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# When Parental Rights and Children's Best Interests Collide: An Examination of Troxel v. Granville as It Relates to Gay and Lesbian Families

Brooke N. Silverthorn

# WHEN PARENTAL RIGHTS AND CHILDREN'S BEST INTERESTS COLLIDE: AN EXAMINATION OF *TROXEL V. GRANVILLE* AS IT RELATES TO GAY AND LESBIAN FAMILIES

## INTRODUCTION

The Due Process Clause of the Fourteenth Amendment to the United States Constitution[1] includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests, including the right of parents to make decisions as to the care, custody, and control of their children.[2] Under the Fourteenth Amendment, the United States Supreme Court has long recognized this fundamental right of parents in the care, custody, and rearing of their children.[3] Traditionally, the state can only intervene in the parent–child relationship when there is a compelling state interest in doing so.[4]

In a plurality decision on June 5, 2000, the United States Supreme Court in *Troxel v. Granville*[5] held that a Washington statute violated the substantive due process rights of the mother by permitting the paternal grandparents an opportunity to obtain increased visitation rights.[6] The statute at issue, Washington Revised Code section

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1. U.S. CONST. amend. XIV, § 1.

2. *Id.*; *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 510 (1925); Meyer v. Nebraska, 262 U.S. 390, 390 (1923).

3. *Prince*, 321 U.S. at 166 (holding that the Fourteenth Amendment protects against those privileges recognized at common law as essential to the orderly pursuit of happiness). "[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*

4. *Pierce*, 268 U.S. at 529 (stating that the State's "power shall not interfere with the rights of the individual, unless such interference is necessary to promote the public welfare and the restrictions placed upon the individual's rights have a real, substantial, and direct relation to the object to be accomplished"); *see also* Coleman v. Coleman, 291 N.E.2d 530, 534 (Ohio 1972) ("A compelling state interest . . . [is] one which the state is forced or obliged to protect.").

5. 530 U.S. 57 (2000).

6. *Id.* at 57 (holding that as applied, § 26.10.160(3) of the Washington Code unconstitutionally infringes on parents' fundamental right to rear their children).

26.10.160(3), provided that "[a]ny person may petition the court for visitation rights at any time."[7]

The *Troxel* decision has significant implications for gay and lesbian families in two important ways: (1) it strengthens the position of homosexual biological or adoptive parents challenged by grandparents or other third parties, and (2) it opens the door to visitation claims by non-biological co-parents (hereinafter co-parents)[8] in the event of dissolution of their relationship.[9] Co-parents are sometimes referred to as "psychological parents"[10] or "de-facto parents"[11] in some courts.[12] Although the extent to which these doctrines help gay and lesbian families is still unclear,[13] recent case

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7. WASH. REV. CODE ANN. § 26.10.160(3) (West 1997).

8. Though the court system most often refers to a lesbian partner of the biological parent as a "third party" to the children for purposes of determining legal rights, this Note uses "co-parent" to describe the non-biological lesbian parent who both parties intend to be a parent because the author believes that these women truly are "parents."

9. *See generally Troxel*, 530 U.S. 57.

10. *See* V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000) (defining psychological parent as a third party who establishes a parent-child bond with the child, that is consented to and fostered by the legal parent and where the third party lives with and performs substantial parental functions for the child); *see also* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (The Free Press 1979) (1973) ("Whether any adult becomes the psychological parent of a child is based . . . on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult . . . ."). The authors also note that any disruptions to the relationship between a child and a psychological parent are "extremely painful" emotionally. *Id.* at 20

11. *See* ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b) (Tentative Draft No. 3, Part 1, 1998) (approved at May 1998 annual meeting).

> A *de facto parent* is an adult, not the child's legal parent, who for a period that is significant in light of the child's age, developmental level, and other circumstances,
> (i) has resided with the child, and
> (ii) for reasons primarily other than financial compensation, and with the consent of a legal parent to the formation of a de facto parent relationship . . . regularly has performed
> (i) a majority of the caretaking functions for the child .

*Id.* This Note uses the terms de-facto parent and psychological parent interchangeably.

12. *See* Eric K.M. Yatar, Note, V.C. v. M.J.B.: *The New Jersey Supreme Court Recognizes the Parental Role of a NonBiological Lesbian "Mother" But Grants Her Only Visitation Rights*, 10 LAW & SEXUALITY 299, 303 (2001) (noting that although courts may consider many different factors, they generally look to whether the third party has established himself or herself as an essential part of the child's daily life and performs a share of the caretaking functions); *see also infra* Part IV.B.1.

13. *See* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Non Biological Lesbian Co-Parents*, 50 BUFF. L. REV. 341, 346-47 (2002) (stating that the failure to treat a co-parent as a legal parent disadvantages the child.) "[A]n adjudication of legal parentage . . . entitles a child to receive child support, qualify as a dependent on her parent's health

law suggests that state courts are increasingly more willing to recognize standing of the psychological or de-facto parent[14] to obtain visitation in the event of a separation.[15]

This Note addresses the implications of *Troxel* for gay and lesbian parents, and specifically, for visitation rights of non-biological lesbian co-parents in the event of a separation. Section I provides an overview of the constitutional rights of parents concerning decisions made in regard to their children. Section II analyzes the *Troxel* case. Section III discusses the implications of the *Troxel* decision on both biological gay and lesbian parents and on non-biological co-parents. This section also examines the difference between co-parents and grandparents as it relates to visitation rights. Section IV focuses on the trend in state courts regarding the use of doctrines, such as the psychological and de-facto parent doctrines, as they relate to the visitation rights of non-biological lesbian parents. Section V looks at more effective alternatives for protecting the relationship between non-biological lesbian parents and their children by allowing them standing to petition the court for visitation. It also suggests an alternative method to protect the on-going parent-child relationship by recognizing co-parents as legal parents entitled to the same legal protections as biological parents. This Note concludes that although a parent's fundamental right to care and control their children should be protected, it should also allow an important relationship between a non-biological co-parent and child to be protected as well.

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insurance, collect Social Security benefits from her parent, sustain an action for wrongful death, recover under a state worker's compensation law, and in many states, inherit from her parent." *Id.* at 346.

14. *Id.* at 348-49 (noting that because the law sees non-biological co-parents as "third parties," they are "often unsuccessful in overcoming the constitutional principles of parental autonomy and privacy" and thus lack standing to assert any parental rights).

15. *See generally* E.N.O. v. L.M.M., 711 N.E.2d 886, 890 (Mass. 1999) (holding that even in the absence of a statute granting visitation privileges to a de facto parent against the natural parent's wishes, "[t]he court's duty as *parens patriae* necessitates that its equitable powers extend to protecting the best interests of [the child]"); V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (holding that non-biological parent was a "psychological" parent and it was in the best interests of the child to grant visitation); J.C. v. C.T., 711 N.Y.S.2d 295, 299-300 (2000) (holding that the lack of a biological relationship between children and their mother's former lesbian partner was not an absolute bar to the former partner's petition for visitation); Rubano v. DiCenzo, 759 A.2d 959, 977 (R.I. 2000) (holding that "constitutional rights as a biological parent to prevent third parties from exercising parental rights vis-à-vis her child are not absolute when . . . the best interests of the child are at stake").

## I. PARENTS' FUNDAMENTAL RIGHT TO THE CUSTODY, CARE, AND CONTROL OF THEIR CHILDREN

### *A. The United States Constitution*

Under the Due Process Clause of the Fourteenth Amendment, the Supreme Court has a long history of protecting the fundamental liberty interest of parents in the care, custody, and control of their children.[16] Encompassed in the definition of "custody" is a parent's right to make decisions concerning care, control, education, health, and religion.[17] Additionally, the law presumes that fit parents act in the best interest of their children.[18] Moreover, at common law, states give parents the authority to act on behalf of their children without state interference.[19]

However, although parents do retain a fundamental constitutional right to make decisions concerning their children, courts have held that this right is not absolute because states ultimately retain the power to protect their citizens.[20] The doctrine of *parens patriae*[21]

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16. *See* Quillon v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *see also* Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923) (holding that the Due Process Clause protects liberty interests, which include parents' rights to "establish a home and bring up children"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (holding that parents' liberty rights include the right to "direct the upbringing . . . of children under their control"); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (noting the Supreme Court's "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

17. *See* UNIF. MARRIAGE & DIVORCE ACT § 408(a), 4 U.L.A. 1 (1973).

