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AGUILAR V. AGUILAR AND THIRD-PARTY CUSTODY DETERMINATIONS: EXAMINING THE DEFINITION OF “PARENT” FROM THE EYES OF THE CHILD

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In Aguilar v. Aguilar, the South Dakota Supreme Court affirmed the trial court’s award of custody of a minor child to the child’s aunt over the objections of the biological father. Using the authority granted in South Dakota Codified Law sections 25-5-29 and 30, the court found that extraordinary circumstances were present such that the child should continue to be raised by her aunt. The court’s decision recognizes that in some situations, it is in the child’s best interests to have custody granted to a third party who has taken on a parenting role and supported the child physically and emotionally for a substantial period of time in the child’s life. This recognition will continue to gain importance as it becomes increasingly common for children to be raised by same-sex couples, step-parents, individuals who procreate using artificial reproduction, grandparents, and significant others. These nurturing individuals, referred to as psychological parents, should not become barred from a child’s life without consideration of the child’s best interests. If a parental relationship has formed between a third party and a child, the child is at risk of serious harm should the relationship be broken. South Dakota laws allow third-parties’ claims for custody or visitation to be legitimized and protects the relationship between caretaker and child. When extraordinary circumstances are present in a child custody proceeding, the best interests of the child should be evaluated in conjunction with the role the psychological parent has played in the child’s life.

I. INTRODUCTION

“A biological parent should not be deemed the proper custodian simply because they are a biological parent; rather, we must place our emphasis on what is best for the child.”¹ This quote by the Honorable Justice Amundson in the 2002 South Dakota Supreme Court case Meldrum v. Novotny recognizes the need for child custody determinations to adjust to contemporary society.² The nuclear family—a mother, father, and dependent children—are no longer the only form

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² Id.
that families take on.\(^3\) It is becoming increasingly common for children to be raised by individuals with whom they have no biological or legal tie.\(^4\) The nuclear family has traditionally taken preference over nontraditional families within the legal system.\(^5\) Whereas nuclear families receive legal protections and rights such as child support obligations, custody protections, inheritance preferences, tax advantages, and other social benefits, non-nuclear families do not.\(^6\) The United States Supreme Court has declared that biological ties between parents and children do not automatically receive constitutional protections, yet biological and legal ties still often trump psychological ties when custody becomes disputed among nontraditional families.\(^7\) In his dissent in the United States Supreme Court case *Michael H. v. Gerald D.*,\(^8\) the Honorable Justice Brennan articulated that “[w]e are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies.”\(^9\) As families change, the law must change with them.\(^10\)

As a response to changing family dynamics, many states have enacted de facto parenthood statutes.\(^11\) As defined by the American Law Institute, a de facto

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3. See Moore v. City of East Cleveland, 431 U.S. 494, 505 (1977) (describing that families take on new forms due to “choice, necessity, or a sense of family responsibility”).

4. See infra Part III.C (discussing various forms that families take on).

5. See MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 1 (1994) (explaining that the law’s emphasis on nuclear families prevents nontraditional families from legal recognition and protection).

6. Id. See also Moore, 431 U.S. at 502 (stating that the state cannot cut “off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family”).

7. Lehr v. Robertson, 463 U.S. 248, 261 (1983) (“[T]he mere existence of a biological link does not merit equivalent constitutional protection.”). Heartache can ensue when the legal parent is granted custody over the psychological parent. Janice M. v. Margaret K., 948 A.2d 73, 93 (Md. 2008). For example, in *Janice M. v. Margaret K.*, same-sex couple Janice and Margaret wanted to start a family. *Id.* at 75. They adopted seven-year-old Maya from India. Brief of Petitioner/Cross-Respondent at 5, Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) (No. 122). Knowing that India would not allow a same-sex couple to adopt, only Janice’s name was listed on the adoption documents as the legal parent. Brief for Appellee/Cross-Appellant at 4, Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) (No. 122). Over the next six years, Maya developed a close and loving relationship with both of her mothers. *Id.* at 5. When Janice and Margaret separated, Janice retained custody of Maya and isolated Maya from Margaret. *Janice M.*, 948 A.2d at 76. Margaret filed a complaint for custody or visitation of Maya. *Id.* The Supreme Court of Maryland held that Margaret could not be granted visitation rights unless either Janice was found to be an unfit parent or extraordinary circumstances were present to overcome Janice’s parental presumption. *Id.* at 93. It should be noted that *Janice M.* was overturned eight years later. Conover v. Conover, 146 A.3d 433, 437 (Md. 2016). In *Conover v. Conover*, same-sex couple Michelle and Brittany Conover desired to start a family together and agreed that Brittany would use artificial insemination to conceive their child. *Id.* Only Brittany was listed as a parent on the birth certificate. *Id.* When their relationship deteriorated a year later, Michelle petitioned the court to have custody or visitation rights to their child. *Id.* The highest court of Maryland held that “de facto parenthood is a viable means to establish standing to contest custody or visitation” without showing parental unfitness or exceptional circumstances, thereby reversing *Janice M.* *Id.* at 437.


9. *Id.* at 141 (Brennan, J., dissenting).

10. See MAHONEY, supra note 5, at 1 (stating that the emphasis on traditional families has prevented nontraditional families from having protections that the law affords).

11. CAL. FAM. CODE § 3041 (West 2017); CAL. RULES OF COURT CODE §§ 5.502(10), 5.534(a) (West 2017); ME. REV. STAT. ANN. tit. 19(A), § 1891 (2017). Maine codified its de facto statute following the case of *Pitts v. Moore*, decided two years prior to the codification. Pitts v. Moore, 2014 ME 59, 90 A.3d 1169. In this case, Matthew Pitts was listed on the child’s birth certificate, though he and the mother
parent is an individual, other than a legal parent, who for more than two years has lived with the child and regularly cared for the child in the capacity of a parent, either because the legal parent agreed to the arrangement or because the legal parent was not able to perform parental duties. Recognition of a de facto parent allows an individual who does not have any legal or biological ties to the child to nevertheless retain visitation or custody rights when it is in the best interests of the child. De facto parents are synonymously referred to as psychological parents because emphasis is placed on the child’s psychological well-being when custody claims become controverted between biological and non-biological parents. As described by the Supreme Court of New Jersey, 

At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest . . . lies in the emotional bonds that develop between family members as a result of shared daily life.

South Dakota has not enacted a de facto parenthood statute, but the legislature acknowledged the need for change in 2002 when it enacted a set of laws allowing third parties to petition for custody of children under certain circumstances. Under South Dakota Codified Law section 25-5-29, a third party can intervene in a proceeding for custody of a child that he or she has cared for and formed a parental bond with. The statute reiterates that it is still assumed that the legal parent is the best parent for the child, but allows challengers to rebut the presumption. As rebuttal evidence, the challenger can show proof that the parent neglected the child, the parent surrendered parental rights, the parent abdicated

knew that the child was not his. Id. ¶¶ 3-4, 90 A.3d at 1172. For the first year of the child’s life, Matthew provided financial, physical, and emotional support for the child. Id. ¶ 5, 90 A.3d at 1172. The Supreme Judicial Court of Maine allowed Matthew to claim de facto status if he could demonstrate that he had undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life and show that exceptional circumstances existed which warranted intrusion into the parent’s rights. Id. ¶ 27, 90 A.3d at 1179. As part of the exceptional circumstances showing, the court must be able to conclude that “the child’s life would be substantially and negatively affected if the person who has undertaken a permanent, unequivocal, committed, and responsible parental role in that child’s life is removed from that role.” Id. ¶ 29, 90 A.3d at 1181. Some courts have refused to adopt a psychological parent or de facto parent doctrine without the legislature creating one first. See, e.g., Jones v. Barlow, 2007 UT 20, ¶ 42, 154 P.3d 808, 819 (declining “to adopt a de facto parent doctrine because it would be an improper usurpation of legislative authority and would contradict both common law principles and Utah statutory law” despite sympathizing with the petitioning third-party).

13. See V.C. v. M.J.B., 748 A.2d 539, 543-44, 555 (N.J. 2000) (allowing the lesbian partner of the birth mother to have visitation rights with the child after taking on a parental role for over two years).
14. See Lindsay J. Rohlf, Note, The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define “Parent”? 94 IOWA L. REV. 691, 698-700 (2009) (discussing the definitions of psychological parent and de facto parent and concluding that despite their nuances, the basic principles of each are the same).
15. V.C., 748 A.2d at 550.
18. Id.
rights, or extraordinary circumstances exist which warrant granting custody to the challenger.\textsuperscript{19} Section 25-5-30 lists ten factors which exhibit extraordinary circumstances.\textsuperscript{20} By showing extraordinary circumstances, the child’s psychological parent can successfully gain custody or visitation rights over the child.\textsuperscript{21}

In 2016, the South Dakota Supreme Court applied these statutes in \textit{Aguilar v. Aguilar}.\textsuperscript{22} The court was asked to decide whether extraordinary circumstances were present such that custody of the child at issue should be granted to the child’s aunt, rather than her biological father.\textsuperscript{23} The child had never lived with her father: he was in and out of prison in Arizona since she was born, and she had lived with her aunt in South Dakota since less than six months of age.\textsuperscript{24} Whereas her father had never provided for the child’s needs, her aunt had provided love and guidance, food and clothing, and a nurturing, stable, and drug-free home.\textsuperscript{25} The court ruled that the aunt should have custody of the child because she had been the child’s primary caregiver, an extraordinary circumstance that overcame the father’s presumptive rights.\textsuperscript{26}

