HE AIN'T HEAVY, HE'S MY BROTHER:[1] THE NEED FOR A STATUTORY ENABLING OF SIBLING VISITATION

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> What right could be more basic, more precious than that of sharing life experiences with one's own brother or sister? Surely, nothing can equal or replace either the emotional and biological bonds which exist between siblings, or the memories of trials and tribulations endured together, brotherly or sisterly quarrels and reconciliations, and the sharing of secrets, fears and dreams. To be able to establish and nurture such a relationship is, without question, a natural, inalienable right which is bestowed upon one merely by virtue of birth into the same family.[3]

[1] THE HOLLIES, *He Ain't Heavy, He's My Brother*, *on* HOLLIES SING HOLLIES (Abby Road Records 1969).

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[3] L. v. G., 497 A.2d 215, 218 (N.J. Super. Ct. Ch. Div. 1985).

I. INTRODUCTION

Melissa was nearly thirteen years old when the problems began. At the time, Melissa's father was out of the picture, and Melissa was living with her abusive mother.[4] Worried about Melissa's deteriorating home-life, Melissa's paternal grandparents petitioned for custody of Melissa. After a tumultuous custody proceeding, the family court placed Melissa with her paternal grandparents. In doing so, the court separated Melissa from her eight-year-old half-brother, Erik, with whom Melissa was incredibly close. Melissa's happiest childhood memories included playing with Erik and cooking breakfast for him. Erik was Melissa's best friend and closest companion. When Melissa left her mother's home, Melissa's biggest concern was what would happen to Erik. Unfortunately, little could be done for Erik. He was not related to Melissa's paternal grandparents, and neither his father nor his father's family were in his life. During the years that followed, Melissa tried to re-establish a relationship with her younger brother, but Melissa's mother continually denied Melissa access to Erik. To this day, Melissa's mother continues to deny Melissa—now an independent twenty-one-year-old college student—contact with her brother.

Unfortunately, Melissa has limited recourse in trying to establish contact with Erik, a sibling who once represented a significant part of her life, because the state she resides in has no sibling visitation statute. Some states currently give siblings standing in family court through sibling visitation statutes, but those states are few in number.[5] Additionally, while many states allow for third-party visitation claims, some state standards are of

[4] The author wrote this story to showcase a common way in which siblings are separated.

[5] *See* statutes cited *infra* note 102.

questionable validity[6] and others are difficult for siblings to meet, given the uniqueness of sibling relationships.[7]

Typically, the federal government is not involved in most family law matters.[8] However, the federal government does involve itself when a constitutionally protected right is implicated as in *Troxel v. Granville*,[9] *Michael H. v. Gerald D.*,[10] and *Loving v. Virginia*.[11] The federal government also becomes involved in family law matters by offering conditional funding for welfare programs such as Temporary Assistance for Needy Families (TANF).[12] Among family law cases in the Supreme Court's jurisprudence, *Troxel* is the most consequential in relation to sibling visitation because it establishes the parameters of constitutional protection among parents, children, and third parties.[13] Over a decade before *Troxel* defined third-party visitation rights, several federal courts found constitutionally protected rights for siblings under the rights of association and of preservation of family integrity.[14] In addition, many commentators over the past twenty-five years have argued that siblings possess a fundamental right under the United States Constitution to maintain contact with one another, even over parents' objections.[15]

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[6] *See* discussion *infra* notes 193-94.

[7] *See, e.g.*, MINN. STAT. § 257C.08 (4) (2017) (allowing other persons to seek visitation when they have resided with the child for more than two years and have, among other things, established emotional ties that create a parent like relationship); *see also* discussion *infra* notes 165-66.

[8] *Ex Parte* Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.").

[9] Troxel v. Granville, 530 U.S. 57 (2000) (affirming that parents have a fundamental liberty interest in the care, control, and custody of their minor children).

[10] Michael H. v. Gerald D., 491 U.S. 110 (1989) (ruling that an adulterous, biological father does not have a constitutional right to paternity over the marital father).

[11] Loving v. Virginia, 388 U.S. 1 (1967) (ruling that restrictions of marriage solely based on race violates the Equal Protection Clause).

[12] *See, e.g.*, 42 U.S.C.A. § 671(a)(31) (West 2015) (placing conditions on Title IV-E Foster Care Agencies in order to receive federal funds); Social Security Act of 1935, 42 U.S.C.A. §§ 651-669b (West 2014) (placing numerous conditions on state child support agency in order to receive federal funds).

[13] *See Troxel*, 530 U.S. 57 (2000).

[14] *See* Aristotle P. v. Johnson, 721 F. Supp. 1002, 1005 (N.D.Ill. 1989) ("This court finds that the childrens' [*sic*] relationships with their siblings are the sort of 'intimate human relationships' that are afforded 'a substantial measure of sanctuary from unjustified interference by the State")(quoting Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984)); Trujillo v. Bd. of Cty. Comm'rs of Santa Fe Cty., 768 F.2d 1186, 1189 n.5 (10th Cir. 1985) (siblings' "relationships at issue clearly fall within the protected range" established in *Roberts*); *see also* Rivera v. Marcus, 696 F.2d 1016, 1024-25 (2d Cir. 1982).

[15] *See* Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV.

This article does not take a position on whether the Constitution protects the right of siblings to associate with one another. Instead, this article argues that states should enact sibling visitation statutes that create a right for both adult siblings and minor siblings[16] to assert a claim for visitation with a minor sibling. Sibling visitation statutes are important because there is immense value in maintaining the sibling bond, if possible.[17] This article focuses on a sibling's ability to visit another sibling through family court proceedings and not child welfare proceedings.[18] Furthermore, Troxel should only apply to non-sibling third-party visitation suits because *Troxel*'s demands do not equally apply to members of the nuclear family as it does to third parties.[19]

Part II of this article details the immense importance of sibling relationships by examining psychological research. Part III analyzes *Troxel* and its aftermath for third-party visitation. Part IV details why siblings should not be considered third parties and analyzes a 2014 Maryland Court of Appeals case in which the court held that siblings are third parties for visitation purposes. Part V discusses one type of model statute that can be used to ensure that sibling access is fostered and protected.

II. BENEFITS OF THE SIBLING RELATIONSHIP

> A sibling relationship can be an independent emotionally supportive factor for children in ways quite distinctive from other relationships, and there are benefits and experiences that a child reaps from a relationship with his or her brother(s) or sister(s) which truly cannot

1187, 1188 (1993) (arguing that "siblings possess a fundamental constitutional right to maintain relationships with each other"); William Wesley Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. MIAMI L. REV. 745, 784-85 (1994) (arguing that courts should declare that siblings have a fundamental liberty interest in associating); Seth A. Grob, *Sibling Visitation: A Child's Right*, 22 COLO. LAW. 283, 284 (arguing that courts could find that children possess a liberty interest in association under the Due Process Clause and the First Amendment of the United States Constitution); Angela Ferraris, *Sibling Visitation as a Fundamental Right in Herbst v. Swan*, 39 NEW ENG. L. REV. 715, 753 (2004) (arguing that the California Court of Appeals weakened the constitutionally protected rights of siblings).

[16] Some states with sibling statutes allow an adult such as a parent or legal guardian to bring a claim for sibling visitation on behalf of a minor. *See, e.g.*, ARK. CODE ANN. § 9-13-102 (West 1981); N.Y. DOM. REL. LAW § 71 (McKinney 1989); 15 R.I. GEN. LAWS § 15-5-24.4 (West 2012).

[17] Robin Marantz Henig, *Your Adult Sibling May Be The Secret To A Long, Happy Life*, NPR (November 27, 2014, 9:03AM), http://www.npr.org/sections/health-shots/2014/11/27/366789136/your-adult-siblings-may-be-the-secret-to-a-long-happy-life.

[18] *See* discussion *infra* notes 185-87 about the protections in place for siblings in child welfare proceedings.

[19] *See* discussion *infra* Section III. D.

> be derived from any other. Those of us who have been fortunate enough to experience a sibling relationship are aware of these basic human truths.[20]

More than 80 percent of children in the United States have at least one brother or sister.[21] Today's children are more likely to grow up with a sibling than a father.[22] The sibling relationship is generally regarded to be the longest relationship a person will have because the relationship will typically last longer than a relationship with a parent or spouse. Additionally, through adolescence children commonly spend more time with their sibling than they do with their friends, aunts, uncles, grandparents, teachers, and even parents.[23]

While initially overlooked at the expense of research into the parent-child relationship, for the past several decades researchers have begun to delve more deeply into the sibling relationship.[24] Researchers have specifically linked a strong sibling bond to peer acceptance,[25] social competence,[26] academic engagement,[27] and long-term mental health.[28]

Psychologists frame the sibling relationship dynamic through either attachment theory or Alfred Adler's theory of individual psychology.[29] Attachment theory describes the developmental change in social relationships beginning at a young age, while Adler's theory of individual psychology analyzes external social influences on personality development.[30] Both theories ultimately suggest, however, that sibling

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[20] L. v. G., 497 A.2d 215, 220-21 (N.J. Super. Ct. Ch. Div. 1985).

[21] Susan M. McHale et al., *Sibling Relationships and Influences in Childhood And Adolescence*, 74 J. MARRIAGE & FAM. 913, 913 (2012).

[22] *Id.*

[23] *See* JUDY DUNN, SISTERS AND BROTHERS 4 (1985); Susan M. McHale & Ann C. Crouter, *Family and Sibling Relationships*, *in* SIBLING RELATIONSHIPS 181 (Gene Brody ed., 1996).

[24] Mark E. Feinberg, et al., *The Third Rail of Family Systems: Siblings Relationships, Mental and Behavioral Health, and Preventive Intervention in Childhood and Adolescence*, CLIN. CHILD FAM. PSYCHOL. REV., 43, 43 (2012).

[25] AVIDAN MILEVSKY, SIBLING RELATIONSHIPS IN CHILDHOOD AND ADOLESCENCE, xxiii (2011).

[26] *Id.*

[27] *See* Janet N. Melby, et al., *Adolescent Family Experience and Educational Attainment During Early Adulthood*, 44 DEVELOPMENTAL PSYCHOL., 1519, 1530-32 (2008).

[28] Robert J. Waldinger, et al., *Childhood Sibling Relationships As A Predictor Of Major Depression In Adulthood: A 30-year Prospective Study*, 164 (6) AM. J. PSYCHIATRY 949, 953 (2007).

[29] Shawn D. Whiteman, Susan M. McHale, & Anna Soli, *Theoretical Perspectives on Sibling Relationships*, 3 J. FAM. THEORY REV. 124, 125 (2011).

