursuing a better job. The trial court appears to be left with significant discretion to evaluate parental conduct and motivation; however, as in the polar star cases, the appellate court may decide in certain cases that the trial court made the wrong decision. The best interest test is notorious for the vast reservoir of unbridled discretion it bestows on the trial court, often to the discomfort of the appellate bench.³⁷⁴

dispositional stage." *Id.*

371. 254 N.C. 434, 119 S.E.2d 189 (1961); see *supra* notes 64-72 and accompanying text.

372. 247 N.C. 273, 101 S.E.2d 16 (1957); see *supra* notes 55-63 and accompanying text.

373. See *Price*, 346 N.C. at 83, 484 S.E.2d at 537.

374. Our legal system is sometimes viewed as inherently ill-suited to address and resolve certain custody matters. The legal system's focus on appellate review of trial court proceedings to determine the correct procedures and the correct test or considerations to be applied may result in good law but can also ignore the child's sense of time and basic need for continuity of relationships and surroundings. See Resnik, *supra* note 168, at 364 (noting that the legal system is "woefully inadequate to handle the

Finally, *Price's* focus on the subjective agreement between the parties as to the length or temporary nature of the custody with the de facto parent³⁷⁵ is an important variable whose significance remains to be discerned. Will a specific agreement for less than a certain amount of time absolutely protect a natural parent's custodial interest, or will it simply be a factor to be balanced along with the other circumstances? Will such a rule only apply for custodial agreements of six months or less? It is expected that the trial courts' exercise of reasonable discretion will be upheld so long as the focus remains on the conduct of the parent inconsistent with parental responsibilities.

VII. CONCLUSION

In custody disputes between natural parents and unrelated third parties, applying a pure best interest test³⁷⁶ and conferring standing on everyone may not be good policy and probably violates the constitution as applied to some cases. But the General Assembly properly determines policy and arguably has not placed any limits on the standing of unrelated third parties to bring custody or visitation actions, and it has decreed that a pure best interest test will apply.³⁷⁷ If these statutes are unconstitutional as applied in certain situations, it is the judiciary's job to so determine. The appellate courts,

contentious issue of unwed fathers' rights with the requisite rapidity to avoid endangering the children around whom the controversies centered").

375. See *Price*, 346 N.C. at 83, 484 S.E.2d at 537.

376. Appellate judges may be uncomfortable with their role of reviewing best interest decisions only under the abuse of discretion standard. The courts—both trial and appellate—are more comfortable applying clear rules and presumptions, and the true best interest test, with its lack of clear limits on the judge's exercise of discretion, can indeed appear as the kind of social engineering that judges traditionally loathe. See *supra* note 4 (discussing social engineering and the Baby Jessica case). Commentators critical of the best interest test point out that the standard allows "a disturbing erosion of critical due process protections that serve the interests of both parents and children" and that "[t]he lack of a uniform understanding of the term 'best interests'" and the resulting uncertainty "raise[] significant concerns about 'social engineering.'" Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. OF GENDER L. & POL'Y 63, 66 (1995). They also conclude that these ambiguities will most affect the "families whose racial and economic status already place them at great risk of destructive state intervention." *Id.* Most significantly, they say, the best interest standard does not protect children from "the conflicting interests of unrelated adults," but that "it simply serves in practice to shift responsibility for making decisions about children among adults." *Id.*; see also Elizabeth P. Miller, Note, *DeBoer v. Schmidt and Twigg v. Mays: Does the "Best Interests of the Child" Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497, 504, 509 (1994) (noting the confusion and inconsistency caused by the vagueness of the best interest standard).

377. See N.C. GEN. STAT. § 50-13.2(a) (Supp. 1997).

however, are properly bound by the need to interpret any common law rights in light of subsequent legislation, to interpret legislation in light of the clear language chosen by the legislature, and to address constitutional conflicts when necessary. Shortcutting or confusing this process can result in some unintended yet heartrending consequences that can be difficult to remedy or even address if the analysis is disjointed or illogical.

For example, if unrelated third parties *never* have standing to bring custody actions, then otherwise valid custody actions under the *Price* standard may remain unfiled for lack of anyone to bring the action. In addition, if a natural parent is always entitled to custody if fit, then the powerful emotional ties present in a de facto family, acknowledged by the United States Supreme Court as legitimate factors in due process issues,³⁷⁸ count for nothing. Such dogmatic rules are too simple and absolute and are not compelled by the common law, the North Carolina General Statutes, or the United States Constitution. Psychological parents and de facto families exist. It is not good policy—and it is not the policy of North Carolina—to ignore these established but non-biological relationships. North Carolina law must provide for consideration and protection of these de facto relationships.

Price's modification of the *Petersen* rules may or may not prove sufficient. *Price* allows consideration, albeit indirect, of the existence of these de facto relationships, although the focus is exclusively on the natural parent's conduct rather than the interests of the de facto parent and the child. This focus may, in some cases, unduly limit consideration of the de facto relationship. Whether *Price* is sufficiently flexible will be determined by how it is applied by the trial courts and interpreted by the appellate courts. It will also be critical, of course, if *Price* is viewed as implicitly overruling the *Petersen* language regarding standing of unrelated third parties under § 50-13.1. Again, the trial courts will need to address this issue long before the appellate courts resolve the matter. Given the uncertainty but clear importance of the standing issue, it might be advisable for the General Assembly to consider enacting a new standing statute, perhaps along the lines of other states' statutes that expressly give standing to defined psychological parents³⁷⁹ or that give standing to any person who has had custody of the child for a continuous six-

378. See, e.g., *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 836, 844 (1977).

379. See *supra* note 362 (discussing Oregon statute).

month period.³⁸⁰

In addition to these matters left unclear by *Price* and *Petersen*, North Carolina attorneys should consider approaches that were not attempted in *Price* and *Petersen* but nevertheless appear viable. For example, equitable principles appear applicable to third-party custody disputes and might be applied to estop a natural parent from denying standing, denying the de facto relationship,³⁸¹ or asserting a paramount right to custody.³⁸² Equitable parenthood may be a legal

380. Texas statutes provide that an original suit may be filed by "a person who has had actual care, control and possession of the child for not less than six months preceding the filing of the petition." See TEX. FAM. CODE ANN. § 102.003(9) (West 1996).