This casenote argues that third parties who have become psychological parents to children they have nurtured and cared for should use South Dakota Codified Law sections 25-5-29 and 30 to gain custody or visitation rights.\textsuperscript{27} First, this casenote describes the facts and procedure of \textit{Aguilar v. Aguilar}.\textsuperscript{28} Next, it discusses the evolution of third-party child custody determinations in South Dakota and the constitutionality of those decisions.\textsuperscript{29} The background also assesses the need for children to maintain continuity of care with the person whom they have formed a parent-child relationship with.\textsuperscript{30} Finally, this casenote will conclude that extraordinary circumstances should legitimize psychological parents’ claims and examine the best interests of the child in conjunction with extraordinary circumstances.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{19} Id.
\item \textsuperscript{21} See infra Part II (describing the background of \textit{Aguilar} and the South Dakota Supreme Court’s award of custody to the child’s psychological parent, her aunt).
\item \textsuperscript{22} 2016 SD 20, ¶ 11, 877 N.W.2d 333, 336-37.
\item \textsuperscript{23} Id. ¶¶ 5, 12, 877 N.W.2d at 335, 337-38.
\item \textsuperscript{24} Id. ¶¶ 3-5, 877 N.W.2d at 335; Findings of Fact and Conclusions of Law at 9, Aguilar v. Aguilar, 2016 SD 20, 877 N.W.2d 333 (No. Div. 14-52) [hereinafter Findings of Fact].
\item \textsuperscript{25} \\textit{Aguilar}, 2016 SD 20, ¶ 22, 877 N.W.2d at 339-40 (citing Findings of Fact, \textit{supra} note 24, at 6).
\item \textsuperscript{26} Id. ¶ 23, 877 N.W.2d at 340.
\item \textsuperscript{27} See infra Part IV.C (showing that if extraordinary circumstances are present, then many of the best interests of the child factors can be met as well).
\item \textsuperscript{28} See infra Part II (stating the facts and procedure of \textit{Aguilar v. Aguilar}).
\item \textsuperscript{29} See infra Part III (detailing various ways child custody determinations are made).
\item \textsuperscript{30} See infra Part III.C (citing statistics showing the variety of family forms and analyzing the effects of family dissolution upon children).
\item \textsuperscript{31} See infra Part IV.C (comparing factors considered in the best interests of the child to factors included in extraordinary circumstances).
\end{itemize}
II. FACTS AND PROCEDURE

Antonio ("Tony") and Brittany Aguilar were married in Tucson, Arizona, in the summer of 2010. Both Brittany and Tony were nineteen years old at the time of her birth. Neither were gainfully employed—Tony sold drugs to support Brittany and their child—and both were heroin users.

Tony grew up in Tucson and Phoenix, sometimes residing with his grandmother and sometimes living in a group home. From the age of twelve, he lived on his own and sold drugs as a member of the Vista Bloods gang. His criminal background included convictions for possession, consumption, and distribution of controlled substances, as well as multiple aggravated assault convictions. On April 14, 2011, at the age of nineteen, he was convicted of a class-two felony for the sale of cocaine. He was placed in an intensive probation program, but as a result of a failed drug test, was placed in a minimum security jail. After a time, he was placed on work furlough.

In October 2011, Tony was allowed to return home to obtain some of his belongings. While at home, he noticed that Brittany did not look healthy. Concerned for M.A.'s care, Tony called Brittany's mom, Koree Hamilton, and requested that she take M.A. back to South Dakota with her. Koree came to Arizona with Tosha Smith, Koree's daughter, and brought M.A. to Sioux Falls to live with Tosha. Brittany also returned to Sioux Falls with her mother and sister. She was encouraged to seek treatment for her drug abuse problems but failed to do so.

Since October 2011, M.A. was cared for by Tosha, residing for a time in Sioux Falls and later moving to Rapid City. Brittany allowed Tosha to become M.A.'s custodian and conceded that she was not able to provide a safe and
nurturing home for M.A. Tosha and M.A. formed a strong parental bond, and Tosha encouraged M.A. to form relationships with extended family, including aunts, uncles, and cousins in the Rapid City area. Tosha provided all of M.A.'s necessities of life, including "daycare, medical, educational, clothing, food, and daily needs." Perhaps most importantly, Tosha provided M.A. with love and guidance.

After M.A. moved to South Dakota, Tony had minimal contact with her. He visited her twice; once in Sioux Falls in the summer of 2012, and a second time in December 2013 in Rapid City. The circuit court, in its findings of fact, stated "[u]ntil the commencement of [Tony's] divorce action [from Brittany in 2014], Antonio did not maintain regular phone contact with M.A. or [keep] in contact with Tosha to check on the welfare of the minor child." He had never taken on a parental role in her life or provided a home or financial support.

During probation, Tony took parenting and substance abuse classes and obtained his GED. In September 2013, Tony was released from custody and moved in with his girlfriend, Chantil, whom he met through his brother, another Vista Gang member. He continued to improve his life by leaving the gang and joining a church. He also found part-time work as a cook. Chantil provided most of his financial support.

Tony and Chantil drove to Rapid City in December 2013 with the hope of taking M.A. back to Arizona with them. M.A. was approximately two and a half years old at that time. During their visit, Tony, Tosha, and M.A. were driving around Rapid City when Tosha asked Tony to drive them to a convenience store so that M.A. could use the bathroom. Tosha locked herself and M.A. in the bathroom and called Koree and Brittany for help to prevent Tony from taking M.A. away to Arizona.

50. Id.
51. Id. at 5.
52. Id.
53. Id.
54. Aguilar v. Aguilar, 2016 SD 20, ¶ 5, 877 N.W.2d 333, 335; Appellee's Brief, supra note 36, at 4.
55. Appellee's Brief, supra note 36, at 4; Appellant's Brief, supra note 36, at 7.
56. Findings of Fact, supra note 24, at 5. Tony, however, testified that he had frequent contact with his daughter by conversing with her via FaceTime three times a week. Appellant's Brief, supra note 36, at 9. Koree testified that M.A. would kiss the iPad screen while they were FaceTiming. Id.
57. Findings of Fact, supra note 24, at 5.
58. Aguilar, 2016 SD 20, ¶ 6, 877 N.W.2d at 335.
59. Id.; Appellee's Brief, supra note 36, at 4.
60. Aguilar, 2016 SD 20, ¶ 6, 877 N.W.2d at 335.
61. Appellant's Brief, supra note 36, at 11.
62. See Aguilar, 2016 SD 20, ¶ 6, 877 N.W.2d at 335-36 (stating that "Tony is unable to financially support M.A. on his own, making M.A. dependent on Tony's relationship with Chantil"). Chantil had two children of her own and worked as an insurance agent. Appellant's Brief, supra note 36, at 10.
63. Aguilar, 2016 SD 20, ¶ 7, 877 N.W.2d at 336; Appellant's Brief, supra note 36, at 8. Chantil believed Tony to be a good father to her children and was open to having M.A. come join their family in Ft. Mohave, Arizona. Appellant's Brief, supra note 36, at 10.
64. Aguilar, 2016 SD 20, ¶ 2, 7, 877 N.W.2d at 335-36.
65. Id. ¶ 7, 877 N.W.2d at 336; Appellant's Brief, supra note 36, at 8.
M.A. with him. Tony called law enforcement, but they refused to intervene when Brittany declared herself the mother. Tony and Chantil returned to Arizona without M.A.

Tony filed an Emergency Petition for Physical Custody on February 4, 2014, in the Seventh Judicial Circuit Court in Pennington County. Tosha filed a Motion to Intervene and requested custody of M.A. under South Dakota Codified Law section 25-5-29. A week later, Tony filed a divorce action against Brittany. A hearing was scheduled for July 7, at which Judge Gusinsky consolidated the pleadings into the divorce case. The hearing was rescheduled for December 19, and on April 21, 2015, the circuit court granted custody of M.A. to Tosha. The court found three reasons, all supported by clear and convincing evidence, to rebut Tony’s presumptive parental rights. First, the court found that “Tosha [had] been M.A.’s primary caretaker since she was less than six months old until the present.” Second, the court held that Tony had abandoned and persistently neglected M.A. because he was not present in her life and did not provide love, care, monetary support, or affection. Though Tony had become closer with M.A. between filing the action and the hearing, the court described Tony’s future as “uncertain” and was worried that he would maintain his contacts with the Vista Blood Gang. Lastly, the court reasoned that to remove M.A. “from the only home and caretaker that she has known” would cause serious detriment and emotional harm to her. In Arizona, she would live with a family who would be strangers to her. Because extraordinary circumstances were shown with clear and convincing evidence, the court found it to be in M.A.’s best interests to remain in Tosha’s custody. The court granted Tony unsupervised visitation whenever he was in Rapid City and reasonable contact through phone

66. Aguilar, 2016 SD 20, ¶ 7, 877 N.W.2d at 336; Appellant’s Brief, supra note 36, at 8.
67. Id.
68. Id.
69. Id. at 3; Findings of Fact, supra note 24, at 1.
70. Findings of Fact, supra note 24, at 1.
71. Appellant’s Brief, supra note 36, at 3.
72. Id. at 1.
73. Order Granting Intervener Custody/Guardianship Over Minor Child, M.A. at 1, Aguilar v. Aguilar, 2016 SD 20, 877 N.W.2d 333 (No. Div. 14-52) [hereinafter Order Granting Intervener Custody].
74. Findings of Fact, supra note 24, at 7-12. Brittany did not seek custody of M.A. Id. at 9. She was incarcerated during many of the proceedings, and there was no dispute that she was not a fit parent. Id.
75. Id. M.A. turned four years old shortly after the custody decision was made. Id.
76. Id. at 9-10.
77. Id. at 10. In its Findings of Fact, the court did not reference testimony given by counselor Stacey Keyser, who supervised Tony’s visitations with M.A. in the spring and summer of 2014. Appellant’s Brief, supra note 36, at 11. She testified that Tony and M.A. had an “intimate relationship,” “exchanged love and affection,” and enjoyed spending time together. Id.
78. Findings of Fact, supra note 24, at 11.
79. Id.
80. Id. at 12.
or any other electronic communication. Tony filed a notice of appeal on May 13, 2015.