[30] *Id.* at 127.

relationships are consequential to an individual's personal development.[31]

Under attachment theory, infants form intense emotional bonds with their primary caretakers, who serve as a source of comfort as they engage in new experiences.[32] The attachment bond formed between a child and his or her caretaker can vary in degree according to the responsiveness of the caretaker.[33] Infants can also form attachment relationships with other persons in the infants' social world, such as siblings who may develop attachment relationships with one another.[34] This could be especially true in the face of domestic violence or other conflict involving a primary caretaker.[35] In such instances, siblings may rely more on one another for support and comfort, and consequently form a deeper attachment.[36] These sibling relationships, for many, last a lifetime. Siblings are common sources of social support and assistance in older adulthood, thus siblings may develop significant attachment bonds with one another over their lifetimes.[37]

Adler's theory of individual psychology, on the other hand, highlights the importance of external social influences, emphasizing that family dynamics and sibling influences are key components in personality development.[38] A key component of Adler's theory is the inferiority complex, which causes some to "de-identify" with their siblings and create different personal attributes and qualities through the course of their childhood development.[39] Psychological research, however, has not yet definitively ascertained whether and how siblings' personal qualities and differences are related to the quality and closeness of the sibling relationship.[40]

Under both theories, the sibling relationship dynamic is consequential to an individual's development as a human being.[41] Some scholars have even suggested that siblings may have more of an effect on personality than parents.[42] This could be especially true when the family is going through

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[31] *Id.* at 125, 128.

[32] *Id.* at 125.

[33] *Id*

[34] *Id.*

[35] *See* Jennifer M. Jenkins, *Sibling Relationships in Disharmonious Homes: Potential Difficulties and Protective Effects, in* CHILDREN'S SIBLING RELATIONSHIPS: DEVELOPMENT AND CLINICAL ISSUES 130-31 (Frits Boer & Judith Dunn eds., 1992).

[36] *Id.*

[37] VICTOR G. CICIRELLI, SIBLING RELATIONSHIPS ACROSS THE LIFE SPAN 53-54 (1995).

[38] *See* Whiteman et al., *supra* note 29, at 129.

[39] *See id.* at 125.

[40] *Id.* at 138.

[41] *Id.* at 125, 128.

[42] *See, e.g.*, Heather Rudow, *Siblings Can Affect Your Personality Even More Than Your Parents,* COUNSELING TODAY, (Oct. 26, 2011),

trauma or hardship, such as violence, poverty, devastating illness, or relationship conflict.[43] Siblings serve as friends, mentors, stabilizers, and sources of caring and love, and according to some experts even "validate the child's fundamental worth as a human being because the love he or she receives does not have to be earned."[44] Moreover, these "[p]ermanent, unconditional relationships also produce hope and motivation in an individual."[45] For many, the sibling bond is irreplaceable, particularly when the greater family unit experiences a change that disrupts other attachment relationships.[46] Consequently, ensuring separated siblings are able to spend time with one another is central in supporting the continued growth and benefits of sibling relationships.

III. TROXEL V. GRANVILLE AND ITS IMPLICATIONS FOR SIBLING VISITATION

Prior to the Supreme Court's decision in *Troxel*, all fifty states in the United States had some form of a grandparent or third-party visitation statute.[47] These state statutes differed considerably both in terms of standing and burden of proof for grandparent visitation.[48] Although *Troxel* addresses grandparents seeking visitation, its central holding has had a far-reaching impact on third-party visitation proceedings.[49]

A. *Facts of Troxel v. Granville*

Tommie Granville and Brad Troxel were unmarried parents of Isabelle

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http://ct.counseling.org/2011/10/siblings-can-affect-your-personality-even-more-than-your-parents/; Henig, *supra* note 17.

[43] *See, e.g.*, Mary Anne Alderfer, et al., *Brief report: Does posttraumatic stress apply to siblings of childhood cancer survivors?* 28 (4) J. OF PEDIATRIC PSYCHOL., 281, 283-84 (2003).

[44] Mary Anne Herrick & Wendy Piccus, *Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System*, 27 CHILD. & YOUTH SERVICES REV. 845, 851 (2005).

[45] *Id.*

[46] *Id.*

[47] Troxel v. Granville, 530 U.S. 57, 73, n. * (2000).

[48] *Compare* WASH. REV. Code § 26.10.160(3) (1994), *invalidated by Troxel*, 530 U.S. 57 (which allowed "[a]ny person" to petition for visitation rights "at any time" and for such visitation to be granted when it was deemed to be in the best interest of the children), *with* Mo. Rev. Stat. 452.402.1 (2)-(4) (2017) (requiring that grandparents be denied visitation unreasonably and for continuous period of ninety days before they have standing to seek visitation, along with other mandatory conditions).

[49] *See Troxel*, 530 U.S. at 73.

and Natalie.[50] After Brad and Tommie separated in 1991, Brad moved in with his parents, Jenifer and Gary Troxel ("the Troxels"), and brought Isabelle and Natalie over to the Troxels' home for his weekend visitation.[51] In May 1993, Brad committed suicide.[52] After their son's death, the Troxels continued to see Isabelle and Natalie on a regular basis, but in October 1993 Tommie informed the Troxels that she would be limiting their visitation with Isabelle and Natalie to one day-visit per month.[53]

The Troxels commenced litigation in December 1993, filing a petition in the Washington Superior Court to obtain visitation with their two minor grandchildren.[54] At trial, the Troxels requested two weekend overnight visits per month and two weeks each summer.[55] Tommie opposed the Troxels' request and asked that the Troxels be given one day of visitation per month without any overnight stays.[56] Over a year after the suit commenced, the Superior Court entered an order that awarded the Troxels one weekend of visitation per month, one week of summer visitation, and four hours of visitation on Jenifer and Gary Troxels' birthdays.[57]

Tommie then appealed the Superior Court order to the Washington Court of Appeals, which remanded the order and required the Superior Court to issue a written visitation order.[58] Tommie again appealed after the written visitation order was issued, and the Washington Court of Appeals reversed the Superior Court's order.[59] The Washington Court of Appeals held that Washington Rev. Code § 26.10.160(3) did not confer standing to non-parents unless a custody action was pending.[60] The Troxels then appealed this decision to the Washington Supreme Court, which affirmed the Washington Court of Appeals' decision on a different ground.[61] The Washington Supreme Court disagreed with the Washington Court of Appeals' holding regarding the Troxels' lack of standing under Washington Rev. Code § 26.10.160(3), but ultimately concluded that § 26.10.160(3) violated the United States Constitution because the third-party visitation statute "unconstitutionally infringe[d] on the fundamental right of parents to

[50] *Id.* at 60.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 60-61.
[54] *Id.* at 61.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 62.
[61] *See id.* at 62-63.

rear their children."[62] The United States Supreme Court granted the Troxels' writ of certiorari in 1999,[63] and subsequently affirmed the judgment of the Washington Supreme Court in a plurality opinion consisting of six total opinions.[64]

B. *The Plurality's Opinion*

The Plurality began by affirming "perhaps the oldest fundamental liberty interest" recognized by the Supreme Court: the liberty interest of parents to decide the care, custody, and control of their children.[65] The Court held that Washington Rev. Code § 26.10.160(3) unconstitutionally infringed on Tommie Granville's parental liberty interest under the Due Process Clause.[66]

In identifying the problems with Washington's third-party visitation statute, the Supreme Court noted several significant deficiencies. First, the statute in question was "breathtakingly broad" in that it allowed "any person . . . at any time" standing to seek visitation with a minor child.[67] Second, once the matter was actually placed in front of the judge, the court could grant visitation when "visitation may serve the best interest of the children."[68] This placed the best-interest determination solely in the hands of the judge and allowed the judge to overturn an otherwise fit parent's determination based on the judge's subjective determination of the child's best interests.[69] The Supreme Court held that the lack of deference given to Granville, and the Washington Supreme Court's failure to accord any type of deference, was fatal to the statute as applied in *Troxel*.

The Plurality also noted additional problems with the application of Washington's third-party visitation statute. First, the Superior Court did not find, nor was it alleged, that Granville was in any way an "unfit parent." The Supreme Court held that failure to make a fitness determination was important because under the Court's precedent fit parents presumptively act in the best interest of their children.[70] The Plurality later clarified that the

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[62] *Id.*

[63] *In re* Custody of Smith, 969 P.2d 21 (Wash. 1998), *cert. granted sub nom.* Troxel v. Granville, 527 U.S. 1069 (1999).

[64] Justice O'Connor authored the plurality opinion and was joined by Justices Ginsburg, Breyer, and Rehnquist. Justices Souter and Thomas offered individual concurrences, and Justices Stevens, Scalia, and Kennedy each filed individual dissenting opinions.

[65] *Troxel*, 530 U.S. at 65.

[66] *Id.* at 67.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See id.* at 68 (citing Parham v. J.R., 442 U.S. 584, 602 (1979)).

Superior Court properly intervened in this visitation suit but that the Superior Court should have given special deference to Granville's determination of what was in her children's best interests.[71] Second, the Plurality noted that Granville never sought to completely cut off the Troxels' access to the minor children, but rather simply limit such access.[72] Thus, the Superior Court failed to give any weight to the fact that Granville actually assented to visitation before the lawsuit commenced.[73]

All of these deficiencies, (1) the overbreadth of who has standing, (2) the lack of parental deference, (3) the lack of a finding of fitness, and (4) the lack of consideration to the parent's decision to give some access to the grandparents "[c]onsidered together" demonstrated that the visitation order in *Troxel* infringed on Granville's fundamental right to make certain decisions for her daughters.[74] The Supreme Court's narrow holding did answer the central constitutional question passed on by the lower court—"whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."[75] Since the constitutionality of any standard for awarding visitation turns on the specific manner in which the standard is applied and the constitutional protections in place, the Court declined to hold that specific non-parental visitation statutes (i.e. statutes that do not require a threshold showing of harm) would always violate the Due Process Clause.[76]

C. *The Concurring Opinions*

In his concurrence, Justice Souter argued that the Plurality could have simply invalidated the law facially on two independent grounds: (1) the failure of the law to require a threshold showing of harm to the child and, (2) the statute's overbroad authorization giving anyone standing at any time.[77] Justice Souter stated that since the statute's overbroad authorization rendered the statute unconstitutional on its face, there was no reason to consider the precise scope of parents' rights in regards to a threshold showing of harm analysis.[78]

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[71] *Troxel*, 530 U.S. at 69 (noting the superior court judge appeared to do the exact opposite by presuming the grandparent's request should be granted unless the children would be adversely impacted by the grandparent's lifestyle).

[72] *Id.* at 71 (Thomas, J., concurring).

[73] *Id.* (Thomas, J., concurring).