18. *See* Parham v. J.R., 442 U.S. 584, 602 (1979) ("[N]atural bonds of affection lead parents to act in the best interests of their children.").

19. *See* Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947) ("[T]he law recognizes certain rights in the parent.").

20. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (holding that a state statute which granted parents an absolute veto over a minor child's right to have an abortion was unconstitutional); *see also* Troxel v. Granville, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting) ("We have never held that the parent's liberty interest . . . is so inflexible as to establish a rigid constitutional shield . . . . The presumption that parental decisions generally serve the best interests of their children is sound . . . . But even a fit parent is capable of treating a child like a mere possession.").

21. BLACK'S LAW DICTIONARY 911 (7th ed. 2000). Black's defines *parens patriae* as: "[t]he state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." *Id.*

gives states the power to intervene into the parent-child relationship if a parent cannot adequately care for his or her child.[22]

### *B. State Intervention*

For the most part, each state legislature has discretion to determine the scope and direction of its family laws.[23] However, all state laws are subject to the Fourteenth Amendment constitutional protection of parental rights.[24] Inevitably, a state's interest in the parent-child relationship and a parent's interest in the parent-child relationship are not always congruent.[25] At such times, a court must defer to the parent's liberty interest unless it can find a compelling state interest to intervene in the parent-child relationship.[26] However, if a court finds a compelling state interest to intervene, then it will often use a "best interest" of the child standard to evaluate whether to grant custody or visitation.[27] This standard is increasingly met by co-parents, viewed by the court as "third parties," who wish to obtain visitation rights in opposition of the natural parents' wishes.[28] This is

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22. *See* Susan Tomaine, Comment, Troxel v. Granville: *Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. U.L. REV. 731, n.30 (2001). *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510, 511 (1925) (indicating that it is proper for the state to intervene when it is necessary to promote the public welfare).

23. *See* Dena M. Castricone, *Custody and the Legal Progeny of Same-Sex Parenting*, 49 R.I. B.J. 17, 21 (2001).

24. *Id.* at 45 (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

25. *See generally, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886, 893 (Mass. 1999) (noting that the court has a duty to protect the best interests of the child even when it is against the interests of the parent).

26. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 529 (stating that the State "shall not interfere with the rights of the individual, unless such interference is necessary to promote the public welfare and the restrictions placed upon the individual's rights have a real, substantial, and direct relation to the object to be accomplished").

27. *See, e.g.*, *E.N.O.*, 711 N.E.2d at 893; *see also* Amy Persin Linnert, Note, *In the Best Interests of the Child: An Analysis of Wisconsin Supreme Court Rulings Involving Same-Sex Couples with Children*, 12 HASTINGS WOMEN'S L.J. 319, 322 (2001) (noting that "[t]he 'best interest' standard is inexact because courts may take any number of factors into consideration").

28. *See E.N.O.*, 711 N.E.2d. at 893; *see also* Troxel v. Granville, 530 U.S. 57, 64 (2000) (concluding that the reason states are increasingly enacting non-parental visitation statutes is due to the recognition that the traditional American family is changing in demographic make-up, with persons other than "natural" parents playing a key role in child-rearing). Hence, it is up to states to protect those relationships in order to ensure the welfare of their children. *Id. See generally* T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001) (granting standing to the non-biological lesbian parent in a visitation case under the *in loco parentis* doctrine).

because state courts are increasingly recognizing that children benefit from important relationships with significant "third parties."[29] Additionally, at common law, some courts recognize special circumstances under which an exception to the general rule against interfering with parental autonomy could be granted.[30]

Contrary to the "best interest" standard, some courts look to "unfitness" as a test to find a compelling state interest.[31] Factors looked to under this test include: "abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of the child."[32] Consequently, the unfitness standard, coupled with the presumption that fit parents act in the best interests of their children, makes it much more difficult for a third party to obtain custody or visitation in the face of opposition by a natural parent.[33] The unfitness standard is also troubling as it relates to non-biological co-parents because it does not allow for other "compelling factors" that may be present absent a finding of parental unfitness.[34]

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29. Troxel v. Granville, 530 U.S. 57, 64 (2000).

30. *See* J.A.L. v. E.P.H., 682 A.2d 1314, 1320 (Pa. 1996).

> [W]hile it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent.

*Id.*; *see also* Ward v. Ward, 537 A.2d 1063, 1067 (Del. Fam. Ct. 1987) (recognizing a protected non-parental interest when there had been day-to-day care and nurturing for the minor child).

31. *See, e.g.*, Barstard v. Frazier, 348 N.W. 2d 479, 489 (Wis. 1984).

32. *Id.* at 489

33. *See* Linnert, *supra* note 27, at 325; *see also* Jacobs, *supra* note 13, at 349-50 (noting that in lesbian co-parent cases rarely is the biological parent unfit).

34. *See* Linnert, *supra* note 27 at 325-26; *see also* Brief of Amici Curiae Lambda Legal Defense and Educ. Fund et al. at 8, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138) (arguing that a "best interests of the child" standard is preferable because a court's requirement of severe psychological harm "exceeds what is constitutionally required to justify the imposition on parental liberty of visitation orders").

## II. TROXEL V. GRANVILLE

### *A. The Facts*

Tommie Granville and Brad Troxel never married, but together did have two daughters, Isabelle and Natalie.[35] Granville and Troxel subsequently ended their relationship in 1991, at which point Brad Troxel moved in with his parents, Jenifer and Gary Troxel, the petitioners in this case.[36] Because Brad was living with his parents, when he had visitation with his daughters on the weekends, he brought them to his parents' home.[37] In May of 1993, Brad Troxel committed suicide.[38] For a few months following Brad's death, the Troxels continued to have regular visitation with their granddaughters.[39] That changed, however, in October 1993 when Granville informed the Troxels that she wanted to limit their visitation to one visit per month.[40] Two months later, in December 1993, the Troxels filed suit against Granville in order to retain visitation rights with their granddaughters.[41] The Troxels brought the action under two Washington state statutes, only one of which was at issue in this case.[42] Washington Revised Code section 26.10.160(3) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."[43]

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35. Troxel v. Granville, 530 U.S. 57, 60 (2000).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *See In re* Troxel, 940 P.2d. 698, 699 (Wash. App. 1997).
41. *See Troxel*, 530 U.S. at 61 (2000).
42. *See id.* The Troxels filed their suit under both WASH. REV. CODE §§ 26.09.240 (1996) and 26.10.160(3) (1997). Only the latter was at issue in this case. *Id.*
43. WASH. REV. CODE ANN. § 26.10.160(3) (West 1997).