The South Dakota Supreme Court affirmed custody of M.A. to Tosha in an opinion authored by the Honorable Chief Justice Gilbertson on March 9, 2016. The court discussed three reasons why granting custody of M.A. to Tosha was correct. First, the court stated that a determination of whether Tony was a fit parent was not necessary because the circuit court had found there were extraordinary circumstances present and such circumstances made a finding of parental unfitness unnecessary. Second, the court found that Tosha’s status as the primary caregiver of M.A. was an extraordinary circumstance as stated in South Dakota Codified Law sections 25-5-29(4) and 25-5-30(3). Because Tosha was found to be M.A.’s primary caregiver, the court did not review the circuit court’s two additional findings of abandonment and emotional harm. Third, the court stated it was clear that the circuit court did take M.A.’s best interests into account when deciding which person should have custody. Thus, the court concluded that it was in M.A.’s best interests to remain with Tosha.

III. BACKGROUND

A. CHILD CUSTODY DETERMINATIONS IN SOUTH DAKOTA

South Dakota courts give deference to the legislature when making child custody decisions by following enacted statutes. In addition to statutory interpretation, courts take into account the wishes of the parties and child, enforceable agreements of the parties, case law, and the best interests of the child. The best interests of the child standard has been included in South Dakota statutes as far back as 1877 when it was included in the Revised Codes of the Territory of Dakota. This standard has since been codified into the present codes, yet there is no statute setting out factors to be examined in order to decide the child’s best interests. Instead, the codes contain a statute which simply states

81. Order Granting Intervener Custody, supra note 73, at 2-3.
82. Appellant’s Brief, supra note 36, at 4.
83. Aguilar v. Aguilar, 2016 SD 20, ¶ 1, 877 N.W.2d 333, 333, 335.
84. Id. ¶¶ 13-22, 877 N.W.2d at 338-40.
85. Id. ¶ 14, 877 N.W.2d at 338.
86. Id. ¶¶ 15-20, 877 N.W.2d at 338-39.
87. Id. ¶ 20, 877 N.W.2d at 339.
88. Id. ¶¶ 21-22, 877 N.W.2d at 339-40.
89. Id. ¶ 23, 877 N.W.2d at 340.
91. Id. at 415.
93. See S.D.C.L. § 25-4-45 (2013 & Supp. 2017) (directing courts to use the best interests of the child as a guiding standard). A survey of South Dakota Supreme Court cases reveals that the factors used to decide the best interests of the child vary widely depending on the facts of the case. See, e.g., Severson
that the court should be guided by the child’s temporal, mental, and moral welfare when deciding custody of the child. If the child is mature enough, the court should also take into consideration the preference voiced by the child. In general, factors that are considered in a best interests of the child analysis include the fitness of the parents, the ability of the parent to provide a stable home environment, the role of the primary caretaker in parenting the child, the child’s preference, harmful parental misconduct, and separation of siblings.

Courts in South Dakota have traditionally preferred awarding custody to parents over non-parents. Prior to 1991, South Dakota statutes ordered preference of custody of minors to parents first, followed by individuals whom the deceased parent indicated should have custody, individuals named as trustee of a trust to benefit the child, and relatives. Abrogation of this law was accidental when it was included in a substantial repeal and revision of the probate code. Though the statute was not recodified, parents are still given preference in custody determinations, as seen in the pertinent statute which reads, “It is presumed to be in the best interest of a child to be in the care, custody, and control of the child’s parent . . . .”

v. Hutchinson, 2013 SD 70, ¶¶ 12, 21, 24, 838 N.W.2d 72, 75, 77 (affirming custody to father after finding that father had “exceptional parenting skills” and demonstrated an even temperament with the children, unlike the mother who suffered from a generalized anxiety disorder); Beaulieu v. Birdsbill, 2012 SD 45, ¶ 11, 815 N.W.2d 569, 572 (affirming custody to father upon finding that mother did not provide a stable home and had problems with alcohol use and domestic violence); Kreps v. Kreps, 2010 SD 12, ¶¶ 39-41, 778 N.W.2d 835, 846-47 (affirming custody of children to father after a finding that the mother was unlikely to facilitate contact with father and alienated the children’s affections from the father); Heinen v. Heinen, 2008 SD 63, ¶¶ 5-6, 12-13, 753 N.W.2d 891, 892-95 (refusing to allow mother to relocate children to distant town as the children were stable in their current school and community and moving would cause them hardship); Hathaway v. Bergheim, 2002 SD 78, ¶ 21, 648 N.W.2d 349, 352-53 (refusing to modify custody because it was in the children’s best interests to continue living with step-sibling); Zepeda v. Zepeda, 2001 SD 101, ¶ 19, 632 N.W.2d 48, 55 (affirming custody to mother despite her fault in causing the breakdown of the marriage); Voelker v. Voelker, 520 N.W.2d 903, 906-07, 907 n.2 (S.D. 1994) (affirming custody to mother because she had been the primary caretaker and the children preferred to live with her); Mellema v. Mellema, 407 N.W.2d 827, 830 (S.D. 1987) (cautioning courts to consider the best interests of the child and not become sidetracked by the shortcomings of the parents when awarding custody). As noted by Roger M. Baron, Professor Emeritus at University of South Dakota School of Law, child custody determinations rely as much on personalities, human nature, and factual determinations than on objective determinations. Baron I, supra note 90, at 411.

95. Id.
96. Fuerstenberg v. Fuerstenberg, 1999 SD 35, ¶¶ 24-32, 591 N.W.2d 798, 807-11. Many of these factors also have sub-factors. Id. An examination of the fitness of the parents should include a look at their mental and physical health, ability to provide the child with food, clothing, and other basic needs, the ability to provide love and education, willingness to foster contact with the other parent, commitment to prepare the child for adulthood, and exhibiting good behavior for the child to witness and learn from. Id. ¶24, 591 N.W.2d at 807. Ability to provide a stable home life means examining the relationship of the child to the rest of the family, the child’s adjustment to home and community, the parent to whom the child has bonded with the most, and continuity of care with that parent. Id. ¶26, 591 N.W.2d at 808.
97. Baron I, supra note 90, at 425.
98. ROGER M. BARON, CASES AND MATERIALS ON FAMILY LAW FOR THE SOUTH DAKOTA LAWYER 244 (7th ed. 2010) [hereinafter BARON II].
99. Id.
There are several ways in which third parties are granted custody of children, such as when the legal parents voluntarily relinquish rights. Custody disputes become harder to resolve when the battle is between a legal parent and psychological parent, both of which have valid claims to custody. The two primary ways in which third parties have asserted custody rights both involve fact-intensive inquiries. First, if the non-parent challenger can clearly show that the biological parent is not fit to parent due to gross misconduct or unfitness, then custody will not be granted to the biological parent. Second, a non-parent could prevail in a custody dispute if it could be shown by the challenger that extraordinary circumstances exist which made it in the child’s best interests to have custody granted to a non-parent. Hence, extraordinary circumstances was a means to award a third party custody prior to the enactment of South Dakota Codified Law sections 25-5-29 and 30. But, a look at case law reveals it was not often successful, despite obvious harm inflicted upon the child when separated from his or her psychological parent. If neither parental unfitness nor extraordinary circumstances could be met, the court could use its power as parens patriae to grant custody or visitation rights to a third party.

1. Gross Misconduct or Parental Unfitness

The fitness of the parent is evaluated according to his or her mental and physical health, capacity to provide the child with basic needs, ability to provide love and guidance, willingness to allow the child to have contact with the other parent, commitment to raising the child into adulthood, and proper role modeling. Conduct by the parent is considered gross misconduct if it has a

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103. See infra Part III.A.1-3 (describing facts analyzed in various child custody determinations).


107. See infra Part III.A.1 (giving the facts of two cases in which custody of the child was granted to the parent despite evidence that the child would suffer emotional harm if separated from psychological parent).

108. See infra Part III.A.2 (illustrating the parens patriae power).

109. Fuerstenberg v. Fuerstenberg, 1999 SD 35, ¶ 24, 591 N.W.2d 798, 807. The court in Meldrum also stated A parent’s disqualification results not only from a lack of ability but also from an unwillingness or from an indifferent lack of desire, as well, to rear a child spiritually, morally, mentally and physically according to the minimum standard the law condones. Thus, unfitness would follow from voluntary conduct bearing on a parent’s cruelty, morals, extreme neglect, abandonment or any attitude or condition, created through marriage or otherwise, resulting in home surroundings below the minimum standards; and
“demonstrable effect on the child” and “is committed in the presence of a child old enough to perceive the misconduct.” 110 The challenger must show “clear and satisfactory proof” of parental unfitness or gross misconduct. 111 Only if a clear showing of unfitness or misconduct is met would the best interests of the child be analyzed and custody to a third party be considered. 112

In Cooper v. Merkel, 113 the South Dakota Supreme Court affirmed the trial court’s dismissal of the acting father’s appeal for visitation rights for failure to state a claim. 114 The acting father, Donald Merkel, was not the biological or legal father of the child. 115 He asked the court to recognize him as the de facto parent of the child since he had assumed parental responsibilities of the child in the seven years that Donald, the child’s mother, and the child lived together. 116 The South Dakota Supreme Court refused to grant him de facto parent status, declaring that only when the natural parent is unfit or guilty of misconduct, or other extraordinary circumstances exist, can a legal parent’s custodial rights “be disturbed in favor of a nonparent.” 117 Since the mother was not an unfit parent and no extraordinary circumstances existed, Donald was not able to present evidence of his parental bond with the child and describe the impact their separation might have on the child. 118

A year after Cooper, the same result was reached in In re Guardianship of Sedelmeier. 119 Here, the South Dakota Supreme Court refused to give custody to a couple who had been the child’s caregivers for seven years beginning when the child was two years old. 120 The child was born in 1981 to Kris and Randy Sedelmeier. 121 Their marriage ended in divorce two years later, and Kris was given custody of the child. 122 Following the divorce, Bob and Barb Cumber, who had been neighbors to the Sedelmeiers, became primary caregivers to the child and even asked for permission to adopt him, an offer Kris refused. 123 During the seven years Bob and Barb cared for the child, Kris remarried, suffered three

unfitness would also result from involuntary circumstances such as extreme poverty, physical or mental infirmity, or any other condition making it impossible for the parent to care for the child according to the minimum requirements.