[74] *Id* at 72.

[75] *Id.* at 73.

[76] *Troxel*, 530 U.S. at 73.

[77] *Id.* (Souter, J., concurring).

[78] *Id.* at 77 (Souter, J., concurring).

Justice Thomas concurred with the Plurality. He first noted that neither party had argued that the Court's substantive Due Process Clause cases were wrongly decided.[79] He also offered that while he agreed with the Plurality's opinion, he believed it was a mistake not to articulate a clear standard of review.[80] Justice Thomas made clear that he would apply strict scrutiny since the Washington visitation statute implicated a fundamental right.[81]

D. *Troxel's Application to Sibling Visitation (The Fallout of Troxel)*

At first blush, it seems that *Troxel* would have an almost unlimited application to sibling visitation. After all, *Troxel* reaffirmed parents' fundamental right to decide the care, custody, and control of their children.[82] However, *Troxel* did not invalidate all third-party visitation statutes. Beginning almost immediately after *Troxel*, dozens of state visitation statutes went through "*Troxel* challenges."[83] Of these state visitation statutes, approximately fifteen were upheld. Courts in those states reasoned that the various state statutes were narrowly tailored and not facially unconstitutional.[84] In many cases, as-applied challenges failed,[85] however some states did strike down their grandparent visitation statutes because these statutes violated parents' due process rights under *Troxel*.[86]

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[79] But Thomas indicated that he would appreciate an opportunity to re-evaluate the meaning of the Privileges and Immunities Clause. *See Troxel*, 530 U.S. at 80, n.*.

[80] *Id*. at 80.

[81] *Id.*

[82] *Id.* at 66.

[83] *See* cited cases *infra* note 84-86.

[84] For an incomplete spread of failed facial *Troxel* challenges see: Arizona (Jackson v. Tangreen, 18 P.3d 100, 104 (Ariz. Ct. App. 2000), California (*In re* Marriage of Harris, 96 P.3d 141, 151 (Cal. 2004)); Colorado (*In re* Adoption of C.A., 137 P.3d 318, 326 (Colo. 2006)); Indiana (Crafton v. Gibson, 752 N.E.2d 78, 91 (Ind. Ct. App. 2001)); Louisiana (Galjour v. Harris, 2000-2696 (La. App. 1 Cir. 3/28/01), (795 So. 2d 350)); Maine (Rideout v. Riendeau, 761 A.2d 291, 301 (Me. 2000)); Massachusetts (Blixt v. Blixt, 774 N.E.2d 1052, 1060 (Mass. 2002)); Mississippi (Stacy v. Ross, 798 So. 2d 1275, 1279 (Miss. 2001)); Missouri (Blakely v. Blakely, 83 S.W.3d 537, 538 (Mo. 2002), *as modified on denial of reh'g* (Aug. 27, 2002)); New Mexico (Williams v. Williams, 50 P.3d 194, 196 (N.M. 2002)); New York (Fitzpatrick v. Youngs, 717 N.Y.S.2d 503, 506 (Fam. Ct. 2000)); Ohio (Harrold v. Collier, , 836 N.E.2d 1165, 1172); Pennsylvania (Hiller v. Fausey, 904 A.2d 875, 886 (Pa. 2006)); Texas (Lilley v. Lilley, 43 S.W.3d 703, 712 (Tex. App. 2001)); West Virginia (State *ex rel*. Brandon L. v. Moats, 551 S.E.2d 674, 684 (W. Va. 2001)).

[85] *See, e.g.*, *Marriage of Harris*, 96 P.3d at 151; *Rideout*, 761 A.2d at 301; *Williams*, 50 P.3d at 196.

[86] *See, e.g.*, Weldon v. Ballow, 200 So. 3d 654 (Ala. Civ. App. 2015) (holding a subsection of a grandparent visitation statute facially unconstitutional), *cert. denied sub nom. Ex parte* Strange, 200 So. 3d 675 (Ala. Jan 22, 2016) (NO. 1150152); Santi v. Santi, 633

Perhaps the greatest challenge *Troxel* posed to state third-party visitation statutes was not that it struck down a grandparent visitation statute, but rather that it created an unclear standard for the analysis of parental rights.[87] Today, judges and justices from around the country continue to disagree about the level of scrutiny that *Troxel* requires.[88] The Plurality opinion[89] and the dissenting opinions of both Justice Stevens[90] and Justice Kennedy[91] suggest that a balancing approach should be applied in third-party visitation statute challenges to determine whether a parent's due process rights have been violated. However, Justice Thomas asserted in his short concurrence that the standard should be strict scrutiny, an assertion that the Plurality and Justice Souter failed to contest.[92] Accordingly, we can infer that strict scrutiny is not necessarily the standard, especially given the Plurality's careful avoidance of strict-scrutiny terminology.[93]

The unsettled third-party visitation suits standard fails to address whether a showing of harm is required for third-party visitation statutes.[94] If strict scrutiny is the correct standard in reviewing cases regarding infringement of parents' fundamental right to the care and custody of their children, then showing harm to the child is likely the only compelling interest that would provide sufficient justification for state interference.[95] The Plurality had the ability to address the third-party visitation standard but failed to

N.W.2d 312 (Iowa 2001) (holding a grandparent visitation statute facially unconstitutional); DeRose v. DeRose, 666 N.W.2d 636 (Mich. 2003) (holding a grandparent visitation statute facially unconstitutional); Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007) (striking down part of Minnesota's third-party visitation law as facially unconstitutional).

[87] *See Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (lamenting an unclear standard for analyzing parental rights).

[88] *See* discussion *infra* note 97-98.

[89] *Troxel*, 530 U.S. at 69 (plurality opinion) ("The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughter's best interests."). The Plurality then goes on to explicitly state that these factors *balanced together* infringe on Granville's substantive due process rights. *Id.* at 72 (emphasis added).

[90] *Id.* at 88 (Stevens, J., dissenting) ("[T]his Court's assumption that a parent's interest in a child must be balanced against the State's long recognized interests in *parens patriae*").

[91] *Id.* at 95-96 (Kennedy, J., dissenting) ("The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases. . .").

[92] *Id.* at 57-79.

[93] *Id.* at 69-72.

[94] *See* discussion *infra* notes 97-98.

[95] *See, e.g.*, Jones v. Jones, 359 P.3d 603, 611 (Utah 2015) ("To withstand strict scrutiny, a grandparent visitation order must be narrowly tailored to advance a compelling governmental interest, or in other words to protect against substantial harm to the child.").

establish a clear level of review. Rather, the Plurality explained that since state visitation cases are evaluated on a "case-by-case basis," they were hesitant to hold that non-parental visitation statutes, without a showing of harm, violated the Due Process Clause "as a *per se* matter."[96] Following *Troxel*, a number of state appellate courts have held that harm is required[97] while other state courts have held that some lesser type of scrutiny is required.[98]

In the end, the determination of the constitutional third-party visitation statute standard is critical because it could impact how individual states elect to deal with sibling visitation going forward.[99] Because *Troxel* identified certain protections to which parents are entitled, and did not require showings of harm, *Troxel* and the Fourteenth Amendment do not preclude siblings from petitioning for sibling visitation provided that certain protections respect parents' rights to care for and control their minor children.[100] Given the uniqueness and importance of the sibling relationship, I argue that siblings should have an easier statutory showing than grandparents and other third parties.

IV. WHY SIBLINGS SHOULD NOT BE CONSIDERED "THIRD PARTIES" IN THE VISITATION CONTEXT

As discussed in Section II, the relationships children form with their siblings are consequential in childhood and adulthood.[101] While a handful

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[96] *Troxel*, 530 U.S. at 73.

[97] *See, e.g.*, *Ex parte* E.R.G., 73 So.3d 634, 645–46 (Ala. 2011); Linder v. Linder, , 72 S.W.3d 841, 855 (Ark. 2002); Roth v. Weston, 789 A.2d 431, 441–42 (Conn. 2002); Doe v. Doe, 172 P.3d 1067, 1077 (Haw. 2007); Lulay v. Lulay, 739 N.E.2d 521, 532 (Ill. 2000); *In re Marriage* of Howard, 661 N.W.2d 183, 188–89 (Iowa 2003); Koshko v. Haining, 921 A.2d 171, 187, 191 (Md. 2007); Blixt v. Blixt, 774 N.E.2d 1052, 1059 (Mass. 2002); SooHoo v. Johnson, 731 N.W.2d at 821 (Minn. 2007); Moriarty v. Bradt, 827 A.2d 203, 222 (N.J. 2003); Hiller v. Fausey , 904 A.2d at 885 (Penn. 2006); Smallwood v. Mann, 205 S.W.3d 358, 362 (Tenn. 2006); Glidden v. Conley, 820 A.2d 197, 205 (Vt. 2003); *In re* Parentage of C.A.M.A., 109 P.3d 405, 410 (Wash. 2005).

[98] *See, e.g.*, Crafton v. Gibson, 752 N.E.2d 78, 91–92 (Ind. Ct. App. 2001) (using rational basis); W. Va. *ex rel.* Brandon L. v. Moats, 551 S.E.2d 674, 684–85 (W. Va. 2001) (using various factors to weigh best interest of the child against whether there is substantial interference with parental rights); E.S. v. P.D., 863 N.E.2d 100, 105-6 (N.Y. 2007) (employing the strong presumption that the parent's wishes represents the child's best interests and then considering many other factors which weigh in the child's best interest considerations).

[99] *See* cases cited *supra* notes 97-98 (applying different standards to third-party visitation suits).

[100] This is true too of grandparent visitation and third-party visitation as a whole.

[101] *See supra* notes 25-28 & 34-36.

of states have enacted sibling visitation statutes,[102] sibling visitation statutes have not received the same type of traction as grandparent visitation and even other third parties.[103] Many third-party visitation statutes allow grandparents to seek visitation but exclude other persons, such as siblings, from having standing to seek visitation.[104] Some third-party visitation statutes, however, do grant standing to certain third parties, and siblings may sometimes have standing under these third-party statues.[105] Standing under these third-party statutes, however, generally fails to adequately protect the interests that siblings have in associating with one another.[106]

Many cases illustrate the injustice of several states' current statutory schemes, which either bar siblings' standing to assert visitation claims or create substantial burdens which effectively bar siblings from ever being awarded meaningful contact with one another.[107] Part A of this section will describe the factual and legal background of the most recent state appellate decisions regarding sibling visitation. Part B will discuss other consequential sibling visitation cases and how these cases have shaped the thought surrounding sibling visitation.