At trial, the Troxels petitioned the court for two weekends of overnight visitation per month and two weeks of visitation per summer.[44] Granville, however, requested that visitation be restricted to one day per month with no overnight stay.[45] In 1995, the trial court entered a decree granting the Troxels visitation one weekend per month, one week during the summer, and four hours on both grandparents' birthdays.[46] Granville appealed.[47]

*1. Washington Court of Appeals Decision*

The Washington Court of Appeals reversed the lower court's visitation decree and dismissed the Troxels' petition for visitation because it found that they lacked standing—no child custody proceeding was pending when the Troxels commenced the action.[48] While the superior court seemed to have applied the plain meaning of the statute in awarding visitation rights to the Troxels, the appeals court looked to the legislative intent.[49] The court reasoned that applying the plain meaning of the statute could lead to "absurd" results that the "canons of statutory construction forbid."[50]

The court then determined that, when read in light of other case law and statutory provisions, the legislature only intended to confer standing to petition for visitation in the context of a custody proceeding.[51] Therefore, the appeals court concluded, "[t]he legislature could not have intended to open the door to 'any' person

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44. *In re* Troxel, 940 P.2d at 699.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 700-01.
49. *In re* Troxel, 940 P. 2d 698, 699-700 (Wash. App. 1997).
50. *Id.* at 699.
51. *Id.* at 700. The court noted that in the case of *In re Custody of B.S.Z.-S*, the court there reasoned in dicta that the third party visitation provision in the statute only applied in the "context of actions for child custody . . . ." *Id.* Additionally, the court looked at another provision of the Code which provided that "a petitioner may commence a third party child custody proceeding only when a child is not in the custody of one of its parents or if the petition alleges parental unfitness." *Id.*

petitioning for visitation 'at any time,' having created such strict standing requirements for third party custody proceedings."[52]

Further, the court noted that the legislature amended another Code provision limiting the conditions under which a non-parent can petition for visitation rights.[53] This provision was amended to provide that a non-parent could not petition for visitation unless one or both of the child's parents had commenced an action for divorce or legal separation.[54] Having met that requirement, a petitioner must also show "clear and convincing evidence" of a significant relationship with the child.[55] The court reasoned that in light of the legislature amending this Code provision, it must have been an "unintentional oversight" to fail to also amend section 26.10.160(3) providing that "any person may . . . petition at any time" because they are incompatible.[56] Therefore, the court concluded that the Troxels did not have standing to bring their petition for visitation.[57] The Troxels appealed, and the Washington Supreme Court granted review.[58]

*2. The Washington Supreme Court Decision*

Although the Washington Supreme Court ultimately agreed with the appeals court result, it took a hard-line approach and affirmed on the ground that the Washington visitation statute unconstitutionally infringed on the fundamental right of parents to rear their children.[59]

The Washington Supreme Court found that the Troxels had standing to petition for visitation under the statute.[60] It reasoned that because the statute's language is unambiguous, the court may not "read into a statute that which it may believe the legislature has

52. *Id.*
53. *Id.*
54. *In re* Troxel, 940 P. 2d 698, 700 (Wash. App. 1997).
55. *Id.*
56. *Id.* at 700-01.
57. *Id.* at 701.
58. *See In re* Custody of Smith, 969 P.2d 21 (Wash. 1998).
59. *Id.* at 23.
60. *Id.*

omitted, be it an intentional or inadvertent omission."[61] However, the supreme court was concerned with the constitutional problems posed by the statute.[62] Specifically, the court outlined two problems. First, because the Constitution requires a showing of harm or potential harm before a state can interfere with parents' rights to rear their children, the statute failed because it did not require any showing of harm or potential harm.[63] Second, the statute sweeps too broadly by allowing anyone to petition for visitation as long as "visitation serve[s] the best interest of the child."[64]

Four justices dissented.[65] The dissenters were concerned that the majority opinion would have "cruel and far-reaching effects" on significant third persons seeking visitation.[66] Furthermore, the dissent pointed out that the United States Supreme Court had previously held that parental rights are not absolute.[67] The dissent also noted a previous case in which the court articulated a balancing test. There, the interests of the parents must be balanced against the interests of the child and the state in order to determine whether a state can intervene into the parent-child relationship.[68] Furthermore, the dissent argued that parental autonomy is founded upon the premise of a "nuclear family" model that does not reflect the current reality of family, and accordingly, "absolute judicial deference to parental rights has become less compelling . . . ."[69]

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61. *Id.* at 26 (quoting Automobile Drivers & Demonstrations Union Local 882 v. Dep't. of Retirement Sys., 92 Wash. 2d 415, 421 (1979)).

62. *Id.* at 27-28.

63. *Id.* at 28-30. "We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child. The difficulty, however, is that such a standard is not required [in the statute at issue]." *Id.* at 30.

64. *Id.* at 30 ("Short of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental rights."); *see also id.* at 31 ("Parents have a right to limit visitation of their children with third persons . . . [and] the parents should be the ones to choose whether to expose their children to certain people or ideas.").

65. *See id.* at 32-42.

66. *See id.* at 32 (Talmadge, J., dissenting).

67. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).

68. *Id.* (citing *In re* Welfare of Sumey, 621 P.2d 108 (Wash. 1980)).

69. *Id.* at 38-39. "It would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a

As a result of the court's decision, Granville appealed, and the United States Supreme Court granted certiorari. [70]

### *3. The United States Supreme Court Decision*

The Supreme Court of the United States thus faced quite a dilemma, and tensions ran high on both sides.[71] On June 5, 2000, in a plurality opinion, the Court held that, as applied, the Washington statute's language providing that "any person may petition the court for visitation at any time" violated the substantive due process rights of Granville, as the biological parent, by permitting the Troxels to obtain increased visitation rights against her wishes.[72] The Washington Supreme Court ruled that the statute was facially invalid because it unconstitutionally interfered with a parent's fundamental rights by failing to outline any kind of standard, such as a showing of harm to the child, upon denial of the visitation claim.[73] Even though the Court agreed with the result of the Washington Supreme Court ruling and recognized that the language of the statute would virtually always place a contested visitation claim in the hands of a state court judge, it refused to declare the statute facially unconstitutional.[74] Instead, the plurality decision very narrowly held that the Washington statute "exceeded the bounds of the Due Process Clause" on a combination of factors, including: (1) the Troxels did not allege that Granville was an unfit parent;[75] (2) the Washington Superior Court gave no special weight to Granville's determination of her

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parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family." *Id.* (citing Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985)).

70. Troxel v. Granville, 530 U.S. 57 (2000).

71. *See generally* Amanda Allison Catlin, Comment, *The Verdict Is In—or Is It?: The Constitutionality of the Texas Grandparent Visitation Statute in Doubt After* Troxel v. Granville, 33 TEX. TECH L. REV. 405, 422 (2002) (noting that many groups had an interest in this case from those on the far left, such as the ACLU and LAMBDA, to those on the far right, such as the Family Research Council, and that all sides praised the decision (in the end)); Brief of Amici Curiae Lambda Legal Defense and Educ. Fund et al. at 8, Troxel v. Granville, 530 U.S. 57 (2000) (No.99-138).

72. *See* Troxel v Granville, 530 U.S. 57, 73 (2000).

73. *See In re* Smith, 969 P.2d 21, 30 (Wash. 1999).

74. *See Troxel*, 530 U.S. at 67, 73 ("[The] language [of the Washington statute] effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review.").

75. *See id.* at 68.

children's best interest;[76] (3) Granville never sought to terminate visitation entirely, but merely to limit it;[77] and (4) the statute was of "sweeping breadth" with "application of [its] broad, unlimited power . . . ."[78]

The Court began its analysis by recognizing that the demographics of American families are rapidly changing and that family composition is no longer static.[79] Furthermore, the Court also recognized that because states are increasingly enacting non-parental visitation statutes, it must also recognize the ever-changing make-up of the American family.[80] Therefore, the Court concluded:

> [T]he constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied . . . [and] [b]ecause much state-court adjudication . . . occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[81]

In arriving at this conclusion, the Court seemed to apply a balancing test because the plurality also made clear that states' statutes must set *some* criteria to limit the availability of visitation for non-parents.[82]

Although parental rights are not beyond limitation, in this case, Granville simply wanted to limit visitation; she did not attempt to deny it altogether.[83] Because she was a fit parent, the trial court did not give this determination any weight.[84] In fact, the trial court

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76. *Id.* at 69.
77. *Id.* at 71.
78. *Id.* at 73.
79. *See id.* at 63.
80. *See id.* at 64. The Court also concluded that state enactment of non-parental visitation statutes is an indication that they recognize that "children should have the opportunity to benefit from relationships with statutorily specified persons . . . [such as] their grandparents." *Id.* at 64.
81. *Id.* at 73.
82. *Id.* at 70 (noting that the superior court failed to provide any protection for Granville's constitutional right to make decisions concerning her daughters); *see also id.* at 80 (Thomas, J., concurring) (stating that he would apply strict scrutiny to infringements of "fundamental [parental] rights").
83. *See id.* at 71.
84. *Id.*

placed the burden on Granville to show that increased visitation would not be in her children's best interests.[85] Thus, while the plurality upheld Granville's right, as a fit parent, to make decisions regarding the rearing of her children without state interference, it refused to decide whether the Constitution always requires a showing of harm or potential harm to a child before visitation is denied.[86]

In the end, the Court tailored its holding to the specific facts of this case without making a constitutional pronouncement. The Court affirmed parental rights without holding that it should never give way to protect an important relationship between a child and a "significant" third person.[87] This scenario is applicable to gay and lesbian parents because their families comprise one legal parent and one non-legal parent as opposed to one parent and one third party.[88]

### *4. The Dissent – How Justices Stevens' and Kennedy's Opinions Recognized Non-Biological Gay and Lesbian Parents Seeking Visitation*

In his dissent, Justice Stevens thought that the Washington statute was legitimate because it recognized certain third parties who should be able to obtain visitation in light of their significant relationship to the child.[89] He was concerned about protecting the child's interest.[90] Although he recognized that the Court has never explicitly defined the "nature of a child's liberty interests, in preserving established familial or family-like bonds," he thought that because parents and families have these interests, so too should a child.[91]

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85. *Id.* at 69.