381. For example, in *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E.2d 659 (1984), a suit between a husband and wife, the husband was equitably estopped from challenging the validity of an admittedly invalid foreign divorce. See *id.* at 535, 311 S.E.2d at 668. The court acknowledged that by estopping the husband from questioning the divorce's validity, it was, in effect "validating a marriage which G.S. § 51-3 declares a nullity." *Id.* at 536, 311 S.E.2d at 668. But, the court explained that "[t]here is a difference . . . between declaring a marriage valid and preventing one from asserting its invalidity." *Id.* The theory of equitable estoppel, the court stated, is not to invalidate a legal divorce or to validate an invalid marriage, "but rather, to prevent one from disrupting family relations by allowing one to avoid obligations as a spouse." *Id.* Whether equitable estoppel should apply depends on events surrounding the divorce and is a question of the "personal disability of the party attacking the divorce judgment; it is not a function of the divorce decree itself." *Id.* (citing Homer Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 YALE L.J. 45, 47 (1960)). See also Ward v. Ward, 116 N.C. App. 643, 645, 448 S.E.2d 862, 863-64 (1994) (declaring that the plaintiff had waived his right to challenge the judges' actions on the ground of subject matter jurisdiction because he had failed to raise the challenge in earlier appeals and had accepted the benefits of those judgments).

382. Constitutional rights generally and due process rights specifically can be waived. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) (discussing waiver of constitutional rights in civil and criminal contexts). Compare *In re Baby Girl Dockery*, 495 S.E.2d 417 (1998), in which the North Carolina Court of Appeals held that an unmarried father's right to custody of his child was constitutionally denied pursuant to the provisions of former N.C. GEN. STAT. § 48-6(a) (1984) because of the father's failure to acknowledge paternity, to legitimate the child, or to provide substantial financial support or consistent care to the child prior to the filing of the adoption petition. See *id.* at 419-20. The court's holding was made despite facts that showed that the father had no knowledge that the mother—whom he had dated only briefly—had become pregnant; that upon learning of the birth, and within six weeks of the child's birth, the father filed an action seeking to establish his paternity of the child and requesting custody; and that upon learning that an adoption petition had been filed one week earlier, the father moved to intervene in the adoption proceeding. See *id.* at 418-19. The *Dockery* court did not address the paramount right to custody discussed in *Petersen* and *Price*, but instead cited *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), *Lehr v. Robertson*, 463 U.S. 248 (1983), and *Caban v. Mohammed*, 441 U.S. 380 (1979), for the proposition that although the link between a parent and a child is a fundamental right worthy of the highest degree of scrutiny, the mere biological link alone—without an actual relationship with the child—does not merit equivalent constitutional protection. See *Dockery*, 495 S.E.2d at 419-21. The unexamined but crucial issues in *Dockery* are whether an unwed biological father must be allowed some meaningful opportunity or time-period within which to establish an

concept worth exploring in North Carolina.

A second approach is based on the proposition that the due process right of privacy protects not only the natural parent but also the child and the de facto family. United States Supreme Court opinions are not inconsistent with finding constitutional protection of established de facto family relationships.³⁸³ Thus, the powerful constitutional right of a natural parent to custody of her child would control if the natural family was intact. The parent's constitutional rights, however, would be subject to the constitutional rights of the child and psychological parent if the natural family was not intact and if a de facto family had been created.

Custody disputes between a natural parent and a third party will always be among the most difficult matters heard by district court judges. For the most part, intact families should not be subjected to defending their familial life in court simply upon a third party's allegation that different custodial or visitation decisions would be in the child's best interest. Absent more specific and more serious allegations, it seems reasonable that continued custody in the intact natural family is in the child's best interest.

When a third party has had custody of the child for a significant time and a significant de facto parent-child relationship has allegedly developed, there must be some doubt as to where the best interest of that child lies. *Price* may well be interpreted to allow an award of custody to de facto parents, but if it is not, other unexplored legal theories may allow what *Price* would not. In any event, in such cases it would not appear to offend due process if the best interest of the child once more became the polar star to guide the judge otherwise adrift on custody seas under a lowering sky.

actual relationship with the child, whether the father's failure to establish this relationship waives whatever constitutional right he had to establish a relationship, and, on the facts of the case, whether the father waived his right to establish the relationship when, although he initially was not informed of the pregnancy or birth, he nevertheless filed an action for custody of the child within six weeks of her birth.

A result similar to *Dockery* might be required in Utah, where state statutes provide that "[a]n unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur, and has a duty to protect his own rights and interests." UTAH CODE ANN. § 78-30-4.13(1) (1996 & Supp. 1997).

383. See *supra* notes 161-79, 311 and accompanying text (discussing United States Supreme Court cases that support protection of established de facto families).