A. *In Re Victoria C.*

In Re Victoria C. involved a sibling visitation suit brought by Victoria to establish visitation with her two younger brothers, Lance and Evan, over the objection of both her father and Lance and Evan's biological mother.[108] Victoria was twenty-one years old at the time of the Maryland Court of Appeals decision, but she first asserted her claim for sibling visitation when she was a minor through a juvenile proceeding.[109]

As a minor, Victoria had lived with her father, George C., and her father's wife, Kieran C.[110], for over five years, following her mother's

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[102] ARK. CODE ANN. § 9-13-102 (West 2017); HAW. REV. STAT. § 571-46(a)(7) (2016); 750 ILL. COMP. STAT. ANN. 5/602.9 (West 2016); LA. STAT. ANN. § 9:344 (2017); NEV. REV. STAT. ANN. § 125C.050(1) (2017); N.Y. DOM. REL. LAW § 71 (McKinney 2017); R.I. GEN. LAWS ANN. § 15-5-24.4 (West 2016); S.C. CODE ANN. § 63-3-530 (A) (44) (2016).

[103] *See* Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 917 (2012) (explaining why siblings have never gained the broad level of political support that grandparents have obtained).

[104] *Id.*

[105] *See, e.g.*, MINN. STAT. § 257C.08(4) (2017).

[106] *See* discussion *infra* note 172.

[107] *See, e.g.*, MINN. STAT. § 257C.08(4) (2017); N.C. Gen. Stat. Ann. § 50-13.2 (b1) (West 2017) (only allowing grandparents standing to seek visitation).

[108] *In re* Victoria C., 88 A.3d 749, 750 (Md. 2014).

[109] *Id.*

[110] George C. and Kieran C. were married in 2005. *Id.* at 752.

suicide in 2003.[111] Victoria lived with her father and his wife until 2009 when she was sent to live with her maternal aunt in Texas because of a Department of Social Services investigation involving an allegation of abuse committed by George C. against Victoria.[112] In 2010, Victoria's aunt sent her back to Maryland. However, Victoria's father did not allow her to return home and instead paid for her to stay in a hotel.[113] Victoria ran away from the hotel and was ultimately picked up by Department of Juvenile Services and placed in a children's home in Boonsboro, Maryland.[114] After placement in the San Mar Children's home, the Carroll County Department of Social Services filed a petition to declare Victoria a Child in Need of Assistance (CINA).[115] The juvenile court subsequently granted the petition after it was determined that Victoria's continuing presence in her father's home was contrary to her welfare.[116]

After Victoria was adjudicated a CINA, she remained in the custody of the Carroll County Department of Social Services until she was placed into foster care.[117] Victoria's permanency plan set forth an end goal of reunification with her father, and as such, his parental rights were not terminated.[118] The juvenile court held periodic review hearings, and at the first review hearing, Victoria asked to visit her younger brothers, Lance and Evan.[119] The Special Master's report concluded that, "visitation between [Victoria] and her half-siblings shall occur only if and when therapeutically indicated," after noting that Victoria's father stated he did not believe that "it would be appropriate [for Victoria] to have contact with the younger half-siblings at this time."[120] Victoria's father then filed an exception to the Special Master's recommendation, which allowed an expedient hearing to occur in front of a sitting judge.[121] The judge deferred the sibling visitation issue and required Victoria and her father to attend counseling as individuals and as a family.[122] These efforts failed in reunifying Victoria

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[111] *Id.* at 751.

[112] *Id.* at 751, n. 4. (Victoria's school indicated that they suspected abuse when she arrived at school with bruising in her left eye area. The department's finding indicated that there had been a finding of "credible evidence, which has not been satisfactorily refuted, that abuse. . .did occur.")

[113] *Id.* at 751-52.

[114] *Id.* at 751.

[115] *Id.* at 752.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 753.

[121] *Id.* at 753, n. 7.

[122] *Id.* at 753.

with her father.[123] Prior to another review hearing, Lance and Evan's biological mother, Kieran C., filed a motion to intervene on the basis that she had the right to be involved to the extent that her biological children were concerned.[124] The Special Master granted Kieran's motion to intervene and ultimately recommended that Victoria's requests for supervised visitation be granted, reasoning that Victoria would suffer a "significant deleterious effect" if she were barred from having visitation with Lance and Evan.[125]

Relying on *Koshko v. Haining*, George C. and Kieran C. filed joint exceptions to the Special Master's recommendation.[126] *Koshko* held that *Troxel* requires either a showing of parental unfitness or an "exceptional circumstance" which has a "significant deleterious effect" upon the children in order for visitation to be granted in favor of a third party.[127] George C. and Kieran C. further argued that no evidence showed that they were unfit and the Special Master's recommendation only detailed the negative effects on Victoria and not on Lance and Evan.[128] In response, Victoria argued that *Koshko* was inapplicable to her current case because sibling visitation is inherently different than grandparent visitation[129] and she had a "constitutional right of establishing and maintaining a relationship with her siblings."[130] She also argued that she had made a *prima facie* showing of exceptional circumstances because such circumstances are "defined on a case-by-case basis, which [was] exactly . . . the [special] [m]aster['s] [approach] in arriving at her decision."[131]

Prior to the resolution of George C. and Kieran C.'s exceptions, Victoria turned eighteen-years old, and her supervision by the Department of Social Services terminated.[132] In resolution of the exceptions, the reviewing circuit court judge determined that Victoria had met her burden and that it would be in the best interest of Evan to have visitation with Victoria.[133] On an appeal filed by George C. and Kieran C., the Maryland Court of Special

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[123] *Id*.

[124] *Id*.

[125] *Id.* at 753-756.

[126] *Id.* at 755-756.

[127] *Id.* at 756 (citing Koshko v. Haining, 921 A.2d 171, 192-193 (Md. 2007).

[128] *Id.* at 757-758.

[129] *See Koshko*, 921 A.2d at 172. The question before the *Koshko* Court concerned grandparent visitation.

[130] *Victoria C.*, 88 A.3d at 757.

[131] *Id*.

[132] *Id*.

[133] Many factors went into the judge's decision, but it seems one compelling reason was that Evan remembers his sister Victoria, and therefore harm can be inferred to him by not being able to see Victoria. *Id.* at 760.

Appeals reversed the circuit court judge's opinion.[134] In doing so, the Court held that *Koshko* applied to all third parties, including siblings, and that the crucial question was not whether Victoria would be harmed by a lack of visitation, but rather whether Lance and Evan would be harmed by their inability to visit with Victoria.[135] Victoria then appealed to the Maryland Court of Appeals.[136]

At the outset, the Maryland Court of Appeals noted that Victoria's appeal presented two issues.[137] The first issue was whether the circuit court had jurisdiction to order sibling visitation.[138] The Court, however, set aside this question[139] and instead focused on the second issue: whether *Koshko* applied to sibling visitation.[140]

At the core of the Court of Appeals of Maryland's holding was the distinction between two prior decisions: the 2007 *Koshko* decision and the 2000 *In re Tamara R.* decision.[141] Like Victoria's case, *Tamara R.* also addressed sibling visitation. However, the Maryland Court of Appeals distinguished *Tamara R.* from Victoria's case because *Tamara R.* involved minor children in the custody of the state.[142] Thus, in Victoria's case, unlike *Tamara R.*, no "state" interest existed to balance against her father's and step-mother's constitutional interest as articulated in *Troxel*.[143]

In restating the holding of *Troxel*, the Court of Appeals of Maryland went on to establish that "[a] person [who is] not a parent. . .is a third party."[144] They did so by relying on *Troxel*, *Tamara R.*, and three other cases, two of which involved *grandparents* and one of which involved a *same-sex couple*.[145] The Court made this decision even after explicitly reiterating the importance and special consideration sibling relationships deserve.[146]

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[134] *In re* Victoria C., 56 A.3d 338 (Md. Ct. Spec. App. 2012).

[135] *Id.* at 348-349.

[136] *In re* Victoria C., 88 A.3d at 750. The Maryland Court of Appeals is the highest state court in the State of Maryland.

[137] *Id.* at 761.

[138] *Id.*

[139] *Id.* at 762, n.12 (indicating that before a discussion on jurisdiction can take place, the court would want the parties to brief the issue).

[140] *Id.* at 761-762.

[141] *See id.* at 760-61; Koshko v. Haining, 921 A.2d 171 (Md. 2007); *In re* Tamara R., 764 A.2d 844 (Md. Ct. Spec. App. 2000).

[142] *Victoria C.*, 88 A.3d at 760.

[143] *Id*.

[144] *Id.* at 763.

[145] *See id.* at 762-63 (citing McDermott v. Dougherty, 869 A.2d 751, 808 (Md. 2005); Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008); *Koshko*, 921 A.2d at 186).

[146] *See Victoria C.*, 88 A.3d at 761 (citing *In re* Victoria C., 56 A.3d 338, 344-345 (Md. Ct. Spec. App. 2012) (citing *Tamara R.*, 764 A.2d at 856) ("the sibling relationship has long

After concluding that full, half, and CINA siblings are still third parties, the *Victoria C.* Court found that both the master and the trial judge erred in finding exceptional circumstances because they limited their analysis to Victoria and not her brothers.[147] The dissent, however, noted that not only did the majority's holding push the law on parental rights past the Supreme Court's decision in *Troxel*, but it effectively denied children removed from the family any meaningful ability to nurture a sibling relationship.[148] The dissent specifically took issue with the majority's reliance on *McDermott*,[149] *Koshko*,[150] and *Janice M.*,[151] none of which held that all non-parents are third parties but rather that certain classes of people in the context of the familial relationship are third parties.[152] The dissent distinguished the grandparent and sibling relationship:

> Although the benefits offered by grandparents to children should not be underestimated, the grandparent-grandchild relationship is lesser and different in character from the unique bond and life-long relationship a person shares with her siblings. Siblings are *not third parties* to the nuclear family. Rather, they are core members of the family, as close by birth as two humans can be, excepting identical twins.[153]

The dissent went on to add that while parents undoubtedly have a fundamental right to raise their children, this "right is not absolute" and should be analyzed "in the context of the family situation presented."[154] Here, and in many sibling visitation cases, a child brings a petition for visitation exactly because the child was removed from the nuclear family.[155] Destabilization of the nuclear family on its own makes sibling visitation distinguishable from *Troxel* and should indicate that *Troxel* does not *per se* extend to sibling visitation.[156]

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been recognized as an important one, which will be given significant consideration and protection by courts involving the family")).

[147] *Id.* at 764-65 (The Court noted that the district court judge made a finding of harm in regards to Evan, but that the tangential inference was not enough to support exceptional circumstances of harm).

[148] *Id.* at 765-66 (Adkins, J., dissenting).

[149] *McDermott*, 869 A.2d. at 808 (holding a *grandparent* that is given temporary care of a child is a *third party*).