86. *Id.* at 68-69.

87. *See generally id.*

88. *See* Nancy Polikoff, *Who Gets the Children? Parental Rights After* Troxel v. Granville: *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 826-27 (2001) (noting that the categories of parent and non-parent do not adequately reflect lesbian families).

89. *Troxel*, 530 U.S. at 85 (Stevens, J., dissenting) ("Under the Washington statute, there are plainly any number of cases—indeed, one suspects, the most common to arise—in which the 'person' among 'any' seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent.").

90. *Id.* at 86.

91. *Id.* at 88.

Similarly, Justice Kennedy thought that the Washington Supreme Court was unjustified by precedent in replacing the universally accepted "best interest of the child" standard with the "harm to the child" standard.[92] He was also concerned that the "nuclear family" model is the established visitation standard for all domestic cases, even though that model does not realistically portray all, or even most, American families.[93]

Both Justices Stevens and Kennedy seemed equally concerned that the Court consider all of the different cases that come before it in which it would be wise to grant visitation rights to a long-standing caregiver who was viewed by the law as a "third party."[94]

## III. IMPLICATIONS OF *TROXEL* FOR GAY AND LESBIAN FAMILIES: FINDING THE MIDDLE GROUND

### *A. Biological or Adoptive Gay and Lesbian Parents*

Revised Washington Code section 26.10.160(3), by allowing virtually any person to petition for visitation, impermissibly infringed upon parental autonomy in decisions concerning their children.[95] Therefore, the best case scenario for biological parents, and particularly gay or lesbian parents, would have been for the Supreme Court to rule that the Washington statute was facially unconstitutional.[96] However, the Court refused to decide whether the statute was facially unconstitutional and instead decided its constitutionality on an "as applied" basis.[97] Nevertheless, the *Troxel*

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92. *Id.* at 99-100 (Kennedy, J., dissenting).

93. *Id.* at 98.

94. *See id.* at 87, 98 (Stevens & Kennedy, J.J., dissenting). Both Justices cited to *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), which held that the putative father was not able to overcome the presumption that a child born in a marriage is a child of the marriage for the purpose of obtaining visitation. *Id.*

95. *See* Brief of Amici Curiae Lambda Legal Defense and Educ. Fund et al. at 1, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138).

96. *See id.*

97. *See Troxel*, 530 U.S. at 58. "Because the instant decision rests on § 26.10.160(3)'s sweeping breadth and its application here, there is no need to consider the question whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation . . . ." *Id.*

decision is significant to gay and lesbian biological parents because it strengthens their position when challenged by a potentially hostile third party by upholding parental liberty and requiring states to give a parent's determination of their child's best interest "special weight."[98]

Furthermore, the Washington Supreme Court stressed the importance of not allowing the state to interfere with a parent's constitutional right to rear his or her children even if a judge thinks he could make a better decision.[99] This is important because some judges will make custody or visitation determinations based solely on sexual orientation.[100]

### *1. The Best Interest Standard*

The "best interest" standard employed by courts presents problematic issues for gay and lesbian biological parents because courts possess wide discretion in deciding which factors to use in the determination.[101] Historically, even "fit" parents can be denied custody if the court determines that it is not in the child's best interest.[102] For example, in *Weigand v. Houghton*,[103] a case decided before *Troxel*, the Mississippi Supreme Court reached such a result.[104] In *Weigand*, a gay biological father petitioned the court for a modification of custody because the child's step-father, with whom he was living, was arrested for disturbance of family, simple assault,

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98. *See id.* at 57; *see also* Brief of Appellant at 20, Weigand v. Houghton, 730 So. 2d 581 (Miss. 1999) (No. 97-CA-01246) (arguing that banning visitation between a gay biological father and his son in the presence of his father's life partner "burdens and violates the fundamental right of both father and son to an ongoing relationship").

99. *See In re* Smith, 969 P.2d 21, 31 (Wash. 1998).

100. *See* White v. Thompson, 569 So. 2d 1181 (Miss. 1990) (deciding that courts can consider homosexual activity in matters of child custody); *see also* Weigand v. Houghton, 730 So. 2d 581, 586 (Miss. 1999) (stating that "moral fitness" was an important factor in custody determination and that this factor alone was the greatest concern to the court when deciding whether to award the natural father custody because he is an "admitted homosexual").

101. *See* Linnert, *supra* note 27, at 322.

102. *See id.*

103. 730 So. 2d 581 (Miss. 1999).

104. *Id.*

and mental and emotional abuse to his step-son, Paul.[105] The step-father, who was also unemployed, caused severe financial strain on the family.[106] In light of these circumstances, Weigand believed it was in his son's best interest to be in his custody instead of in the custody of his mother and step-father.[107] Weigand's "fitness" as a parent was not an issue; in fact, he was deemed fit.[108] Yet, even though Paul was living in a "psychologically and physically dangerous environment" with his step-father, the court refused to change the custody order in favor of Weigand.[109] A dismayed Justice McRae, in his dissent, concluded :

> No child should be subjected to such a potential for short- and long-term psychological and physical abuse just because the chancellor thinks little of homosexuals. It boggles the mind how the chancellor and this Court thus could deem it in Paul's best interest to remain in his mother's custody.[110]

The Mississippi Supreme Court did not give any deference to Weigand's constitutional right as a fit parent to determine the best interest of his son.[111] However, in *Troxel*, the Court clarified the proper application of the best interest standard by noting that the Washington statute improperly gave no deference to a fit parent's determination of her child's best interest.[112] Accordingly, *Troxel* requires that state courts "take extra care to interpret relevant statutes in a manner that protects parents' constitutional rights."[113]

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105. *Id.*

106. *Id.* at 585.

107. *Id.* at 584.

108. *Id.*; *see also* Brief of Appellant at 17, Weigand v. Houghton, 730 So. 2d 581 (Miss. 1999) (arguing that the chancellor found Weigand to be an "exemplary parent" apart from his sexual orientation).

109. *Weigand,* 730 So. 2d at 588 (McRae, J., dissenting). McRae dissented because he believed the majority was "blinded by the fact that [Weigand was] gay," which should not have been an issue. *Id.* Rather, McRae thought the issue should have been that Paul was living in a "psychologically and physically dangerous environment from which he should be saved." *Id.*

110. *Id.* at 588.

111. *Id.*

112. *See* Troxel v. Granville, 530 U.S. 57, 58 (2000).

113. *See* Castricone, *supra* note 23, at 45.