Meldrum v. Novotny, 2002 SD 15, ¶ 21, 640 N.W.2d 460, 463-64 (citing Blow v. Lottman, 59 N.W.2d 825, 827 (S.D. 1953)).

110. Id. ¶ 31, 591 N.W.2d at 809.


112. Id. at 87.


114. Id. at 256.

115. Id. at 254.

116. Id.

117. Id. at 255.

118. Id. at 255-56.


120. Id. at 87.

121. Id.

122. Id.

123. Id.
miscarriages, and was hospitalized for depression. In 1990, after Kris received counseling, she took the child from Bob and Barb and became his primary caregiver. The transition was distressing to the child, who suffered psychological trauma and was hospitalized for thirty days. Bob and Barb sought custody and visitation rights. Their request was denied.

The mother was not found to be an unfit parent. The court also did not believe that any extraordinary circumstances existed to change custody, despite the knowledge that the child suffered a psychological breakdown upon separation from Bob and Barb. Bob and Barb requested that an experienced child psychologist conduct a home visit in order to evaluate the child’s psychological and emotional condition and make a recommendation to the court as to the best interests of the child. The court stated that since the mother was not found to be unfit, there was no reason to determine the best person to have custody of the child. As a result, the court did not address the strength of the bond the child developed with Bob and Barb after being in their care from the ages of two to nine.

2. Parens Patriae Power

One source of power that grants South Dakota courts more deference in custody determinations is the doctrine of parens patriae—the belief that “the court ought to provide protection for those who cannot protect themselves.” For instance, in In re L.S., the South Dakota Supreme Court refused to bar a child custody claim under res judicata and declared “the children’s welfare still demands that we place greater emphasis on their protection than on a judicial policy against repeat litigation.” In addition to bending policy rules, the doctrine also allows courts to occasionally elevate the interests of the child above the fundamental rights of the parents. South Dakota, however, has not allowed

124. Id.
125. Id.
126. Id.
127. Id. at 87, 89.
128. Id. at 87-89.
129. Id. at 88-89.
130. Id. at 87, 89.
131. Id. at 88.
132. See also Langerman v. Langerman, 336 N.W.2d 669, 670 (S.D. 1983) (stating “an award cannot be made to grandparents simply because they may be better custodians”).
133. Id. at 87.
134. BARON II, supra note 98, at 251. See also Swenson v. Swenson, 529 N.W.2d 901, 904 (S.D. 1995) (declaring that the court, acting in the role of parens patriae, can insist that children are adequately provided for, regardless of the wishes and desires of the parents).
135. 2006 SD 76, 721 N.W.2d 83.
136. Id. ¶ 29, 721 N.W.2d at 92.
137. See In re T.G., 1998 SD 54, ¶ 21, 578 N.W.2d 921, 924 (declaring that “the fundamental nature of parental rights mandates a reasonable effort to aid them in maintaining their offspring; however, the best interests of the children must always prevail”).
the doctrine to make child custody determinations completely boundless.\textsuperscript{138} In \textit{Langerman v. Langerman}, the court declared that “an award cannot be made to grandparents simply because they may be better custodians” as long as the parents are not found to be unfit to have custody of the child.\textsuperscript{139}

The \textit{parens patriae} doctrine was used to the advantage of one child in \textit{Quinn v. Mouw-Quinn}.\textsuperscript{140} Patrick and Tamera Quinn were married for two years; following their divorce, Tamera became pregnant and gave birth to Samantha.\textsuperscript{141} Though Patrick was not the father, he supported Tamera through her pregnancy, even after they were no longer married, and accepted Samantha as his own.\textsuperscript{142} They established a parent-child relationship in which Samantha would refer to Patrick as “daddy.”\textsuperscript{143} Patrick and Tamera eventually remarried each other and had two children during this second marriage.\textsuperscript{144} Four years following their second marriage, Patrick filed a divorce complaint and requested custody of all three children.\textsuperscript{145} Custody was given to Tamera, and Patrick was granted visitation with the children equally and was ordered to pay child support to all three.\textsuperscript{146} The court found it in the best interests of Samantha, who was six years old at the time of the divorce, to have the same visitation with Patrick as her two step-siblings.\textsuperscript{147}

The South Dakota Supreme Court affirmed the trial court’s order, recognizing that courts have the authority to act as \textit{parens patriae} to children and protect them from “destructive actions of divorcing parents.”\textsuperscript{148} Traditionally, visitation rights stem from the right of custody.\textsuperscript{149} In this situation, the compelling factor was what was in Samantha’s best interests.\textsuperscript{150} Patrick was the only father she had ever known; there never had been contact with her biological father.\textsuperscript{151} In all respects except biology, they had a parent-child relationship.\textsuperscript{152} Her close relationship with Patrick and the harm she would suffer as a result of their separation was found to be an extraordinary circumstance.\textsuperscript{153} The court declared that her well-being was more important than “any petty dispute between parents and step-parents,” and the court, acting as \textit{parens patriae}, used its authority to ensure that Samantha was cared for in a way that was not detrimental to her

\textsuperscript{138} Langerman v. Langerman, 336 N.W.2d 669, 670 (S.D. 1983).
\textsuperscript{139} Id. at 670.
\textsuperscript{140} Quinn v. Mouw-Quinn, 552 N.W.2d 843, 846-47 (S.D. 1996).
\textsuperscript{141} Id. at 845.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 846-47.
\textsuperscript{149} Id. at 845.
\textsuperscript{150} Id. at 846-47.
\textsuperscript{151} Id. at 845.
\textsuperscript{152} Id. at 846.
\textsuperscript{153} Id.
emotional and physical well-being.154 Though the court did not use the term psychological parent to describe Patrick’s status, in essence, that is what he had become.155

3. Extraordinary Circumstances

Prior to the codification of South Dakota Codified Law sections 25-5-29 and 30, there was not a statutory definition of the factors that should be considered in an extraordinary circumstances analysis.156 This statute was brought into being following the case of *Meldrum v. Novotny*.157 In this case, both the biological father and acting father requested custody of the child, T.D.M.158 The child was born in 1988 to Timothy and Nancy Meldrum.159 Two years later, Nancy began performing as an exotic dancer.160 Though Timothy and Nancy lived in Illinois, Nancy travelled as far as Winner, South Dakota, to perform.161 During one of her trips to Winner, Nancy met Charles Novotny.162 She later moved in with Charles, and in 1992, she brought T.D.M. to live with them in Winner.163 Nancy and Charles had a child together.164 While Nancy worked, Charles stayed home to care for the children, including overseeing their medical and educational needs.165 In 1995, Nancy and Charles separated, and he was given temporary physical custody of the two children.166 Nancy divorced Timothy, and she was awarded custody of T.D.M.167 Following Nancy’s death in a car accident in 1998, Timothy sought and was awarded custody of T.D.M.168 Since an attorney had not been appointed to represent T.D.M. during this trial, the South Dakota Supreme Court remanded the case.169

At the new trial, evidence showed that T.D.M. referred to Charles as his father and did not think of Timothy in this way.170 A witness testified that Charles “was a caring man and a good provider.”171 The trial court found that

154. *Id.* at 846-47.
155. See *id.* at 846 ("[T]heir relationship is that of a father and daughter in all respects except for that of biology.").
156. See *infra* Part III.A.4 (discussing the codification of South Dakota Codified Law sections 25-5-29 and 30).
157. See *infra* Part III.A.4 (discussing the codification of South Dakota Codified Law sections 25-5-29 and 30).
158. Novotny, 2002 SD 15, ¶ 5, 640 N.W.2d at 461.
159. *Id.* ¶ 6, 640 N.W.2d at 461.
160. *Id.*
161. *Id.* ¶¶ 6-7, 640 N.W.2d at 461.
162. *Id.*
163. *Id.* ¶¶ 7-8, 640 N.W.2d at 462.
164. *Id.* ¶ 9, 640 N.W.2d at 462.
165. *Id.*
166. *Id.* ¶ 10, 640 N.W.2d at 462.
167. *Id.* ¶ 11, 640 N.W.2d at 462.
168. *Id.* ¶¶ 12-13, 640 N.W.2d at 462.
169. *Id.* ¶ 13, 640 N.W.2d at 462.
170. *Id.* ¶¶ 15-16, 640 N.W.2d at 462.
171. *Id.*
there were no extraordinary circumstances which would defeat Timothy’s parental preference, nor did Timothy exhibit parental unfitness.\(^ {172} \) Timothy was awarded custody of T.D.M., and Charles was given visitation rights to the child.\(^ {173} \)

On appeal to the South Dakota Supreme Court, the attorney for T.D.M. argued that there were extraordinary circumstances such that custody should be granted to Charles.\(^ {174} \) Charles explained that the child had been diagnosed with attention-deficit/hyperactivity disorder, and children with this disorder need as much structure as possible in order to encourage learning at home and school.\(^ {175} \) Charles was committed to providing the child with stability and continuously monitored the child’s education.\(^ {176} \) The Honorable Chief Justice Gilbertson, who wrote one section of the decision, found there were extraordinary circumstances and remanded the case back to the trial court to examine the best interests of the child.\(^ {177} \) In his concurrence, the Honorable Justice Konenkamp identified a host of extraordinary circumstances that would rebut the parental preference, one of which was “the existence of a bonded relationship between the child and the nonparent custodian sufficient to cause significant emotional harm to the child in the event of a change in custody . . . .”\(^ {178} \)

An out-of-court agreement was reached in which the child would return to Timothy to finish the school year and would spend his summer and holidays with Charles.\(^ {179} \) After the year, the child would be able to choose the father he wanted to remain with permanently, and the father he would visit during summers and holidays.\(^ {180} \)

\(^ {172} \) Id. ¶ 17, 640 N.W.2d at 463. Since the law presumes that the biological parent is the best individual to act in the child’s best interests, the individual challenging the biological parents’ right must overcome this presumption. Id. ¶ 20, 640 N.W.2d at 463.