[150] *Koshko*, 921 A.2d 171 (holding a grandparent is a third party).

[151] *Janice M.*, 948 A.2d at 93 (Md. 2008) (holding a former live-in *life partner* that shared parenting duties is a *third party*).

[152] *Victoria C.*, 88 A.2d at 765 (Adkins, J., dissenting).

[153] *Id.* at 765-66.

[154] *Id.* at 767.

[155] *Id.*

[156] *Id.*

After explaining the primary basis for dissent, the dissenting opinion also noted that the majority's interpretation of *Koshko* caused the majority to incorrectly decide *In re Victoria C.*[157] Specifically, the dissent mentioned that the circuit court not only applied *Koshko*[158] but applied it correctly by determining that exceptional circumstances were present, and that Lance and Evan would experience deleterious effects if they were denied visitation with Victoria.[159]

Lastly, the dissent pointed out that the majority's opinion invites abuse.[160] The majority concluded, in essence, that an exceptional circumstance does not occur when a sibling is removed from the home due to allegations of abuse and later denied reunification with her family.[161] Thus, the dissent noted, under the majority's new rule, children who leave an abusive household have essentially "no recourse to attempt to gain visitation with their siblings unless their former abusers consent to it."[162]

B. *Brief Overview of Other Sibling Visitation Proceedings*

The number of grandparent visitation statutes far exceeds the number of sibling visitation statutes.[163] Nevertheless, sibling visitation suits have arisen in several different jurisdictions throughout the country.[164] Generally, if a state does not have a statute authorizing sibling visitation, then the courts will dismiss sibling visitation petitions for lack of standing.[165] The general rule that without a statute there is no standing has

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[157] *Id.*

[158] *Id.* at 768-69 ("The trial court also observed that 'the requirements of *Koshko* . . . must be applied here, too', and '*Koshko* is the minimum bar which state limitations on parents' fundamental rights must meet, and thus it is the bar over which Victoria C. must pass.").

[159] *Id.* at 769 ("Because the Court can infer harmful effects on at least Lance that result in significant deleterious effects of losing the relationship with his sister . . . and because the situation before this Court appears in itself to be an exceptional circumstance, the Court finds that Victoria has met her burden . . . under the U.S. Constitution."); *see also Id.* at 602. (Explaining that the court "could only infer based on the evidence and testimony submitted to it, that there would be harm or a deleterious effect on [the minor] children."); *see also id.* ("Indeed, under the Majority's rule, were George and Kieran to abandon Lance as they have Victoria, Evan would not be able to show that he would suffer significant harm from being deprived of visitation with his older brother" because this would likely need to be established upon an *inference* of harm).

[160] *Id.* at 771.

[161] *Id.* at 772.

[162] *Id*.

[163] *See, e.g.*, cases cited *infra* notes 166, 169.

[164] *Id.*

[165] *See* Joel V. Williams, Comment, *Sibling Rights to Visitation: A Relationship Too Valuable to be Denied*, 27 U. TOL. L. REV. 259, 286-87 (1995); ("Case law specifically

persisted in the face of more recent challenges and demonstrates why sibling visitation statutes are critical.[166] Although many states do not have sibling visitation statutes, siblings could bring a petition for visitation under states' third-party visitation statutes.[167] Unfortunately, general third-party statutes are not specifically tailored for sibling visitation and are typically so onerous that siblings encounter difficulty satisfying the statutory criteria.[168]

Since the early 2000s, several states have had the opportunity to evaluate their respective sibling statutes in the light of *Troxel*.[169] Of those states, at least one has concluded that its sibling visitation statute is unconstitutional.[170]

While few reported decisions clearly show operation of sibling visitation statutes in action, New York State has demonstrated a clear operation of its sibling visitation law N.Y. Dom. Rel. Law § 71 in the case of *Isabel R. v. Meghan MC*.[171] The court in *Isabel R.* awarded sibling visitation to the two minor children (ages ten and seven years) with their younger half-sibling (age six years) after finding that not only did the petitioning sibling have standing to bring the action but also that it was in the children's best interest to have visitation.[172]

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addressing siblings' rights to visitation is sparse. However, courts which have heard such cases have generally abided by a 'no statute—no standing—no right to visitation rule"); *but see* L. v. G., 497 A.2d 215 (N.J. Super. Ct. Ch. Div. 1985) (invoking inheritable equitable jurisdiction to hear a sibling visitation petition); Lindsie D. L. v. Richard W. S., 591 S.E.2d 308 (W. Va. 2003) (finding that there may be a legal right to sibling visitation without statute specifically authorizing such visitation).

[166] *See* MBB v. ERW, 100 P.3d 415, 420 (Wyo. 2004); D.N. v. V.B., 814 A.2d 750, 753-54 (Pa. Super. Ct. 2002); B.L.M. v. A.M., 381 S.W.3d 319 (Ky. Ct. App. 2012).

[167] *See, e.g.*, MINN. STAT. § 257C.08(4) (2017).

[168] *See, e.g.*, *id.* (granting standing to "other [persons]" that have resided with the minor child for a period of two years or longer). However, § 257C.08(4) also requires a court to make several findings including that "the petitioner and child had established emotional ties creating a parent and child relationship." This statute would foreclose the ability of other minor siblings from seeking visitation and would create an almost insurmountable hurdle for adult siblings.

[169] *See, e.g.*, Herbst v. Swan, 125 Cal. Rptr. 2d 836 (Cal. Ct. App. 2002) (holding that California's third-party visitation statute was unconstitutional as applied to siblings); for a more detailed analysis of the California Court of Appeals decision in *Herbst*; *see generally* Ferraris, *supra* note 15, at 719-27.

[170] *See id.* (holding that California's third-party visitation statute was unconstitutional as applied to siblings); for a more detailed analysis of the California Court of Appeals decision in *Herbst*; *see generally* Ferraris, *supra* note 15, at 719-27.

[171] Isabel R. v. Meghan MC., 885 N.Y.S. 2d 711 (Fam. Ct. 2009) (analyzing sibling visitation under N.Y. Dom. Rel. Law § 71 (2016)).

[172] *Id.* *5-*9.

C. *Siblings Should Not Be Considered Third Parties In Light Of Troxel*

Given the importance of the sibling relationship, siblings should have standing to submit a sibling visitation claim. Section V considers the debate about the type of procedures that states should. First, however, it is important to address why siblings, because of their positions in nuclear families, should not be considered third parties in the visitation context.

As demonstrated by many of the cases cited throughout this article, sibling most often petition for sibling visitation when problems arises in the nuclear family.[173] Child welfare cases aside,[174] many instances of family disintegration necessitate sibling visitation.[175] For example, a biological parent's death,[176] a biological parent's incarceration,[177] removal of a minor child from the home,[178] or domestic violence[179] are all common reasons for families to dramatically change and the nuclear family to disintegrate. Moreover, in many of these instances, siblings that have grown up together and have close relationships with one another are forced apart.[180] This sibling separation happens despite the siblings not being at fault.[181]

As noted by Judge Adkins in her dissent in *Victoria C.*, siblings are not third parties to the nuclear family.[182] Rather, they are significant members who make up the inner circle of the family.[183] Knowing that siblings form intimate and enduring relationships, Congress unanimously passed legislation in 2008 to address sibling contact in foster care by conditioning certain federal funds to the Title IV-E foster care program.[184] While individual states vary on how far they will go to ensure siblings are placed

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[173] *See* cases cited *infra* note 174-77.

[174] Child welfare proceedings commonly end the nuclear family as many proceedings conclude with a termination of parental rights. *See, e.g., In re* Star Leslie W., 470 N.E.2d 824 (N.Y. 1984).

[175] *See* case cited *infra* note 174.

[176] Herbst v. Swan, 125 Cal. Rptr. 2d 836, 837 (Cal. Ct. App. 2002).

[177] Barger *ex rel.* E.B. v. Brown, 134 P.3d 905, 907 (Okla. Civ. App. 2006).

[178] *In re* Victoria C., 88 A.3d 749, 759 (Md. 2014); *see also supra* Section I.

[179] Isabel R. v. Meghan MC., 885 N.Y.S. 2d 711 (Fam. Ct. 2009) (father was subject to an order for protection).

[180] *See, e.g.*, *Herbst*, 125 Cal. Rptr. 2d at 837; *Victoria C.*, 88 A.3d at 751.

[181] *See, e.g.*, *Herbst*, 125 Cal. Rptr. 2d at 837; *Victoria C.*, 88 A.3d at 751.

[182] *Victoria C.*, 88 A.3d at 765-66 (Adkins, J., dissenting).

[183] *Id.*

[184] *See* Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 206, 122 Stat. 3949, 3962 (2015) (codified as 42 U.S.C. § 671(a)(31)(A)-(B) (hereinafter "Sibling Placement Act")) (Requiring that "reasonable efforts" be made in the placement of "siblings removed from their home." In addition, if placement cannot be achieved then the state must ensure ongoing interaction with siblings unless it would implicate "the safety or well-being of any of the siblings.").

together in foster care,[185] the Sibling Placement Act requires every state to at least consider placing siblings together unless placement together would negatively impact the safety or well-being of any siblings.[186] As such, all states to some extent recognize that when siblings are separated from each other, through no fault of their own, they deserve at least a chance at maintaining a relationship with one another.

Even before the Sibling Placement Act, a majority of states recognized the importance of at least considering the option of placing siblings together in foster homes through the creation of sibling placement policies and visitation statutes.[187] Regrettably, state laws have not followed a similar trend in regards to private sibling visitation statutes.[188] In 1995, seven state statutes provided specific relief for siblings to seek visitation.[189] In 2017, only three additional statutes specifically provide siblings with standing to seek visitation.[190] Oklahoma passed a sibling visitation statute in 1999,[191] however, the Oklahoma legislature subsequently repealed the statute in 2009.[192] Other states subsequently adopted statutes that seemingly allow for siblings to assert standing,[193] but some of these statutes may be unconstitutional under *Troxel* because the statutes allow a broad class of people to seek visitation.[194]

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[185] *See* Hasday, *supra* note 103, at 906-07 (comparing N.Y. Comp. Codes R & Regs. Tit. 18, §§ 421.2(e), 421.18(d)(3) (2008) and 102 Mass. Code Regs. 5.08(10) (1998) with Ariz. Rev. Stat. Ann. § 8-513(D) (Supp. 2010) and MO. Code Regs. Ann. Tit. 13, § 40-73.080(5)(C) (1998)).

[186] 42 U.S.C. § 671(a)(31)(A)-(B)

[187] William Wesley Patton, *The Rights of Siblings in Foster Care and Adoption: A Legal Perspective*, SIBLINGS IN ADOPTION AND FOSTER CARE 57-68 (2009). By 2005, 28 states had sibling placement policies, and 32 states had sibling visitation statutes for children in foster care.