In *Bottoms v. Bottoms*,[114] a case in which a grandparent challenged a lesbian biological parent's custody, the court, finding the mother's lesbianism was a *per se* showing of unfitness, awarded custody to the grandparent.[115] This was an odd result considering that the same court had previously held lesbianism was not a *per se* showing of unfitness.[116] Although the impact that the *Troxel* decision would have had on the *Bottoms* case had it been decided previously is unclear, the *Troxel* requirement that state courts carefully apply an "exceptional circumstances" analysis before awarding custody to a non-parent to protect the fundamental interest of biological parents in raising their children is clear.[117]

In *Troxel*, the Court took one step toward protecting homosexual biological parents' custody and/or visitation rights by requiring a court to "accord at least some special weight to [a fit] parent's own determination."[118]

### *B. Non-Biological Co–Parents: Does Troxel Help, Hurt, or Both?*

#### *1. The Psychological/De Facto Parent Doctrines*

Although the *Troxel* opinion does not specifically address either the psychological or de-facto parent doctrine, the opinion does lay the framework for their use by state courts because it declines to rule that all visitation statutes must include a showing of harm before

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114. 457 S.E.2d 102 (Va. 1995).

115. *See id.* at 109 (Keenan, J., dissenting) ("The record plainly shows that the trial court made *a per se* finding of unfitness based on the mother's homosexual conduct.").

116. *See* Doe v. Doe, 284 S.E.2d 799, 806 (Va. 1981).

117. Although an in-depth discussion of the many complex issues in the *Bottoms* case is beyond the scope of this Note, it is apparent that a *Troxel* analysis may have helped Sharon Bottoms. This is true to the extent that the court may have had to find a more compelling state justification for denying her custody, as the biological parent, than unfitness due to lesbianism. *Troxel*, 530 U.S. at 70.

118. *Id.*; *see also* Castricone, *supra* note 23. *But see* Jonet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 377 (2002) ("*Troxel* gives minimal guidance to lower courts and legislatures. The decision, read as a set of six contrasting opinions, is susceptible to diverse, even contradictory, interpretations. No majority coalesced, and the decision as a whole is comprised of six significantly different views of the social and jurisprudential issues under consideration.").

allowing visitation.[119] Accordingly, the psychological parent doctrine fits within this framework because rarely is the psychological parent alleging harm when petitioning for visitation.[120] Furthermore, because the demographics of families are changing, courts have found it more difficult to define the term "parent."[121] The difficulty lies in the social reality that many people who act as "parents" for all intents and purposes may not actually be recognized as parents in the eyes of the law.[122] Consequently, it is almost impossible for these "parents" to overcome a biological parent's constitutional right to the care and custody of his or her children in order to obtain visitation rights with the children.[123]

Although many courts are unwilling to expand the definition of "parent" beyond biology or adoption, some courts have recently expanded this definition to allow non-biological co-parents to obtain visitation through the psychological or de facto parent doctrines.[124] Although a few de-facto parents have prevailed under the doctrine, the extent to which this doctrine actually helps the majority of co-parents is unclear.[125] Moreover, neither of these doctrines addresses the more significant issue of recognizing the co-parent as a legal parent in the eyes of the law.[126] Accordingly, she is relegated to third

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119. *See* Troxel v. Granville, 530 U.S. 57, 73 (2000) (noting that because the constitutional standard for awarding visitation largely depends on how the standard is applied, it is best to decide the protections afforded by the Constitution "with care").

120. *See* J. Shoshanna Ehrlich, *Co-Parent Visitation: Acknowledging The Reality of Two Mother Families*, 9 LOVE & SEXUALITY 151, 161 (1999-2000) (noting that the dissent in *E.N.O.* "chastised the majority" because it awarded visitation without a claim that the biological mother "failed in any recognized legal duty to her child").

121. *See* Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New A.L.I. Principles*, 35 WILLAMETTE L. REV. 769, 769 (1999).

122. *See id.* at 771.

123. *See id.*

124. *See* V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (holding that non-biological parent was a "psychological" parent and as such it was in the best interests of the child to grant visitation). *But see* Matter of Allison D. v. Virginia M., 569 N.Y.S.2d 586, 587 (1991) (holding that same sex partners who are "biological stranger[s]" to the child are not "parent[s]").

125. *See* Shapiro, *supra* note 121, at 769, 770-82 (noting that most lesbian non-biological parents will not qualify as a de-facto parent because of the requirement that they provide caretaking at least as great as that of the natural parent, which is unrealistic even in traditional families).

126. *See generally* Jacobs, *supra* note 13.

party status, resulting in both her and her child failing to receive any legal benefits of parenthood.[127]

### *2. Visitation v. Custody Claims*

Although *Troxel* concerned a grandparents' visitation claim, it nevertheless has an impact on non-biological mothers seeking visitation or custody.[128] *Troxel's* impact, however, is less helpful to lesbian non-biological parents seeking custody. Conversely, *Troxel's* impact is more helpful when a lesbian non-biological parent is seeking visitation.[129] Therefore, in some circumstances *Troxel* does present a significant step toward allowing non-biological co-parents to obtain visitation rights to the children they have partnered in raising.[130]

For instance, the Court refused to rule the Washington state statute a *per se* violation of the Constitution, in part because it recognized the changing demographics of the American family.[131] Additionally, because the Court did not rule on "whether the Due Process Clause requires all third party visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation," it opened the door to a non-biological parent who is seeking visitation rights without having to show that the biological parent is unfit.[132]

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127. *Id.* at 346-47.

128. *See* Ruthann Robson, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15, 21 (2000) (discussing the impact of the *Troxel* decision on non-legal lesbian mother's rights to visitation).

129. *See* Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I. 2000) (applying *Troxel* in its analysis and ultimately holding that a biological parent's use of her constitutional rights to prevent third parties from exercising parental rights vis-à-vis her child are not absolute when the best interests of the child are at stake).

130. *See generally* Troxel v Granville, 530 U.S. 57 (2000).

131. *See id.* at 63; *see also* Castricone, *supra* note 23, at 46 (noting that *Troxel* supports granting a third party visitation by recognizing the change in American family demographics and the resulting needs of non-traditional families); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459, 461 n.2 (1990) (indicating that in 1987 as many as ten million children were being raised in gay or lesbian families).

132. *See* Castricone, *supra* note 23, at 45.

### 3. Gestl v. Frederick – Troxel *Potentially Helps and Hurts*

*Troxel* was potentially helpful to a non-biological lesbian parent in *Gestl v. Frederick*,[133] because the Maryland court held that it was not inconsistent with *Troxel* to allow a non-parent custody upon a showing of "exceptional circumstances."[134] In *Gestl*, the issue was whether the Maryland court had jurisdiction to hear claims of custody, visitation, and other relief by the former partner of the biological mother.[135] The court ultimately decided that Maryland did have jurisdiction and that Gestl could proceed with her claims.[136]

In *Gestl*, the lesbian co-parent sought custody, visitation, and other relief after a separation from the child's biological mother with whom she had been living at the time of the birth of the child and for several years thereafter.[137] Custody has a higher standard than visitation, and although it is not inconsistent with *Troxel*, *Troxel* certainly confirms the difficulty of meeting this higher standard.[138]

*Troxel* may prove more helpful to Gestl in her visitation claim because

> [t]he Supreme Court's decision in *Troxel* may require some modification of Maryland's standards respecting visitation by third parties, but *Troxel* does not prohibit courts from ordering third-party visitation, so long as the decision-making process

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133. 754 A.2d 1087, 1101 (Md. Ct. Spec. App. 2000).

134. *Id.* ("[W]e do not read *Troxel* to be inconsistent with existing Maryland law allowing custody in a non-parent upon a showing of exceptional circumstances.").

135. *See id.* at 1090.

136. *Id.* at 1097. However, the result could prove bittersweet as far as the custody proceeding is concerned. *See generally*, Gestl v. Frederick, 754 A.2d 1087 (Md. Ct. Spec. App. 2000) (To date, this case has not been decided as to the actual custody and visitation claims).

137. *See Gestl*, 754 A.2d at 1090.

138. *See id.* at 1101-02 (noting that appellant's task is difficult in that *Troxel* gives her a chance, but she must prove exceptional circumstances to be awarded custody). Also potentially weighing against the appellant is *Troxel's* requirement that courts take extra care in applying the exceptional circumstances standard so that they continue to protect the natural parents' fundamental interests in the care and custody of their children. *Id.* at 1102.