\(^ {173} \) Id. ¶ 17, 640 N.W.2d at 463.

\(^ {174} \) Id. ¶ 34, 640 N.W.2d at 465.

\(^ {175} \) Id. ¶ 43, 640 N.W.2d at 467.

\(^ {176} \) Id.

\(^ {177} \) Id. ¶ 39, 640 N.W.2d at 466. The Honorable Justice Sabers and Miller acknowledged that “[a] showing of extraordinary circumstances affecting the welfare of the child may defeat parental preference under South Dakota law.” Id. ¶¶ 32-35, 640 N.W.2d at 465-66.

\(^ {178} \) Meldrum v. Novotny, 2002 SD 15, ¶ 58, 640 N.W.2d 460, 470-71 (Konenkamp, J., concurring in part). Justice Konenkamp stated the extraordinary circumstances factors

include the abandonment or persistent neglect of the child by the parent; the likelihood of serious physical or emotional harm to the child if placed in the parent’s custody; the extended, unjustifiable absence of parental custody; the abdication of parental responsibilities; the provision of the child’s physical, emotional, and other needs by persons other than the parent over a significant period of time; the existence of a bonded relationship between the child and the nonparent custodian sufficient to cause significant emotional harm to the child in the event of a change in custody; the substantial enhancement of the child’s well-being while under the care of the nonparent; the extent of the parent’s delay in seeking to reacquire custody of the child; the demonstrated quality of the parent’s commitment to raising the child; the likely degree of stability and security in the child’s future with the parent; the extent to which the child’s right to an education would be impaired while in the custody of the parent; and any other circumstances that would substantially and adversely impact the welfare of the child.

\(^ {179} \) Bolson, supra note 102, at 495-96.

\(^ {180} \) Id. at 496.
4. Codification of South Dakota Codified Law section 25-5-29 and 30

As a result of Meldrum, the South Dakota Legislature enacted legislation known as "Timmy's Law" in 2002. The resulting law allows a third party to petition for custody or visitation if the third party has acted as a primary caretaker, has bonded with the child as a parental figure, or has formed a significant or substantial relationship with the child. The law reiterates that parents are still presumed to be the best custodians of their children, and this presumption can only be overcome by proof that the child was abandoned, the parents surrendered their rights, or that other extraordinary circumstances exist that warrant a change of custody to a non-parent. The extraordinary circumstances that Justice Konenkamp described in Meldrum were codified into section 25-5-30.

The South Dakota Supreme Court has had five occasions to review circuit courts' application of the statutes to custody and visitation proceedings. In two of those cases, the third-party parent was able to successfully prevail under the law and was granted custody or visitations rights. In addition, the court has also had one occasion to examine the constitutionality of the statutes and subsequently held them constitutional.

B. CONSTITUTIONAL CONSIDERATIONS TO THIRD-PARTY CUSTODY

Under the Due Process clause of the Fourteenth Amendment, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." This clause guarantees more than fair process and grants "heightened protection against government interference with certain fundamental rights and


183. Id.


185. See Aguilar v. Aguilar, 2016 SD 20, ¶ 14, 877 N.W.2d 333, 338 (holding extraordinary circumstances were present), Veldheer v. Peterson, 2012 SD 86, ¶ 31, 824 N.W.2d 86, 97 (reversing circuit court's award of custody of the children to their grandparents because the grandparents had not met the evidentiary burden demanded by the statute), Beach v. Coisman, 2012 SD 31, ¶ 10, 814 N.W.2d 135, 139 (denying grandparents visitation rights because they offered no evidence as to how their lack of visitation would result in serious detriment to the children), In re Guardianship of S.M.N, 2010 SD 31, ¶ 29, 781 N.W.2d 213, 225 (reversing circuit court's grant of guardianship to grandmother because the facts were insufficient to meet the standard of extraordinary circumstances), Clough v. Nez, 2008 SD 125, ¶¶ 6, 26, 759 N.W.2d 297, 304, 308 (affirming visitation to non-biological father after finding that extraordinary circumstances were present).

186. See supra note 185 (discussing Aguilar and Clough which held that extraordinary circumstances were present to award custody to third-parties).

187. See Feist v. Lemieux-Feist, 2010 SD 104, ¶ 13, 793 N.W.2d 57, 62-63 (holding statutes constitutional).

188. U.S. CONST. amend. XIV, § 1.
liberty interests." As applied to family law, this has been interpreted to mean that parents have a fundamental right to the custody, care, and control of their children. The law assumes that parents will act in the best interests of their children due to the "natural bonds of affection" that exist among most families.

By providing heightened protection to families, the United States Supreme Court acknowledged that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American Tradition."

Though individuals have a preference for privacy over state interference, especially in regard to family life, the state is allowed to intervene when the health of the child is at risk. For example, in *Prince v. Massachusetts*, the United States Supreme Court affirmed Prince’s conviction for violating state child labor law when she allowed her children to sell religious materials on the street under her supervision. The Court declared that the state can intervene in children’s upbringing because "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." In addition, the Court said the state has more authority over children than adults in order to ensure their protection.

Though willing to intervene when the health of the child is at risk, the United States Supreme Court has been reluctant to grant third parties rights to visitation and custody of children to whom they have no legal tie. In 2000, the Court struck down a Washington state statute that allowed any individual to petition for visitation and custody of a child when it was in the child’s best interests to do so, regardless of the parents’ wishes, the fitness of the parents, or whether there had been a change in circumstances. The paternal grandparents of the children at issue, the Troxels, had been granted visitation rights to their two granddaughters...

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190. *Id.* at 66. The court in *Meyer* stated that parents’ fundamental right to the care of their children denoted not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

193. *See Lassiter v. Dep’t of Soc. Servs. of Durham City*, 452 U.S. 18, 27 (1981) ("Since the State has an urgent interest in the welfare of the child, it shares the parent’s interest in an accurate and just decision."); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) ("[T]he family is not beyond regulation."); *Yoder*, 406 U.S. at 213 ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."); *Meyer*, 262 U.S. at 401 ("[T]he state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally . . . ").
195. *Id.* at 160-62, 171.
196. *Id.* at 168.
197. *Id.*
199. *Id.* at 61-63.
under this statute in order to continue their close relationship with them. The Court found the language of the statute "breathtakingly broad" in allowing any person to petition for visitation at any time. Therefore, the statute was found to unconstitutionally infringe on Granville's rights as a parent to the care, custody, and control of her children.

However, the Court in Troxel did not completely bar the possibility that the parental sphere could be invaded; it said "there will normally be no reason for the State to inject itself into the private realm of the family." The presence of "special factors" may justify overriding the parental preference. Additionally, Troxel only stands to prevent "any person" from petitioning for visitation with a child "at any time" without reason. Because family law issues are commonly decided on a case-by-case basis, the Court declined to assert that all non-parental visitation statutes are per se unconstitutional. Accordingly, Troxel is not a complete bar to third parties seeking custody.

Guided by Troxel, the South Dakota Supreme Court has held that South Dakota Codified Law section 25-5-29 is constitutional. In 2010, the South Dakota Supreme Court reversed a circuit court's holding that the statute was unconstitutional. The circuit court had declared the statute unconstitutional because it "contain[ed] no requirement for a finding of parental unfitness prior to awarding custody to a non-parent." On appeal, the court held that the statute "can be constructed constitutionally" because Troxel does not require that the parents be found unfit prior to awarding custody to a third party. Instead, it only mandates that "special weight" be afforded to the legal parents when they are fit parents or when no extraordinary circumstances apply. Special weight is afforded to parents because the statute "contains a provision expressly protecting the constitutional rights of natural parents." This express provision is stated thus: "It is presumed to be in the best interest of a child to be in the care, custody,

200. Id. at 60-61. Specifically, the Troxels wanted their granddaughters to remain part of their "large, central, loving family" and "provide opportunities for the children in the areas of cousins and music." Id. at 61-62.
201. Id. at 67.
202. Id. at 73.
203. Id. at 68 (emphasis added).
204. Id.
205. Id. at 67.
206. See id. at 73 (declaring "because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific non-parental visitation statutes violate the Due Process Clause as a per se matter").
207. See Conover v. Conover, 146 A.3d 433, 446 (Md. 2016) (holding that Troxel does not bar recognition of de facto parenthood).
209. Id. ¶1, 793 N.W.2d at 58.
210. Id. ¶2, 793 N.W.2d at 59.
211. Id. ¶¶7, 13, 793 N.W.2d at 61, 63.
212. See id. ¶11, 793 N.W.2d at 62 (quoting Clough v. Nez, 2008 SD 125, ¶22, 759 N.W.2d 297, 307) ("[D]eference and special weight must be given only when a fit parent has adequately cared for his or her children, [for example] when no extraordinary circumstances apply. When extraordinary circumstances have been shown, the presumption disappears.").
and control of the child's parent, and the parent shall be afforded the constitutional protections as determined by the United States Supreme Court and the South Dakota Supreme Court. This parental presumption is rebutted, however, when extraordinary circumstances are present. The existence of extraordinary circumstances must be proven with clear and convincing evidence.