[188] *See* statutes cited *supra* note 102.

[189] *See* Williams, *supra* note 165, at 261, n. 3 (citing the seven sibling visitation statutes in 1995).

[190] *See* HAW. REV. STAT. § 571-46(a)(7) (1967), amended by Hawaii Laws Act 78 (H.B. 1864) (2002); R.I. GEN. LAWS § 15-5-24.4 (West 2016); S.C. CODE ANN. § 63-3-530(A)(44) (2017).

[191] OKLA. STAT. tit. 10, § 5A (2009).

[192] Law of Nov. 1, 1999, c. 383, § 2, 1999 Okla. Laws c. 233, § 158 (repealed 2009).

[193] *See, e.g.*, OHIO REV. CODE ANN. § 3109.051(B)(1) (West 2017) ("the court may grant reasonable companionship or visitation rights to any grandparent, any person related to the child by consanguinity or affinity, or *any other person other than a parent*") (emphasis added); VA. CODE ANN. § 16.1-278.15 (West 2016) ("upon petition to any party with a legitimate interest therein, including, *but not limited to*, grandparents, stepparents, former stepparents, blood relatives and family members") (emphasis added).

[194] Troxel v. Granville, 530 U.S. 57, 73 (2000) ("we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case").

State sibling visitation statutes in the context of child welfare proceedings and the Fostering Connections to Success and Increasing Adoptions Act of 2008 demonstrate that the state undoubtedly has a role in protecting the sibling relationship.[195] However, not all nuclear family break-ups interact with the foster care system.[196] For example, situations like Melissa's exist in which a child's only opportunity at reunification with his or her sibling is through a private suit in family court.[197] Without sibling visitation statutes that reach beyond the welfare context, Melissa will not be able to see her brother until he is an adult regardless of how impactful her relationship with him can be during his ascent into adulthood.

At the core of *Troxel* is the idea that the Constitution protects the ability of parents from having their judgment *usurped by a third party* via the judicial process.[198] For example, a best interest test alone is unsuitable for determining custody or visitation with a third party because at any moment a new caretaker could show that they would do a better job raising a child.[199] Upon showing that they are a more worthy caretaker, that third party could replace an average or below-average parent.[200] However, third-party usurpation is not at issue in the context of sibling visitation. Rather, what is typically at stake is an attempt for one adult or minor child to create a semblance of their old "nuclear family" with their sibling or to establish a close familial relationship. When siblings petition courts for sibling visitation, they are not typically attempting to usurp a parent's ability to parent, or to control the education and upbringing of a minor child, but rather they are making a concerted effort to establish a relationship with another member of the immediate family *as siblings*.[201]

Justice O'Connor's plurality opinion in *Troxel* notes the changing composition of families and the nationwide recognition that when grandparents and other relatives undertake quasi-parental duties, states should provide a forum to protect these third party relationships.[202] Implicit in this recognition is the idea that children should have the ability to benefit from their caretakers' influences, but as O'Connor later states,

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[195] 42 U.S.C. § 671(a)(31)(A)-(B).

[196] *See* case cited in *supra* note 174-77 for other ways siblings can be separated.

[197] *See supra* Section I.

[198] *Troxel*, 530 U.S. at 69 ("Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

[199] *See* Reno v. Flores, 507 U.S. 292, 304 (1993) (citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978)).

[200] *Id.*

[201] *See, e.g.*, cases cited supra note 174-77.

[202] *Troxel*, 530 U.S. at 64.

"the State's recognition of an independent third party interest in a child can place a substantial burden on the traditional parent-child relationships."[203] However, unlike third parties, a sibling generally does not represent the same level of burden on the parent because, absent an intervening circumstance, an older sibling is in the same position as the parent, unlike relatives who are "outside the nuclear family" and "are called upon with increasing frequency to assist in the everyday tasks of child rearing."[204] Because the role of siblings, and the sibling relationship itself, is different than traditional third parties, siblings should not be treated like every other third party that attempts to establish visitation with a child.

V. SOLUTIONS – MODEL SIBLING VISITATION STATUTE

This Section outlines a model statute that states should enact to allow siblings the ability to reestablish relationships with one another. The statute incorporates provisions from several other statutes from the few states that have sibling visitation statutes. The model statute also incorporates requirements outlined in *Troxel*. Further, the model statute sets forth an alternative provision that mandates a finding of harm for sibling visitation to be granted. While *Troxel* does not mandate a finding of harm, several state courts have found that the federal Constitution and their respective state constitutions require a finding of harm for all non-parents.[205]

A. *Standing Preconditions*

The first hurdle in any lawsuit—including sibling visitation lawsuits—is establishing standing to bring suit.[206] States have typically followed the "no statute—no standing—no right to visitation" rule.[207] This rule restricts siblings' ability to file visitation suits in states without sibling visitation statutes. Thus, it is critical that states statutorily grant siblings or their

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[203] *Id.*

[204] *Id.*

[205] *See, e.g.*, Jones v. Jones, 359 P.3d 603, 610 (Utah 2015) ("the state interest in overriding a parent's fundamental rights is 'compelling' only in circumstances involving the avoidance of harm that is *substantial*"); Moriarty v. Bradt, 827 A.2d 203, 221 (N.J. 2003) ("avoiding harm to the child is polestar and the constitutional imperative that is necessary to overcome the presumption in favor of the parent's decision and to justify intrusion into family life.").

[206] *See* Williams, *supra* note 165, at 286-87.

[207] *Id.* For more recent examples of this "rule" in action see D.N. v. V.B., 814 A.2d 750 (Pa. Super. Ct. 2002) (dismissing the petition for lack of standing because Pennsylvania courts "'generally find standing in third-party visitation and custody cases only where the legislature specifically authorizes the cause of action'. . ." (quoting T.B. v. L.R.M., 786 A.2d 913 (Pa. Super. Ct. 2002) and MBB v. ERW, 100 P.3d 415 (Wyo. 2004)).

representatives[208] the ability to bring a visitation claim.

Many states with sibling visitation statutes create specific standing requirements for siblings within those statutes.[209] For example, New Jersey law requires that a minor child with whom visitation is sought have a parent or parents who are deceased, divorced, or living separate and apart for siblings to have standing to bring a sibling visitation suit.[210] Illinois law has the same statutory restrictions as New Jersey but includes additional standing options such as where one parent is absent for more than one month or where one parent joins the petition for sibling visitation.[211] New York law, on the other hand, allows sibling visitation suits to proceed "[w]here circumstances show that conditions exist which equity would see fit to intervene."[212]

States with specific standing requirements for sibling visitation such as death of a parent or divorce, seemingly ensure at the outset that decisions by parents who are still together and living will enjoy a special type of deference which precludes standing from a sibling who has trouble with both parents' decisions.[213] The presumption is somewhat troubling, however, because it excludes the (albeit) small number of cases where a couple's arbitrary decision to separate their children will cause harm to both siblings.[214] As one commentator notes, "the psychological and sociological damage of separating the siblings is no different whether a widowed parent, divorced parent, or married parent refuses to allow their children to establish and maintain their relationship."[215] Thus, it is problematic to totally preclude siblings from having any standing when both biological parents are both still living and making a uniform decision.

Nonetheless, society is more likely to view the decision of two married parents, who are the biological parents of both the sibling seeking visitation and the minor sibling, as a reasonable decision taken in the best interest of the minor child.[216] Thus, a decision by parents of both siblings to cut one

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[208] Referring to a competent person to bring a sibling visitation claim on behalf of a minor child such as a parent or legal guardian.

[209] *See* N.J. STAT. ANN. § 9:2-7.1 (West 2017); 750 ILL. COMP. STAT. ANN. 5/607 (West 2014); N.Y. DOM. REL. LAW § 71 (McKinney 2017)

[210] N.J. STAT. ANN. § 9:2-7.1 (West 2017).

[211] *See* 750 ILL. COMP. STAT. ANN. 5/607 (West 2014).

[212] N.Y. DOM. REL. LAW § 71 (McKinney 2017).

[213] *See, e.g.*, Weber v. Weber, 524 A.2d 498 (Penn. Super. Ct. 1987).

[214] *Id.* at 498 (parents wanted to limit adult sibling's ability to spend time with minor sibling because of adult siblings "lifestyle choices").

[215] *See* Williams, *supra* note 165, at 292.

[216] For example, the adult sibling in *Weber*, 524 A.2d at 499 (Penn. Super. Ct. 1987) would have likely lost on the substantive aspect of her sibling visitation claim because the biological parents of both siblings were not excluding complete access (but rather just

sibling's access to another can be analyzed under section (e)(1) of the Model Sibling Visitation Statute, affording more weight to the parents' joint decision.[217] A joint parental decision should only be overridden when the petitioner-sibling has proven a rebuttable presumption factor under section (e)(1).[218]

Most current sibling visitation statutes also implicitly prioritize the conservation of judicial resources.[219] Consequently, the conservation of judicial resources, an important and practical consideration, should be taken into account. The best way to conserve judicial resources is to impose a standing requirement that ensures there is a problem that requires judicial intervention. Thus, the Model Sibling Visitation Statute should include a provision like the one seen in Rhode Island's sibling-visitation statute. The Rhode Island statute requires (1) that the sibling seeking relief not be able to visit with his or her minor sibling, due to the actions of the minor sibling's parent(s) or guardian(s), for a period of at least thirty days immediately preceding the petition, and (2) requires that the petitioning sibling only be able to receive access to the minor sibling with the court's intervention.[220]

This type of standing requirement ensures that court resources are expended only when intervention regarding sibling access is necessary.[221] In addition, by not including a "triggering event" standing condition, the proposed sibling visitation statute also ensures that reestablishment of the sibling relationship is not precluded at the outset simply because a joint parental decision was made to block visitation.[222]

B. *No Showing of Harm Required; Showing of Harm Provision for Specific States*

Under the Model Sibling Visitation Statute, no "showing of harm" is required.[223] The Model Sibling Visitation Statute does not require a

demanding that access occur at their home) and the denial of visitation at the sibling's home was because she was engaged in a lifestyle choice that they believed would be detrimental to their minor child for whom visitation was being sought. However, at the very least standing should be given to ensure that no married parents engage in an otherwise arbitrary and capricious denial of a sibling's ability to foster a relationship with their sibling.

[217] *See* Model Sibling Visitation Statute § (e)(1)-(3), *infra* Section V. E.

[218] *Id.*

[219] *See, e.g.*, statutes cited in *supra* note 209.