> affords adequate protection to the parent's constitutional rights.[139]

This type of balanced standard benefits both biological gay and lesbian parents, as well as non-biological gay or lesbian parents, because it protects each in their desire to maintain a close relationship with their children.[140]

*4.* Rubano v. Dicenzo – Troxel *Proves Helpful to De-Facto Parent Seeking Visitation*

In *Rubano v. Dicenzo*,[141] the Rhode Island Supreme Court used the *Troxel* analysis where the parties were two lesbian partners who decided to raise a child together.[142] Dicenzo was artificially inseminated and gave birth to a boy in 1992.[143] Rubano and Dicenzo raised the boy as their son and jointly agreed that his last name would be listed as Rubano-Dicenzo on his birth certificate.[144] The couple then sent birth announcements identifying both of them as the child's parents.[145] Rubano and DiCenzo lived together and raised the child for four years until they separated, and Dicenzo then moved to Rhode Island with the boy.[146] Initially, the women set up a visitation schedule, but after a year, DiCenzo resisted the agreement, and Rubano filed a petition with the court to establish de-facto parent status and to obtain court-ordered visitation with her son.[147]

The two parties then negotiated a consent order, which the court subsequently granted as being "in the best interests of the child."[148]

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139. *See id.* at 1102.

140. *See* Brief of Amici Curiae Lambda Legal Defense and Educ. Fund et al. at 19, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138) (arguing that when considering third party visitation claims, the state must strive for a "proper balance of the competing interests at stake that does not unreasonably jeopardize the parent's liberty [interest] in light of the intrusion at issue").

141. 759 A.2d 959 (R.I. 2000).

142. *Id.* at 961.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See id.* at 959, 961-62.

148. *Id.* at 962.

Under the order, Rubano was to have "permanent visitation with [the child]" as long as she agreed to waive "any claim or cause of action she has or may have to recognition as a parent of the minor child."[149] Later, DiCenzo entered into a new relationship and thwarted Rubano's attempts at visitation by alleging that her visitations had become "psychologically harmful to the child."[150] Rubano asked the family court to enforce the order, but DiCenzo challenged jurisdiction.[151]

Ultimately, the court ruled that although the legislature did not intend to confer jurisdiction over this type of controversy on the family court, the Rhode Island Constitution guaranteed Rubano a remedy.[152] Accordingly, the majority found two alternative grounds on which the family court could exercise its jurisdiction in this case.[153]

*Troxel* is significant to this case for several reasons. First, the majority interpreted *Troxel* to mean that if the family court were to find Rubano a de-facto parent, that finding would overcome the "presumption in favor of honoring a fit custodial parent's determination not to allow such visitation."[154] Second, the court stated that it "[had] join[ed] with the high Court in recognizing that . . . the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association . . . ."[155] Third, under *Troxel*, the court decided that there are circumstances under which even a biological relationship

149. *Id.*

150. *Id.* at 963.

151. *Id.* DiCenzo argued that the family court lacked jurisdiction to enter the order, much less to enforce it, because her relationship did not constitute a "family relationship" as required by statute. *Id.*

152. *See* R.I. CONST. art. I, § 5 ( "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character."); *Rubano*, 759 A.2d at 966-973.

153. *See Rubano*, 759 A.2d at 965; *see also* R.I. GEN. LAWS § 15-8-26 (1996). The majority used this statute to justify jurisdiction because it provides that "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship." *Id.*; R.I. GEN. LAWS § 8-10-3(a) (Supp. 1999) (providing that the family court has jurisdiction over matters "relating to adults who shall be involved with the paternity of children born out of wedlock").

154. *Rubano*, 759 A.2d at 968.

155. *Id.* at 973.

between parent and child is not enough to prevent certain others from obtaining parental rights to the child.[156]

### *C. Difference Between Grandparents & Co-Parents*

Though all fifty states have enacted grandparent visitation statutes, none has specifically enumerated a "co-parent" visitation statute.[157] One of the reasons asserted for the interest in creating grandparent visitation statutes is public policy: most people would agree that it is important, in most circumstances, for children to spend time with their grandparents.[158] Accordingly, if public policy is the standard for the ability to obtain statutorily protected visitation rights for grandparents, then it is equally important to public policy that the relationship between non-biological parents and their children also be statutorily protected.[159] The framers of the Constitution as well as the members of the Supreme Court have obviously placed a high value on the relationship between biological parent and child.[160] Perhaps the framers of the Constitution could not foresee the many different variations of "family" and "parent" that exist today.[161] The Supreme Court, on the other hand, has recognized that family dynamics are changing and that parental rights are not always based solely on biology, but also on the nature of the relationship.[162] Because, by definition, a co-parent assumes all of the parental duties

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156. *Id.* at 974.

157. *See* Tomaine, *supra* note 22, at 731.

158. *See id.* at 732.

159. *See* Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993) ("When social mores change, governing statutes must be interpreted to allow for those changes . . . ."); *see also* Laurie A. Rompala, Note, *Abandoned Equity and the Best Interests of the Child: Why Illinois Courts Must Recognize Same-Sex Parents Seeking Visitation*, 76 CHI.-KENT. L. REV. 1933, 1957 (2001) (arguing that denying children a continuing relationship with their non-biological de-facto parent does not serve any legitimate state interest and that, if legislatures refuse to extend parental rights based solely on sexual orientation, then courts have no choice but to resolve the issue in favor of a "best interest of the child" standard).

160. *See supra* Part I.

161. *See* Troxel v. Granville, 530 U.S. 57, 63 (2000) (recognizing the ever-changing face of the American family).

162. *See* Caban v. Mohammed, 441 U.S. 380, 397 (1979) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.").

that a biological parent assumes in caring for his or her child, public policy demands that there be some sort of legal recourse for these co-parents (and children)[163] in the event the parents separate.[164]

In contrast to grandparents, who are third parties to the "nuclear family," two lesbians who decide to have and raise a child together are the "nuclear family," and no intention exists at that point that the non-biological parent is a "third party."[165] The non-biological co-parent does not become a "third party" until the couple separates and she wants to maintain a relationship with her child against the wishes of the biological parent.[166] It is only at this point that both the courts and the biological parent label her as a "third party."[167] Although the law may classify a non-biological parent as a "third party," the child rarely does.[168] Fortunately, states are increasingly recognizing that their failure to protect these relationships can have potentially devastating effects on the well-being of the child.[169]

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163. *See* J.C. v. C.T., 711 N.Y.S.2d 295, 298 (2000) (stating that courts have recognized visitation with a non-custodial parent as a right of the children).

164. *See* V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000) (stating that a psychological parent's interest in custody and visitation with the child is as important as a legal parent's because the child needs to maintain ties with adults who care for them and with whom they form emotional bonds and intimate association characterized by a parent-child relationship).

165. *See* Stacy A. Warman, Note, *There's Nothing Psychological About It: Defining a New Role for the Other Mother in a State that Treats Her as Legally Invisible*, 24 NOVA L. REV. 907, 926 (2000).

166. *Id.*

167. *Id.*; *see also V.C.*, 748 A.2d at 542-43 (2000). M.J.B., the biological mother, referred to V.C. as the children's "mother" when the relationship was intact, but when V.C. pursued a claim for joint custody and visitation after their separation, M.J.B. claimed she was a "mere helper" and "not a co-parent." *Id.*

168. Warman, *supra* note 165, at 907-08.

169. *See* Watkins v. Nelson, 748 A.2d 558, 565 (N.J. 2000) (standing for the proposition that depriving a child of contact with a psychological parent poses serious harm to the child because of the importance of the psychological parent in the child's life).