C. FAMILY FORMS INFLUENCE CONSIDERATIONS OF THE CHILD'S BEST INTERESTS

The American family has taken on many forms, yet the law has been slow to accept nontraditional family structures. Historically, motherhood was determined by biology, and fatherhood was determined by marital status. While the traditional nuclear family may still be a popular family form, other makeups have been gaining popularity, including same-sex couples, families created from assisted reproductive technology, divorced and remarried families, and extended family members as primary caregivers.

According to U.S. Census data, there are 400,000 same-sex married households in the United States. Many of these couples choose assisted reproductive technology as a means to have families, as approximately 1.6% of all births in the United States every year are the result of assisted reproductive technology. Marriage trends among heterosexual adults are also changing:

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215. S.D.C.L. § 25-5-29(4); Cough, 2008 SD 125, ¶ 22, 759 N.W.2d at 306.
217. See Karen Struening, Families "In Law" and Families "In Practice": Does the Law Recognize Families as They Really Are?, in FAMILIES AS THEY REALLY ARE 75, 78-80 (Barbara J. Risman ed., 2010) (explaining that the law provides predictability to families but does not always respond appropriately when confronted with new family forms because new forms do not fit into old legal categories); MARTIN GUGGENHEIM, ALEXANDRA DYLAN LOWE & DIANE CURTIS, THE RIGHTS OF FAMILIES: THE AUTHORITATIVE ACLU GUIDE TO THE RIGHTS OF FAMILY MEMBERS TODAY 89 (1996) (stating "law is commonly slow to react to social change"); see also Moore v. City of East Cleveland, 431 U.S. 494, 496, 506 (1977) (acknowledging that a family unit can include a grandmother, her son, and two grandsons who are first cousins to one another); Borough of Glassboro v. Vallorosi, 568 A.2d 888, 889 (N.J. 1990) (holding that ten college students living together constitutes a family under the city's zoning ordinance).
218. Struening, supra note 217, at 76. See also S.D.C.L. § 25-5-3 (2013 & Supp. 2016) (stating that individuals who are married at the time of birth are presumed to be the parents of the child).
219. See infra notes 220-229 and accompanying text (citing statistics that show the family structure is not confined to a single form).
221. CENTERS FOR DISEASE CONTROL AND PREVENTION, ART Success Rates (Oct. 1, 2017), https://www.cdc.gov/art/artdata/index.html. It is highly recommended that all parties involved in the artificial reproduction process authenticate written contracts or formal agreements in order to delegate rights and responsibilities prior to conception. JOHN C. MAYOUE, BALANCING COMPETING INTERESTS IN FAMILY LAW 178 (2th ed. 2003). When complications as to parenthood arise, courts are left to decide assignment of rights. See, e.g., Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 532, 537-38 (Cal. Ct. App. 1986) (holding that the semen donor was the legal father of the child born to mother and her lesbian partner
13% of men and 14% of women have been married twice. As divorce and remarriage become more common, 6% of all children in households are either stepchildren or adopted. Additionally, many adults who have never been married are choosing to forego matrimony and live as cohabitating couples instead; one-third of children born in the U.S. are born to unmarried mothers. Lastly, it is becoming more common for extended family members to assist with caregiving. In 2003, AARP conducted a study of grandparents raising grandchildren. By examining U.S. census data, they found that in a ten-year span from 1990 to 2000, minor children being cared for primarily by grandparents increased by 30%. By 2000, there were four and a half million children living in homes headed by grandparents. The factors contributing to the rise in grandparenting are many and various, including drug and substance abuse of the parent, teenage pregnancy, divorce, single-parent households, mental and physical illness, incarceration, and death. All of this data suggests that children are more likely than ever to be raised in nontraditional households.

The United States Supreme Court has confirmed that there may no longer be "an average American family" due to the varying composition of families. Upon dissolution of a family structure, children no longer have a continuity of because the couple had allowed the donor to be the father figure in the child's life and no formal contract was made as to his rights).
personal relationships.\(^{232}\) If courts can no longer decide child custody cases based on biological ties, there must be another standard to guide their decisions in order to promote stable childhood relationships.\(^{233}\)

In 1973, three researchers, Joseph Goldstein, Anna Freud, and Albert J. Solnit, brought greater attention to psychological parenthood through publication of their book, *Beyond the Best Interests of the Child.*\(^{234}\) They believed that the law should not simply recognize legal or biological ties, but only those ties to the child which develop into a caring and nurturing relationship.\(^{235}\) Their proposition is summed up in the following:

> 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.\(^{236}\)

Family should not be defined in terms of biology, but as the “unit responsible for and capable of providing a child on a continuing basis with an environment which serves his numerous physical and mental needs during immaturity.”\(^{237}\) The United States Supreme Court has reiterated that having a biological tie to an adult does not automatically mean that particular adult is the best person to care for the child.\(^{238}\) The Court in *Lehr v. Robertson* affirmed that

> [t]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in “promot[ing] a way of life” through the instruction of children as well as from the fact of blood relationship.\(^{239}\)

Children themselves do not view adults in regard to their relationships to one another, whether they are legal, biological, or adoptive relationships.\(^{240}\) For biological or adoptive parents, the time and emotions put into raising children have little effect on “children who are emotionally unaware of the events leading to

\(^{232}\) See, e.g., Veldheer v. Peterson, 2012 SD 86, ¶¶ 3-12, 31, 824 N.W.2d 86, 89-90, 97 (describing that children lived with both parents until they separated, then were primarily cared for by grandparents, and were later placed in the custody of their father).

\(^{233}\) See MAYOUE, supra note 221, at 163 (explaining that when parents are not able to care for their children, state agencies or courts must step in to handle the needs of children).

\(^{234}\) See JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 4 (1973) (recognizing that legal efforts to protect children are important but dedicating their research to examining the psychological needs of children). Joseph Goldstein was a professor at Yale University Law School. Id. at ix. Anna Freud, daughter of Sigmund Freud, was the director of the Hampstead Child-Therapy Clinic, London. Id. Albert J. Solnit was a professor and director of the Child Study Center at Yale University. Id.

\(^{235}\) Id. at 19.

\(^{236}\) Id.

\(^{237}\) Id. at 13.

\(^{238}\) Lehr v. Robertson, 463 U.S. 248, 261 (1983).

\(^{239}\) Id. (quoting Smith v. Org. of Foster Families for Equal. & Reform, 531 U.S. 816, 844 (1977)).

their births." Instead, children find value in adults who can provide nurturing and stable environments. Because children find more value in adults who provide love and support, the best interests of the children should include a consideration of whether the psychological parent should receive custody.

IV. ANALYSIS

Psychological parents who are faced with impending separation from children they have bonded with should utilize South Dakota Codified Law sections 25-5-29 and 30 in order to be considered for custody or visitation rights over the children. As an intervenor in a proceeding, the psychological parent must plead sufficient facts to show the court that a familial bond has formed between the intervenor and child. This standard prevents third parties from intervening in court if no bond is present. Sections 25-5-29 and 30 are constitutional because the parent’s rights are given special weight unless the third party can successfully rebut the parental presumption. Lastly, these statutes should allow the best interests of the child to be examined in conjunction with the bond formed between the psychological parent and child in order to protect the child’s development into adulthood.

A. INTERVENOR’S STANDARD UNDER SOUTH DAKOTA CODIFIED LAW SECTION 25-5-29 PLACES LIMITS ON THIRD PARTIES VYING FOR CUSTODY

In Aguilar, Tony filed for divorce from Brittany and requested custody of their child, M.A. Brittany’s sister, Tosha, intervened and submitted a motion to be granted custody of M.A. pursuant to South Dakota Codified Law section 25-5-29. When a third party intervenes, he or she must plead facts that show “he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship.” The petition does not need to allege facts sufficient to prove the case, but enough facts

241. GOLDSTEIN, supra note 234, at 12.
242. Valastro, supra note 240, at 525.
243. See infra Part IV.C (explaining harmful effects experienced by children when separated from their psychological parent).
245. Veldheer v. Peterson, 2012 SD 86, ¶ 17, 824 N.W.2d 86, 92-93.
246. See S.D.C.L. § 25-5-29 (requiring the intervenor to show “he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship” to be granted standing in court).
247. See S.D.C.L. § 25-5-29 ("It is presumed to be in the best interest of a child to be in the care, custody, and control of the child’s parent, and the parent shall be afforded the constitutional protections as determined by the United States Supreme Court and the South Dakota Supreme Court.").
248. See infra Part IV.C (explaining why preserving the bond between psychological parent and child is vital to the child’s growth and development).
249. Aguilar v. Aguilar, 2016 SD 20, ¶ 1, 877 N.W.2d 333, 335.
250. Findings of Fact, supra note 24, at 1.
such that the court can grant intervention.\textsuperscript{252} Only once the third party is granted intervention can the party attempt to rebut the parental presumption by introducing evidence and calling witnesses.\textsuperscript{253} By requiring intervening parties to meet this standard prior to becoming a party at trial, third parties having minimal contact with the child are prevented from intervening in court.\textsuperscript{254} It also upholds the presumption that the legal parent is the best parent for the child.\textsuperscript{255}