[220] 15 R.I. GEN. LAWS ANN. § 15-5-24.4 (West 2016).

[221] For states with standing conditions see statutes cited in *supra* note 209.

[222] Instead, a sibling challenging two parent's joint decision to withhold visitation will continue to have standing to assert his or her visitation request by showing that the parent's decision is arbitrary, unreasonable, or due to personal animus under § (e)(2).

[223] *But see* optional provision, § (d)(A)-(C), *infra* Section V. E.

showing of harm because *Troxel*, as discussed in Section IV, does not apply to sibling visitation in the same way that it applies to visitation by other non-parents.[224] However, even if *Troxel* did apply in the same way, *Troxel* would not necessarily mandate a threshold showing of harm but it would require sufficient procedural protection that gives deference to parents' decisions for their child.[225] However, because some states have viewed a showing of harm as necessary under *Troxel*, the Model Sibling Visitation Statute includes an optional "showing of harm" provision.

Because siblings are commonly separated after they have already developed a substantial relationship with one another, it is not difficult to infer that close siblings are harmed by separation and lack of visitation.[226] For example, the New Jersey Supreme Court in *In re D.C. & D.C.* notes:

> We can envision, for example, a case in which pre-teen siblings, raised together in the same household, deeply entwined in each other's lives, are removed due to abuse or neglect. If one is adopted by a non-relative and the other taken in by his grandmother, it seems likely to us that denial of the sibling's application to visit his adopted brother would satisfy the harm threshold. To the contrary, it is less clear that siblings separated at birth and raised in different households with no interaction whatsoever would be able to vault the threshold.[227]

It seems clear based on psychological research that siblings who bond with each other as children will be harmed if they are separated from one another and not allowed to remain in contact.[228] This type of harm is different from that harm produced when a grandparent, aunt, uncle, or other relative cannot visit a child because such relationships may not be as important as relationships between siblings.[229] Due to siblings' bonds with one another, siblings are far more likely to be harmed by the forced disintegration of a sibling relationship than by the termination of a typical third-party relationship.[230] Consequently, grandparents or other third parties should continue to be subject to a finding of harm standard.[231]

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[224] *See supra* notes 198-201.

[225] *See supra* notes 89-91.

[226] *See* case cited *infra* note 231.

[227] *See In re* D.C., 4 A.3d 1004, 1020-21 (N.J. 2010).

[228] *See* Herrick & Picus, *supra* note 44.

[229] Based on close proximity during a child's formative years, siblings are typically the most like to develop a close relationship, but as the Plurality alludes to *Troxel*, it is more frequent for these other third parties to develop close relationship with minor children. Troxel v. Granville, 530 U.S. 57, 63-64 (2000).

[230] *See* Dunn, *supra* note 23.

[231] *See, e.g.*, Moriarty v. Bradt, 827 A.2d 203, 211-12 (N.J. 2003) (concluding that the district court's finding through expert testimony that the children would feel alienation from

States that have already mandated a showing of harm requirement for all "non-parents" can include a threshold showing of harm provision in their sibling visitation statute. Of the states that reference harm in the grandparent visitation context, some include a showing of harm as a threshold matter while others incorporate a showing of harm into their respective best interest factors.[232] This optional provision in the Model Sibling Visitation Statute applies as a threshold matter.[233] The Model Sibling Visitation Statute states that, while considering a petition for sibling visitation, the court shall first inquire into the danger of substantial harm to the child with whom visitation is being sought if sibling visitation is denied.[234] The substantial finding of harm may be found on the basis that the minor child and the sibling seeking visitation have a close relationship with each other because they resided together for a period of more than two years,[235] or on the basis that the minor child and the sibling seeking visitation had a significant sibling relationship prior to the denial of access and that it is reasonable to infer that the minor child will suffer severe emotional harm if that important relationship is prohibited.[236] Expert testimony is not necessary because the Model Statute allows siblings seeking visitation to present evidence to the court that could lead a reasonable person to conclude that the loss of such a relationship would lead to potential severe emotional harm to the minor child.[237]

Requiring siblings to show harm would make it substantially more difficult for siblings who are trying to establish a relationship for the first time, or whose past relationship is not viewed as significant.[238] For this reason, a showing of harm is disfavored.[239] Since *Troxel* does not wholly apply to the sibling relationship and also does not command a finding of harm, the harm provision should only be included in an individual state statute if the state's case law requires a showing of harm.

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their mom's side of the family was sufficient to prove harm and grant visitation to the minor child's grandparents).

[232] *Compare* ALA. CODE § 30-3-4.2 (2017) (finding of harm contained within the best interest factors) *with* TENN. CODE ANN. § 36-6-306 (West 2017) (finding of harm must be shown as a threshold matter).

[233] *See* Model Sibling Visitation Statute § (d)(A), *infra* Section V. E.

[234] *See id*.

[235] *See id.* § (d)(A)(2). *D.C.* seems to endorse this idea. *See D.C.*, 4 A.3d at 1020-21.

[236] *See* Model Sibling Visitation Statute § (d)(A)(1), *infra* Section V. E.

[237] *See id.* § (d)(B).

[238] *See id*.

[239] *See id*.

C. *The Presumption In Favor Of A Parent's Decision To Refuse The Petitioner-Sibling's Visitation With The Minor Sibling*

Perhaps the biggest infirmity in the third-party visitation statute struck down by the *Troxel* court was the fact that the statute did not provide a presumption in favor of parents.[240] In a battle of competing rights in the family realm (e.g. a parent's right to the care and custody of a minor child against the other parent's same right) the best interest test is sufficient on its own.[241] However, unless the Supreme Court declares that siblings have a fundamental right to associate, and thus places the sibling relationship on a similar level as the parental relationship, then some type of parental deference will be required in regards to sibling visitation in order to comport with the Due Process Clause.[242]

This type of deference, however, must be different than the normal parental deference that is traditionally applied to third-party visitation requests.[243] As explained above, the impact and character of the sibling relationship is manifestly different than any other third-party relationship in terms of its importance for development and growth.[244] Thus, the proper presumption in the sibling visitation context is that the parents of the minor child with whom visitation is sought act in the best interest of their child when they deny access to the minor child's full-sibling, half-sibling, or step-sibling. However, under the Model Statute all siblings can rebut this presumption by providing testimonial evidence or other applicable evidence that the parents' decision to withhold access was arbitrary, unfair, or based on animus between the parent and the sibling seeking visitation, animus that does not significantly impact the potential relationship between the minor-sibling and the petitioner-sibling.[245] Thus, for example, if a parent denies visitation because of a petitioner-sibling's criminal drug conviction, then a court could find that the parent's decision was not arbitrary or unfair, but rather was based on real concerns about the safety of the parent's minor child. On the other hand, if the parent makes the decision to deny sibling visitation because he or she personally does not like the petitioner-sibling, or has some other objection to the sibling that is based on personal

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[240] *See* Troxel v. Granville, 530 U.S. 57, 69 (2000) (noting the superior court judge in effect placed the burden of disproving the children's best interest on the biological mother).

[241] *See In re Scott S.*, 775 A.2d 1144, 1151 n. 13 (Maine 2001) (The best interest test is primarily used as a "tie-breaker" when equal or similar rights must be balanced against each other).

[242] *Troxel*, 530 U.S. at 57, 69.

[243] *Compare* MINN. STAT. § 257C.08(4) (2017) with statutes cited in *supra* note 102.

[244] *See supra* notes 25-28 & 34-36.

[245] *See* Model Sibling Visitation Statute § (e)(2), *infra* Section V. E.

animus,[246] and which does not implicate the child's safety, then the court can find that the parental presumption is defeated and move on to the best interests factors.[247]

D. *Best Interest Defined*

The last piece of the Model Statute reviews the specific best-interests factors to be used in sibling visitation suits.[248] While many of the already-existing statutes do not specify "best interests" factors to be used in determining whether granting sibling visitation is in the best interest of a child, it is important to craft a specific set of "best interests". Specifically, best interest factors should be enumerated because such factors would remove the excessive judicial discretion that individual judges—who may have their own interpretations of what the best interests of an individual child entail—could exercise.[249]

E. *The Model Sibling Visitation Statute*

The following model statute takes parts of many state statutes including the Rhode Island, New Jersey, Nevada, and Tennessee statutes, as well as a model sibling visitation rights statute created by a commentator.[250] The Model Sibling Visitation Statute includes a standing precondition.[251] However, the standing condition is not particularly onerous; it is meant to ensure that only those cases requiring family court intervention come before family courts.[252] The statute also includes an optional standard of harm provision, but as mentioned in Part V. C., this provision should only be used if necessary because it will likely wrongly preclude some, otherwise worthy, matters from being considered by the court.[253] Lastly, this model statute includes a parental presumption and identifies specific best interest factors that should be employed by trial courts in ascertaining whether

[246] An example of this is seen in Herbst v. Swan, 125 Cal. Rptr. 2d 836, 837 (Cal. Ct. App. 2002) where the respondent (mother) denied sibling access to her daughter in law (the minor-sibling's half-sister) because of a dispute over the father's estate disbursements.

[247] *See* Model Sibling Visitation Statute § (f), *infra* Section V. E.

[248] *See id*.

[249] Troxel v. Granville, 530 U.S. 57, 92 (2000) (The Plurality appeared to place a great deal of importance on excluding an individual judge's subjective ideas on what the best interest of the child entails).

[250] This statute is the combination of some of the ideas presented in the model statute created by Joel V. Williams, as well as several state statutes and *Troxel*. *See* Williams, *supra* note 165, at 296-99.

[251] *See* Model Sibling Visitation Statute § (b), *infra* Section V. E.

[252] *See id*.

[253] *See id.* § (d).

sibling visitation is in the best interest of the minor child with whom visitation is sought.[254]

MODEL SIBLING VISITATION STATUTE

(a) **Definitions**. Notwithstanding any law to the contrary, as used in this section, minor sibling refers to the minor child with whom access is being sought; petitioner-sibling means the sibling, half-sibling, or step-sibling who is seeking to establish visitation; a proper person means a parent, legal guardian, foster parent, next friend,[255] or attorney.

(b) **Standing**. The family court [or district court], upon petition of a brother, sister, half-brother, half-sister, step-brother, step-sister, or on behalf of any of those persons by a proper person, for visitation rights with the petitioner-sibling's sibling, half-sibling, or step-sibling and upon notice to both parents of the minor sibling and notice to the minor sibling, and after a hearing on the petition, may grant reasonable visitation or access rights to the minor sibling to the petitioner-sibling if the petitioner-sibling has repeatedly been denied reasonable access for at least thirty (30) days immediately preceding the date the petition was filed, and the petitioner alleges that there is no other way for the petitioner to see his or her sibling, half-sibling, or step-sibling without the court's intervention.[256]

(c) **Written Findings.**[257] In order for the court to grant reasonable visitation rights, the court must make written findings as to the following:

(1) That the petitioner-sibling has complied with the standing requirements of this statute and is in need of the court's intervention;[258]

(2) That the petitioner-sibling has, by clear and convincing evidence,

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[254] *See id.* § (e)-(f).