## IV. THE TREND IN STATE COURTS

### A. *Application of the Psychological or De-Facto Parent Doctrine*

State courts seem to recognize the changing needs of the family in today's society.[170] In particular, courts are recognizing the importance of the bond between non-biological lesbian parents and their children.[171]

#### *1.* V.C. v. M.J.B.[172]

In this case, the biological mother's former same-sex partner sought joint legal custody and visitation with the children she partnered in raising.[173] Although there was some dispute as to whether they jointly decided M.J.B. would be artificially inseminated, there was no dispute that after the twins were born, they held themselves out to the world as a family unit.[174] M.J.B. claimed that V.C. was not a "co-parent," but rather a "helper."[175] The facts, however, tended to show that V.C. was more than a mere helper with the children.[176] In 1995, a few months after the twins were born, they purchased a home together and had a commitment ceremony, establishing themselves as a "married" family unit.[177] A year later, they talked about V.C. adopting the twins, and even paid a retainer to an attorney; however, they separated before the adoption process began.[178] Initially, the women took turns living in the house with the children, but eventually V.C. moved out and visited with the children

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170. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 557 (N.J. 2000) (recognizing the changing social norms on families today).

171. *See, e.g., id.* (Long, J., concurring) ("It has been recognized that the psychological aspect of parenthood is more important in terms of the development of the child and its mental and emotional health than the coincidence of biological or natural parenthood.").

172. 748 A.2d 539 (N.J. 2000).

173. *Id.*

174. *See id.* at 543.

175. *Id.*

176. *See id.* In fact, M.J.B. listed V.C. as the "other mother" on pediatrician and day care forms, gave V.C. medical power of attorney over the children, and told others that she and V.C. were "co-parents." *Id.*

177. *Id.*

178. *Id.* at 544.

every other weekend and also paid money to M.J.B. for expenses.[179] Six months after the break-up, M.J.B., alleging that V.C. was not properly caring for the children and that contact with V.C. caused the children distress, refused to allow V.C.'s visitation with the twins to continue.[180] V.C. then filed a complaint seeking joint legal custody and visitation.[181]

The trial court denied V.C.'s application for joint custody because she had not established a relationship or bond with the children that had risen to the level of psychological parenthood.[182] Additionally, the court denied the visitation claim noting that it was not in the best interests of the children because M.J.B. harbored resentments toward V.C. that would pass to the children.[183] V.C. appealed, and the appellate division denied the joint custody application, but granted visitation.[184] Both parties appealed.[185]

M.J.B. argued that as the biological parent, she was entitled to parental autonomy, that the state had no basis for interference, and that she had an absolute right to decide with whom her children would associate.[186] V.C. argued that she qualified as a psychological parent, and that as a psychological parent, the state was justified in invoking the court's *parens patriae* power to protect her relationship with the children by applying a best interest standard.[187]

Ultimately, the New Jersey Supreme Court did not sustain M.J.B.'s argument, but rather reiterated that parents' rights to the care and custody of their children are not absolute.[188] Furthermore, the court recognized the "exceptional circumstances" category which courts sometimes consider as a basis for allowing a third party to

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179. *Id.*
180. *Id.*
181. *Id.*
182. *See id.* at 545 (reassuring that because the trial court found that V.C. was not a psychological parent, she would only be able to obtain custody if she proved that M.J.B. was an unfit mother).
183. *Id.*
184. *Id.* 545-46 (concluding that continued contact with V.C. was in the children's best interest).
185. *Id.* at 546.
186. *Id.*
187. *Id.*
188. *Id.* at 548.

seek custody and visitation of another person's child.[189] Psychological parenthood falls under an "exceptional circumstance" analysis.[190] Accordingly, the court turned its attention to the requirements for establishing psychological parenthood and whether or not V.C. qualified under the test.[191] The test includes four prongs that must be met:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
> (2) that the petitioner and the child lived together in the same household;
> (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development . . . ; and
> (4) that the petitioner has been in a parental role for a length of time sufficient [enough] to have established with the child a bonded, dependent relationship parental in nature.[192]

In applying this test, the court found that V.C. was a psychological parent.[193] Because the court found that visitation was in the best interest of the children, it granted visitation rights to V.C.; but it refused to order joint legal custody.[194] This is not a surprising result, considering the higher bar a psychological parent must meet in order to obtain custody.[195] Nevertheless, it is significant for non-biological lesbian parents to the extent that the "court's recognition of the parental role a same-sex partner can play in the life of a child is arguably indicative of a somewhat larger recognition of the basic

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189. *Id.* at 549 ("The 'exceptional circumstances' category contemplates the intervention of the Court in the exercise of its *parens patriae* power to protect a child.").
190. *Id.*
191. *Id.* at 550-55 (adopting the four prong test used in *Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995)).
192. *V.C.*, 748 A.2d at 551-55.
193. *Id.* at 555.
194. *Id.*
195. *See supra* Part III.B.2.

human rights of homosexual individuals to parent and create families."[196]

2. J.C. v. C.T.[197]

On the same day *Troxel* was decided, the New York Family Court held that the lack of a biological tie between the biological mother's children and her former lesbian partner was not a complete bar to visitation.[198] Both J.C. and C.T. considered themselves the children's parents, as did others in their social network.[199] In fact, the children also considered themselves as having two mothers, referring to J.C. as "Mama."[200] In addition, both parties planned for the birth of both children, jointly agreed upon names, and gave the children both of their last names.[201] In essence, not only did they *act* as a family, but they also held themselves out to the world as a family.[202]

Shortly after the women separated, C.T. terminated J.C.'s visitation with the children.[203] When challenged, C.T. argued that as the biological parent, she had the right to determine the associations of her children.[204] She also argued that because J.C. was not the biological or adoptive parent, she lacked standing to assert any rights to the children.[205]

J.C., proceeding on the doctrine of equitable estoppel, argued that because C.T. had in part created, encouraged, and fostered the parental relationship between J.C. and the children, she should be estopped from denying that relationship.[206]

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196. *See* Yatar, *supra* note 12, at 308.
197. 711 N.Y.S.2d 295 (Fam. Ct. 2000).
198. *See id.* at 299.
199. *Id.* at 296.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 297-98 (noting that in situations such as this, "it would be unconscionable to allow [a] respondent to unilaterally terminate that relationship without the opportunity for a Court to make a determination as to what is in the best interests of the children").

The court then had to decide whether an " 'operative' parent-child relationship" existed between J.C. and her children in order for it to be equitably protected.[207] The court decided that the psychological parent test could be used to determine whether the equitable estoppel doctrine should be applied.[208] This is an interesting approach because, in effect, a finding of parenthood by estoppel confers essentially the same rights as legal parenthood, whereas a finding of psychological parenthood does not.[209] Nevertheless, the court focused on the element of the psychological parent doctrine that addresses the "intent" of the legal parent to create a parental bond between the non-legal parent and child.[210] Additionally, the court deemed it significant to show "that the child is actually psychologically bonded or dependent upon that person as a parent."[211] Further, the court regarded application of these factors to a determination of the applicability of the equitable estoppel doctrine as appropriate considering the competing interests of the parties.[212] Although the court did not decide the actual visitation claim, it did find factors indicating J.C. was a psychological parent; these factors would ultimately prove beneficial to her.[213]

### *3.* E.N.O. v. L.M.M.[214]

In *E.N.O.*, the Massachusetts Supreme Court adopted the de-facto parent doctrine and held that the trial court could grant visitation to the non-biological lesbian parent because of her de-facto parent

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207. *Id* at 299.

208. *Id.*

209. See Coombs, *Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families*, 8 DUKE J. GENDER L. & POL'Y 87, 98-99 (2001) (stating that a parent by estoppel is given the same standing as that of a legal parent to pursue custody and that "[t]he parent by estoppel and the legal parent have the same priority over de-facto parents and people who are not parents").

210. J.C. v. C.T., 711 N.Y.S.2d 295, 299 (N.Y. Fam. Ct. 2000).

211. *Id.*

212. *Id.* at 299 ("The use of such a test is an appropriate way to balance the competing interests of the parties, as well as the interests of the children in maintaining contact with persons who are, at least to them, parents.").