Tosha met this standard because she was M.A.’s primary caretaker for over three years leading up to the decision by the circuit court.\textsuperscript{256} Status as a primary caretaker was the same fact plead by intervening grandparents in \textit{Veldheer v. Peterson}.\textsuperscript{257} In that case, the grandparents had been the primary caregivers to the children for two years, a fact that the father did not dispute.\textsuperscript{258} This was “a sufficient showing for joinder/intervention.”\textsuperscript{259} By granting a third-party intervenor standing in court, that party can present evidence and call witnesses.\textsuperscript{260} Allowing evidence of the bond between the psychological parent and child into court can aid the court in making their determination as to the best interests of the child.\textsuperscript{261} Omission of such evidence can unjustly harm the child, as was the case in \textit{Cooper}.\textsuperscript{262} There, Donald, who had cared for the child for seven years, was unable to present evidence of his bond with the child and the harm their separation might cause.\textsuperscript{263} The intervention standard allows the court to decide whether a third party should be given standing in court, and if the court believes the third party has a strong enough connection to the child, the psychological parent can present evidence to the court.\textsuperscript{264}

\begin{itemize}
\item \textsuperscript{252} Veldheer v. Peterson, 2012 SD 86, ¶ 17, 824 N.W.2d 86, 92-93.
\item \textsuperscript{253} Id. ¶ 17, 824 N.W.2d at 93.
\item \textsuperscript{254} See id. ¶ 18, 824 N.W.2d at 93 (granting grandparents intervention because they had served as primary caretakers of the children for about two years). But see Rohlf, supra note 14, at 718-720 (claiming that the psychological and de facto parenthood doctrines are prone to creation of slippery slopes in which everyone from day-care providers to family friends could upset legal parents’ relationships with their children).
\item \textsuperscript{255} S.D.C.L. § 25-5-29.
\item \textsuperscript{256} See Aguilar v. Aguilar, 2016 SD 20, ¶ 5, 877 N.W.2d 333, 335 (stating that Tosha took custody of M.A. in the fall of 2011); Order Granting Intervener Custody, supra note 73, at 3 (stating the date of the order as April 21, 2015).
\item \textsuperscript{257} Veldheer, 2012 SD 86, ¶ 18, 824 N.W.2d at 93.
\item \textsuperscript{258} Id. ¶ 16, 824 N.W.2d at 92.
\item \textsuperscript{259} Id. ¶ 18, 824 N.W.2d at 93.
\item \textsuperscript{260} Id. ¶ 17, 824 N.W.2d at 93.
\item \textsuperscript{261} See infra Part IV.C (explaining harmful effects experienced by children when separated from their psychological parent).
\item \textsuperscript{262} See Cooper v. Merkel, 470 N.W.2d 253, 255 (S.D. 1991) (disallowing Donald to present evidence of his bond with the child at issue, though he had cared for the child as a parent for seven years).
\item \textsuperscript{263} Id.
\item \textsuperscript{264} Veldheer, 2012 SD 86, ¶¶ 17-18, 824 N.W.2d at 92-93.
\end{itemize}
B. SOUTH DAKOTA CODIFIED LAW SECTIONS 25-5-29 AND 30 ARE CONSTITUTIONAL

Under South Dakota Codified Law section 25-5-29, the parents’ constitutional right to the care, custody, and control of their children is explicitly recognized. Accordingly, fit parents are given deference in custody determinations. The parental presumption can be overcome in one of four ways:

1. That the parent has abandoned or persistently neglected the child;
2. That the parent has forfeited or surrendered his or her parental rights over the child to any person other than the parent;
3. That the parent has abdicated his or her parental rights and responsibilities; or
4. That other extraordinary circumstances exist which, if custody is awarded to the parent, would result in serious detriment to the child.

In Aguilar, the court relied on the last factor, extraordinary circumstances, to overcome Tony’s parental preference, rather than parental unfitness that is implicit in the other three circumstances. Such a finding was constitutional because extraordinary circumstances justify the state interfering with parental rights.

The Aguilar court based its decision on a line of constitutionally sound law and cases interpreting the law, notably, Clough v. Nez. In that case, Clough had taken care of the child at issue for about four years following the child’s birth. Custody was awarded to the biological mother, but Clough was allowed visitation due to the existence of extraordinary circumstances. Namely, Clough had been the child’s primary caretaker since birth by providing her physical and emotional needs, and a break in their closely bonded relationship would be detrimental to the child’s welfare. These facts rebutted the biological mother’s presumptive rights as a parent under sections 25-5-29(4) and 30(3). The Clough court reiterated the proposition that extraordinary circumstances alone can rebut the parental preference.

266. Feist v. Lemieux-Feist, 2010 SD 104, ¶ 11, 793 N.W.2d 57, 62.
268. Aguilar v. Aguilar, 2016 SD 20, ¶ 14, 877 N.W.2d 333, 338; Feist, 2010 SD 104, ¶ 12, 793 N.W.2d at 62.
269. Aguilar, 2016 SD 20, ¶ 19, 877 N.W.2d at 339.
270. Id. ¶¶ 15-20, 877 N.W.2d at 338-39; Clough v. Nez, 2008 SD 125, 759 N.W.2d 297.
271. Clough, 2008 SD 125, ¶¶ 2-6, 759 N.W.2d at 300-301.
272. Id. ¶¶ 7, 29, 759 N.W.2d at 301, 308.
273. Id. ¶¶ 6, 29, 759 N.W.2d at 301, 308.
274. Id. ¶ 16, 759 N.W.2d at 304.
275. Id. ¶ 23, 759 N.W.2d at 307.
As in Clough, the Aguilar court also focused on extraordinary circumstances to rebut the parental preference. Tony argued that his constitutional rights were violated when no determination was made regarding his parental fitness. In its decision, the circuit court stated that "the short amount of time between his criminal past and rehabilitation makes his fitness as a parent speculative at best." The South Dakota Supreme Court also did not examine whether Tony was a fit parent and relied on the circuit court’s determination of extraordinary circumstances to rebut Tony’s constitutional right as a parent.

Tony was the very person who requested that his child, M.A., be removed from her Arizona home and be taken to South Dakota. At the age of approximately six months, M.A. was cared for by Tosha. The circuit court "found that he did not maintain regular contact with M.A. or regularly inquire about her status with Tosha." M.A. formed "a very strong bond" with Tosha during the three and a half years that Tosha cared for her. Like Tony, many legal parents are often the very people who encourage their children to develop relationships with third parties. Some courts have held that a parent exercises his or her constitutional right to the care of the child when he or she invites third parties to foster and maintain relationships with the child.

In the cases discussed above, Kris Sedelmeier willingly gave custody of her child to the Cumbers for seven years, Tamera allowed Donald to live together with their son for seven years, and Nancy authorized Charles to care for her children while she traveled for work.

Legal parents hold the power to encourage these relationships, and they also hold the power to unilaterally sever them with little regard to the interests of the child, a power some psychologists believe is too great. As stated by the Honorable Utah Supreme Court Chief Justice Durham, "[a] parent who

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277. Id. ¶ 14, 877 N.W.2d at 338.
278. Findings of Fact, supra note 24, at 11.
279. Aguilar, 2016 SD 20, ¶ 14, 877 N.W.2d at 338.
280. Id. ¶ 5, 877 N.W.2d at 335.
281. Id. ¶ 2, 5, 877 N.W.2d at 335.
282. Id. ¶ 5, 877 N.W.2d at 335.
283. Brief for Appellee, supra note 36, at 5.
284. See, e.g., Quinn v. Moun-WQuinn, 552 N.W.2d 843, 845 (S.D. 1996) (describing that biological mother asked non-biological father to care for her child, though both parties knew he was not the biological father).
285. Jones v. Barlow, 2007 UT 20, ¶ 95, 154 P.3d 808, 834 (Durham, C.J., dissenting). In addition, the United States Supreme Court has stated that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).
286. See supra Part III.A and accompanying notes (discussing the parents’ actions in In re Guardianship of Sedelmeier, Cooper v. Merkel, and Meldrum v. Novotny).
287. GOLDSTEIN, supra note 234, at 18, 80. New Jersey has expressed the view that a legal parent should not be able to unilaterally sever the bonds between a child and psychological parent when legal and psychological parents become averse to one another. V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000). Instead, when conflicts arise, courts should treat both adults as legal parents and then apply the best interests of the child standard. Id.
encourages the formation of such a relationship cannot later unilaterally sever the connection or complain that a court has violated his or her rights by protecting the relationship.\textsuperscript{288} The United States Supreme Court, however, has yet to openly state that children have autonomous, constitutionally protected rights to maintain relationships with their primary caregivers, regardless of their affiliation.\textsuperscript{289} Nonetheless, under South Dakota Codified Law sections 25-5-29 and 30, third parties are given a constitutional avenue in which to pursue visitation or custody rights over children they have cared for if the parental presumption can be rebutted.\textsuperscript{290}

C. EXTRAORDINARY CIRCUMSTANCES SHOULD EXAMINE THE BEST INTERESTS OF THE CHILD IN CONJUNCTION WITH THE BOND FORMED WITH THE PSYCHOLOGICAL PARENT

In \textit{Aguilar}, the court held that Tosha had “undisputedly been M.A.’s primary caregiver for the vast majority of M.A.’s life.”\textsuperscript{291} Her status as M.A.’s primary caregiver was an extraordinary circumstance that rebutted Tony’s parental preference.\textsuperscript{292} South Dakota Codified Law section 25-5-30 defines extraordinary circumstances as referenced in section 29:

(1) The likelihood of serious physical or emotional harm to the child if placed in the parent’s custody;
(2) The extended, unjustifiable absence of parental custody;
(3) The provision of the child’s physical, emotional, and other needs by persons other than the parent over a significant period of time;
(4) The existence of a bonded relationship between the child and the person other than the parent sufficient to cause significant emotional harm to the child in the event of a change in custody;
(5) The substantial enhancement of the child’s well-being while under the care of a person other than the parent;
(6) The extent of the parent’s delay in seeking to reacquire custody of the child;
(7) The demonstrated quality of the parent’s commitment to raising the child;
(8) The likely degree of stability and security in the child’s future with the parent;

\textsuperscript{288} Jones, 2007 UT 20, ¶ 95, 154 P.3d at 834 (Durham, C. J., dissenting).
\textsuperscript{289} Anne C. Dailey, \textit{Children’s Constitutional Rights}, 95 MINN. L. REV. 2099, 2162 n.251 (2011) (describing \textit{Troxel} as allowing only parents to be given rights as caregivers).
\textsuperscript{291} Aguilar v. Aguilar, 2016 SD 20, ¶ 20, 877 N.W.2d 333, 339.
\textsuperscript{292} \textit{Id.}
(9) The extent to which the child's right to an education would
be impaired while in the custody of the parent; or
(10) Any other extraordinary circumstance that would
substantially and adversely impact the welfare of the child.293

Whether a parent is a primary caregiver is not specifically listed as an
extraordinary circumstance, but the court found that subsection three, "[t]he
provision of the child's physical, emotional, and other needs by persons other than
the parent over a significant period of time," is relevant as to "[w]hether a parent
is fit or not."294 The court went on to explain in a footnote that Troxel requires a
fit parent to adequately care for his or her children, and a fit parent is one who
"provides for the child's physical, emotional, and other needs."295 Tosha had
cared for M.A. since she was six months old, and M.A. was almost four years old
at the time of the court's decision.296 The court went so far as to say that M.A.
probably had no recollection of living with her biological parents in Arizona.297

The court was able to examine what was in M.A.'s best interests by holding
that Tosha had become M.A.'s primary caregiver, an extraordinary circumstance
as implicitly stated in subsection three of South Dakota Codified Law section 25-
5-30.298 The necessity of rebutting the parental preference before examining the
best interests of the child was articulated in Clough.299 However, the necessity of
finding an extraordinary circumstance before looking at the best interests of the
child is an illogical endeavor because many of the extraordinary circumstances
stated in the statute are the same factors used when evaluating the best interests of
the child.300 For example, "[t]he existence of a bonded relationship between the
child and the person other than the parent sufficient to cause significant emotional
harm to the child in the event of a change in custody" is equivalent to the best
interests of the child factor of stability, which is evaluating "the parent with whom
the child has formed a closer attachment, as attachment between parent and child
is an important developmental phenomena and breaking a healthy attachment can
cause detriment" as stated in Fuerstenberg.301

Despite similarities, South Dakota has stated, "extraordinary circumstances
must denote more than a simple showing of the child's best interests."302 The best

("That other extraordinary circumstances exist which, if custody is awarded to the parent, would result in
serious detriment to the child."). These ten factors closely mirror the factors set forth by the Honorable
Justice Konenkamp in his concurrence in Meldrum. See supra note 178 (listing the factors Justice
Konenkamp identified).
294. Aguilar, 2016 SD 20, ¶ 19, 877 N.W.2d at 339 n.5.
295. Id.
296. Id. ¶ 19, 877 N.W.2d at 339.
297. Id.
298. Id. ¶¶ 22-23, 877 N.W.2d at 339-40.
300. Fuerstenberg v. Fuerstenberg, 1999 SD 35, ¶¶ 24-32, 591 N.W.2d 798, 807-10; S.D.C.L. § 25-
301. S.D.C.L. § 25-5-30(4); Fuerstenberg, 1999 SD 35, ¶ 26, 591 N.W.2d at 808.
302. Feist v. Lemieux-Feist, 2010 SD 104, ¶ 10, 793 N.W.2d 57, 62 (quoting In re Guardianship of
interests of the child should be included as part of extraordinary circumstances because inequitable decisions result when the best interests of the child are subverted by the need to show parental unfitness or extraordinary circumstances. A case illustrative of such a result is seen in Sedelmeier in which custody of the child was granted to the mother, despite the fact that the child was cared for by the Cumbers for seven years and suffered a psychological breakdown lasting thirty days shortly after returning to his mother’s care. The child’s best interests were ignored because there was insufficient evidence of his mother’s unfitness. The court should have found that the length of time the child had spent with the Cumbers and his psychological health were extraordinary circumstances such that his mother’s parental presumption should have been satisfactorily rebutted. As stated by Justice Amundson in Meldrum, “South Dakota should . . . place the best interest of the child as the paramount factor in . . . custody dispute[s] so that the presumption of custody for a natural parent is subordinate to the child’s best interest.”

Aguilar was correctly decided because South Dakota courts should be able to allow children to maintain their intimate relationships with their nurturing caretakers in order to ensure that children will grow to reach their fullest potential. Children need a stable environment in which their emotions are affirmed in order to develop into confident adults. Family break-ups have been shown to have deleterious effects on children. One study found that children benefitted socially and emotionally from “stable dual and single parent living arrangements,” whereas children’s psychological well-being declined when they experienced family transitions. Any time the tie between child and caregiver is broken, the effects can be extremely painful for the child, potentially causing poor performance in school, inability to cope with change, low self-esteem, and isolation from peers and family.

These consequences of family break-up can last into adulthood; children separated from their psychological parents are often unable to cope with stressful situations and become hostile, depressed, and anxious as adults. In particular, family transitions due to divorce have been linked to teen-age pregnancies, lower

303. See supra Part III.A.1 (detailing the holdings in Sedelmeier and Cooper).
305. See id. at 88 (“Since there was insufficient evidence that Kris was unfit for custody of Aaron, it was unnecessary for a determination or recommendation as to the best person to have custody of Aaron.”).
306. Id. at 87.
308. See Aguilar v. Aguilar, 2016 SD 20, ¶ 22, 877 N.W.2d 333, 339-40 (awarding custody to Tosha because Tosha provided all the child’s emotional and physical needs and was the only parent the child had ever known).
309. GOLDSTEIN, supra note 234, at 20.
310. Sinikka Elliott & Debra Umberson, Recent Demographic Trends in the U.S. and Implications for Well-Being, in THE BLACKWELL COMPANION TO THE SOCIOLOGY OF FAMILIES 34, 45 (Jacqueline Scott, Judith Treas & Martin Richards eds., 2004).
311. Id.
312. Valastro, supra note 240, at 523.
313. Id. at 523-24.
achievement in school, and overall poorer life outcomes for children caught in the middle of divorces.\textsuperscript{314} The need for continuity is most crucial in infancy when children learn to form attachments, and if attachments never form or are broken, their ability to form attachments later in life is inhibited.\textsuperscript{315} One Massachusetts court went so far as to say that even psychiatrists cannot predict the severity or impact of harm to a child when parental bonds are broken.\textsuperscript{316} For these reasons, the current approach of awarding child custody to a legal parent is not always in the best interests of the child.\textsuperscript{317} By overcoming the parental presumption by showing extraordinary circumstances, the best interests of the child can be kept as a paramount concern by recognizing that children can suffer psychological and emotional harm when parent-child bonds are broken.\textsuperscript{318}

V. CONCLUSION

The extraordinary circumstances rebuttal to the parental presumption recognizes that psychological parents can play just as an important role in the lives of children as legal parents. When a parent encourages or allows a third party to form a close relationship with a child, disruption of that relationship should not be analyzed solely from the perspective of the parent and third party: the child is also an interested party and his or her rights of association with a psychological parent must be protected.\textsuperscript{319} Courts should not rigidly adhere to the principle that legal parenthood is an exclusive status without considering the deleterious, long-term effects family transitions can have upon a child. South Dakota recognized the need to reconsider child custody determinations when it codified laws that allow third parties to rebut the parental preference and show evidence of the bond between caregiver and child. These statutes were used to the benefit of the child in Aguilar by protecting the bond formed between the child and her aunt, who had been her primary caregiver since the child was six months old. Like the child in Aguilar, all children should be given the opportunity to continue relationships formed with supportive adults until they are old enough to make their own decisions regarding association. "Parent" should not be defined solely through

\textsuperscript{314} Elliott & Umberson, supra note 310, at 45. See also Jan Pryor & Liz Trinder, Children, Families, and Divorce, in THE BLACKWELL COMPANION TO THE SOCIOLOGY OF FAMILIES 332 (Jacqueline Scott, Judith Treas & Martin Richards eds., 2004) (showing that children who experience divorce are more likely to face adversity, "suffer social and emotional problems," exhibit aggressive and antisocial behavior, abuse substances, "leave school early, enter partnerships early, and to become parents early," and suffer mental illnesses such as depression and suicidal thoughts).

\textsuperscript{315} Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Promise of the Nuclear Family Has Failed, 70 VA. L. REV. 879, 903 (1984).


\textsuperscript{317} See supra notes 309-316 and accompanying text (describing negative effects of family dissolution on children).

\textsuperscript{318} Karen P. v. Christopher J.B., 878 A.2d 646, 660 (Md. Ct. Spec. App. 2005). See also Thompson, supra note 100, at 563-64 (arguing for the best interests of the child approach that includes inquiry into the emotional ties between child and psychological parent because it would give more protections to children).

legal or biological bonds, but by acknowledging the individual who has emotionally, mentally, and psychologically supported the child. "Parent" should be defined through the eyes of the child.