[255] *See* ARK. CODE ANN. § 9-13-102 (West 2017). The "next friend" language should be included in instances where a minor petitioner-sibling does not have a parent, guardian, or foster parent.

[256] *See* R.I. GEN. LAWS ANN. § 15-5-24.4(a)(3) (West 2016).

[257] If a state decides to impose a finding of harm, then a "finding of harm" provision should also be included in the written findings section. But, this "finding of harm" provision can replace the "parental presumption" provision.

[258] *See* R.I. GEN. LAWS ANN. § 15-5-24.4(a)(4) (West 2016).

rebutted the presumption that the parent's decision to refuse the petitioner-sibling's request for sibling access was reasonable and done in the best interest of the child; and

(3) That visitation with the petitioner-sibling is in the best interest of the minor sibling as defined in subsection (f);[259]

(d) (A) **Substantial Harm to the Minor Sibling (Optional)**.[260] In determining whether a sibling visitation request should be granted, the court shall first determine the presence of likely harm to the minor sibling by a denial of access to the petitioner-sibling. Such a finding of likely harm may be based upon cessation or severe reduction of access between the minor sibling and the petitioner, under proof that:

(1) The minor sibling has such a significant relationship with the petitioner-sibling that it is reasonable to infer that the denial of access is likely to cause severe emotional harm;[261] or

(2) The minor sibling and the petitioner formerly resided in the same household for a period of over two years, and it is reasonable to infer that the denial of access is likely to cause severe emotional harm.[262]

(B) Expert Evidence is not required.[263] A petitioner under this section is not required to present expert testimony to establish severe emotional harm to the minor sibling. Rather, the court shall consider the facts and evidence before it and decide, in each specific instance, whether the loss of the sibling relationship would likely cause harm to the minor sibling.

(C) Rebuttable Presumption of Harm.[264] For purposes of this section, if the sibling's common parent is deceased, and the petitioning sibling and minor sibling had regular access before

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[259] *See id.* § 15-5-24.4(a)(1) (West 2016).

[260] As explained in Section IV. B., this subsection should only be included if state law makes its inclusion necessary.

[261] *See* TENN. CODE ANN. § 36-6-306(b)(1)(A) (West 2017).

[262] *See id.* § 36-6-306(A)(5) (West 2017).

[263] *See id.* § 36-6-306(b)(3) (West 2017).

[264] *See id.* § 36-6-306(b)(4) (West 2017).

the death of the common parent, then there shall be a rebuttable presumption of substantial emotional harm as to the minor sibling based on the denial of access of the minor sibling to the petitioner.

(e) **Parental Presumption**.

(1) It is presumed that the parent of the minor-sibling acted in the best interest of his or her minor child when he or she denied access to the petitioner-sibling.[265]

(2) It shall be rebuttable that the parent(s) of the minor sibling acted in that minor sibling's best interest upon a showing that the parent(s) denied access arbitrarily, unreasonably, or due to personal animus between the minor sibling's parent(s) or legal guardian(s) and the petitioner-sibling, which does not specifically implicate the relationship between the petitioner-sibling and the minor sibling.

(3) It shall be the petitioner-sibling's burden to prove that, by clear and convincing evidence, the minor sibling's parent(s) denied access because of one of the reasons set forth in § (e)(2).[266]

(f) **Best interest factors**. In determining whether a sibling visitation request is in the best interest of the minor sibling under this section, the court shall consider and weigh the following factors, and the court shall order reasonable sibling visitation between the petitioner-sibling and the minor sibling, if the petitioner-sibling shows, by a preponderance of the evidence, that visitation is in the best interest of the minor sibling:[267]

(1) The relationship between the petitioner-sibling and the minor sibling before access was denied;[268]

(2) The reasonable preference of the minor sibling, if the minor sibling has a preference, and if the child is determined to be of

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[265] *See* NEV. REV. STAT. § 125C.050(d)(4) (2017).

[266] *Id*.

[267] *See* Section IV. D.

[268] N.J. STAT. ANN. § 9:2-7.1(b)(1) (West 2017). This statute was declared unconstitutional as applied in Wilde v. Wilde, 775 A.2d 535, 546 (N.J. Super. Ct. App. Div. 2001). But, *Wilde* dealt with grandparent visitation and not sibling visitation.

sufficient maturity to express a preference;[269]

(3) The time elapsed since the minor sibling last had contact with the petitioner-sibling and since access to the minor sibling was completely denied to the petitioner-sibling;[270]

(4) The mental and physical health of the petitioner-sibling;[271]

(5) The good faith of the petitioner-sibling in filing the petition;[272]

(6) The medical and other needs of the child related to health that might be affected by visitation with the petitioner-sibling;[273]

(7) If applicable, the length of time which the minor sibling and the petitioner spent living in the same household together;

(8) If applicable, whether one or both of the biological parents or step-parents of the minor sibling are deceased or have abandoned the minor sibling;[274]

(9) The willingness and ability of the petitioner-sibling to facilitate and encourage a close and continuing relationship between the minor-sibling and the parent(s) of the minor-sibling;[275] and

(10) Any other factor the court deems relevant in the best interest of the minor sibling.[276]

(g) Other Considerations.

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[269] NEV. REV. STAT. § 125C.050(6)(c)(g) (2017).

[270] N.J. STAT. ANN. § 9:2-7.1(b)(3) (West 2017). This factor has been modified to allow the presiding judge to consider not only the time that has elapsed since the siblings last had contact but to also consider the timing in relation to when access was denied.

[271] NEV. REV. STAT § 125C.050(6)(c)(e) (2017).

[272] N.J. STAT. ANN. § 9:2-7.1(b)(6) (West 2017).

[273] NEV. REV. STAT § 125C.050(6)(c)(h) (2017).

[274] This factor is typically used in statutes as a precondition to standing. *See, e.g.*, CAL. FAM. CODE § 3102(a) (West 2017). This factor is relevant in the best interest factor section of the Model Statute in so far as sibling visitation may be beneficial for the minor sibling if the petitioner-sibling is the only person that remains from the side of the family that has a deceased biological parent.

[275] NEV. REV. STAT § 125C.050(6)(c)(g) (2017).

[276] NEV. REV. STAT. § 125C.050(6)(j) (2017).

(1)The court may, from time to time, modify an order granting sibling visitation whenever modification would serve the best interest of the minor sibling. Unless by stipulation of the parties, no motion to modify a sibling visitation order may be made earlier than 2 years after the date the order is filed unless there has been a substantial change in circumstances.[277]

(2) When granting reasonable visitation to the petitioner-sibling, the court may include reasonable provisions to safeguard the minor sibling including such things as restricting whom the petitioner-sibling may introduce to the minor sibling. A violation of any such reasonable restrictions will constitute a change in circumstances under subsection (a).

(3) Nothing precludes the court under this section from ordering reasonable telephone or Skype access between a petitioner-sibling and their minor sibling if visitation would otherwise be impractical or not in the best interest of the minor sibling.

VI. CONCLUSION

> I met a little girl walking the downs path carrying a very large baby boy. Watching her struggle with the load, I asked if she wasn't tired. Surprised, she replied to me, "No: He's not heavy; He's my brother."[278]

This Article began by illustrating Melissa's story in which her mother unreasonably denied Melissa, an adult sibling, access to Melissa's little brother. Melissa's problem was not simply that her mother was denying access to her little brother but that she had no legal remedy. Melissa had no legal remedy because the state in which Melissa lived did not provide statutory standing to siblings to seek visitation with other siblings. However, under the proposed Model Sibling Visitation Statute, Melissa would have had a potential opportunity to reconnect with her brother. The Model Statute ensures that petitioning siblings have an opportunity to seek redress but ultimately respects caretakers' decisions by (1) imposing a parental presumption that must be rebutted by the petitioner and (2) requiring a best interest test to ensure that visitation is in the best interest of the minor sibling.[279]

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[277] 750 ILL. COMP. STAT. ANN. 5/602.9(d)(1) (West 2016).

[278] JAMES WELLS, THE PARABLES OF JESUS: A BOOK FOR THE YOUNG 163 (Kessinger Publishing, LLC 2010) (1888). This quote has been modified for readability.

[279] *See* Model Sibling Visitation Statute § (a)-(g), *supra* Section V. E.

There is no question as to the importance of what will be for many siblings their longest relationship.[280] There is also no doubt that when parents deny the sibling relationship in some arbitrary or unfair fashion, both siblings suffer a great deal not only during childhood but also into adulthood.[281] Currently, the Constitution protects only the parent-child relationship and not the sibling relationship.[282] Thus, siblings must rely on states to recognize the importance of their relationships with one another.[283] While many states have long statutorily recognized a grandparent's ability to petition for visitation, many states still offer no statutory ability to petition for visitation with siblings who have the only relationship, aside from the parent-child relationship, which has a lifelong impact.[284] Siblings are not third parties to the family or to their siblings.[285] Siblings are friends, mentors, companions, and, most importantly, the most likely persons to be there throughout one's life. It is crucial that every state begins to correct this mass oversight and begins to recognize the importance of the sibling relationship by granting adult and minor siblings the right to petition for sibling visitation and foster sibling relationships. To do anything else relegates the sibling relationship to something even less favored than traditional third parties.[286] But, siblings are not third parties; [287] they are core members of the family who, like the young girl in James Wells's popular story,[288] will help carry us from adolescence to adulthood and finally to death. Therefore, states should begin treating the sibling relationship in accordance with the enormous and positive impact it can have on siblings. It is time for every state to give one of life's most important relationships standing in family court.

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[280] *See supra* notes 25-28 & 34-36.

[281] *See supra* notes 25-28.

[282] Troxel v. Granville, 530 U.S. 57, 63 (2000).

[283] *See* Scruggs v. Saterfiel, 693 So. 2d 924, 926 (Miss. 1997) (inviting the legislature to consider expanding visitation rights to siblings).

[284] *See supra* notes 43-45.

[285] *See supra* Section IV.

[286] *See, e.g.*, *Scruggs*, 693 So. 2d at 926 (noting that grandparents have standing to seek visitation whereas siblings do not).

[287] Paraphrasing Judge Adkins in *In re* Victoria C., 88 A.3d 749, 765-66 (Md. 2014) (Adkins, J., dissenting).

[288] Wells, *supra* note 278.