213. *See generally id.*

214. 711 N.E.2d 886 (Mass. 1999).

status.[215] There, E.N.O. and L.M.M. were partners in a committed relationship for thirteen years.[216] The couple jointly planned to have children, and in 1995, L.M.M. gave birth to a son.[217] E.N.O. actively participated in both the birth and pregnancy as a parent, and the child's last name consisted of both of their last names.[218] Additionally, the child called E.N.O. "Mommy" and told people he had two mothers.[219] When the child was three, the couple separated and L.M.M. denied E.N.O. any visitation with their son.[220]

The probate judge, concluding that courts should treat children who have unmarried parents the same as other children, awarded temporary visitation to E.N.O.[221] In applying the best interest standard, the judge found several factors significant: the joint decision to have the child; E.N.O.'s daily parental contact with the child; L.M.M.'s references to E.N.O. as the "other parent;" and the listing of E.N.O. on all contracts and applications as the child's parent.[222]

L.M.M. appealed on the ground that no statute existed that granted an order of visitation to a third party who acted in a parental role.[223] However, the court found that the probate court had equitable jurisdiction over the matter, which also extended to the right to authorize visitation.[224] The court not only affirmed the jurisdiction of the probate court, but also went a step further by outlining the de-facto parent doctrine, adopting it, and using it to affirm the visitation award.[225] Accordingly, the court decided that any best interest

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215. *Id.* at 896.
216. *Id.* at 888.
217. *Id.*
218. *Id.* at 889.
219. *Id.*
220. *Id.*
221. *See id.*
222. *Id.*
223. *See id.*
224. *Id.* at 889-90.
225. *Id.* at 891 ("The recognition of de-facto parents is in accord with notions of the modern family.").

determination "must include an examination of the child's relationship with both his legal and de-facto parent."[226]

## V. WHERE DO STATE COURTS GO FROM HERE: RECOGNIZING STATES' RESPONSIBILITY TO PROTECT ITS CHILDREN

### *A. Standing and Third-Party Visitation Under the Psychological or De-Facto Parent Doctrines*

In *Troxel*, when faced with two extremes concerning third-party visitation and the constitutional protections afforded biological parents, the Court ultimately landed on middle ground.[227] In doing so, it noted that by enacting third-party visitation statutes, states recognize the need to "ensure the welfare of [their] children . . . by protecting the relationships [they] form" with persons undertaking parental duties.[228] Furthermore, under the doctrine of *parens patriae*, it is a state's responsibility to protect its citizens, which also includes its children.[229] However, the states have been neither consistent nor predictable in protecting children born into same-sex families.[230] In fact, both the states and the legal system as a whole have not protected the children of homosexual parents as they have the children of heterosexual parents.[231]

Because of the increasing number of lesbian couples having and raising children together, states need to adopt strategies to deal with this family law issue in a manner that continues to protect the children's need to maintain relationships with persons they know as

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226. *Id.*

227. *See* Troxel v. Granville, 530 U.S. 57, 61 (2000). The two extremes presented to the Supreme Court were the Washington state statute allowing "any person" to petition for visitation "at any time" and the Washington Supreme Court decision ruling the statute facially unconstitutional so as to make parental autonomy virtually absolute. *Id.*

228. *Id.* at 64.

229. *See* BLACK'S LAW DICTIONARY, *supra* note 21.

230. *See* Nat'l Center for Lesbian Rights, *Our Day in Court – Against Each Other: Intra-Community Disputes Threaten All of Our Rights*, NLCR NEWSLETTER 1 (Winter 1991-1992) (noting that because the law does not protect gay and lesbian families, they cannot rely on the predictability that the law normally provides).

231. *See id.* ("The legal system provides boundaries for the rest of society which it does not provide lesbians and gay men . . . boundaries to define and support families.")

their parent.[232] The psychological and de-facto parent doctrines are two ways in which a few courts have chosen to recognize the importance of protecting the relationships children form with their co-parent.[233]

Although these doctrines do help some co-parents, their scope and reach are limited.[234] They can be helpful to a co-parent who has not been able to obtain a legal relationship with her child, either through a second parent adoption or other means.[235] However, not all courts in all states recognize either the psychological or de-facto parent doctrines.[236]

All too often the non-biological parent fights with both the biological parent and the law in order to continue her relationship with her child, but it is the child who stands to lose the most—a parent.[237] Accordingly, one way to protect children born into non-traditional families is for the states to recognize a special standing requirement that allows psychological parents to maintain a relationship with their children after a separation.[238] By creating a special standing requirement for non-biological co-parents who have not attained "legal" parenthood, states protect the interest of the child in maintaining a relationship with his or her parent. At the same time, the doctrine is specific enough not to open the door to all

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232. *See* ACLU Fact Sheet, *Overview of Lesbian and Gay Parenting, Adoption and Foster Care, available at* http://www.aclu.org/issues/gay/parent.html (Apr. 6, 1999) (last visited Nov. 28, 2001) ("The last decade has seen a sharp rise in the number of lesbians and gay men forming their own families through adoption, foster care, artificial insemination and other means."); *see also* Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177, 216 (1991).

233. *See supra* Part IV.A.

234. *See* Delaney, *supra* note 232, at 190 (noting that a court's recognition of de-facto parent status does not put the lesbian partner on equal legal footing with the biological parent); *see also* Shapiro, *supra* note 121, at 770.

235. *See* Jacobs, *supra* note 13, at 366 (noting that the court system has been increasingly willing to allow a lesbian co-parent to maintain a relationship with her child through an equitable doctrine).

236. *See* Warman, *supra* note 165, at 914-15 (noting that a district court in Florida refused to recognize "psychological parent" status).

237. *See id.* at 932; *see also* E.N.O. v. L.M.N., 711 N.E.2d 886, 893 ("We must balance the defendant's interest in protecting her custody of her child with the child's interest in maintaining her relationship with the child's de facto parent."); Youmans v. Ramos, 711 N.E.2d 165, 171 (Mass. 1999) ("[T]he first and paramount duty of the courts is to consult the welfare of the child.").

238. *See* Warman, *supra* note 165, at 932.

persons seeking visitation rights, as concerned the Supreme Court in *Troxel.*[239]

### *B. Recognition of Non-Biological Parents as "Parents" – A Case for Second-Parent Adoption*

Traditional adoption normally requires a termination of both biological parents' rights.[240] This is because the law will only recognize two legal parents.[241] Therefore, in order for a non-biological mother to adopt a child, the biological mother's parental rights would first have to be terminated.[242] This poses an obvious problem for same-sex couples that want to be joint legal parents to their child.[243] To combat this problem in step-parent adoptions, adoption statutes typically dispense with the requirement that the custodial biological parent's rights be terminated in light of the marriage.[244] However the parental rights of the remaining non-custodial parent must be terminated for a step-parent to adopt.[245]

However, because states do not allow gays and lesbians to legally marry, step-parent adoption is unavailable to them.[246] Faced with this obstacle, many gay and lesbian couples wishing to have the co-parent legally recognized as a parent have asked courts to grant "second-parent" adoptions.[247] In a second-parent adoption, petitioners ask courts to confront the issue of statutory interpretation

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239. *See id.* at 931.

240. *See* Julie Shapiro, *A Lesbian–Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 26 (1999) [hereinafter Shapiro II].

241. *See id.*

242. *Id.*

243. *See* Jane Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 937-38 (2000) (noting that when a lesbian couple seeks to establish a legal relationship between the co-parent and child through adoption, the biological parent "emphatically does not wish to surrender any rights to the child").

244. *Id.* at 937.

245. *Id.*; *see also* Shapiro II, supra note 240, at 27 (noting that this is in line with the law's limitation that each child only have 2 "legal" parents).

246. Schacter, *supra* note 243, at 938.

247. *See, e.g.*, Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Va. 1993); *In re* Hart, 2001 WL 1773607 (Del. Fam. Ct. 2001); Matter of Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); Matter of Jacob, 660 N.E.2d 397 (N.Y. 1995).

as to whether the termination of parental rights bars the second-parent from adopting without terminating the parental rights of his or her partner.[248]

Currently, "eight states and the District of Columbia have approved second-parent adoption for lesbian and gay [persons] either by statute or state appellate [decisions], which means that it is granted in all counties statewide."[249] Furthermore, in nineteen other states, second-parent adoptions have been granted at the trial court level.[250] However, Florida and Mississippi explicitly prohibit gays and lesbians from adopting.[251]

Courts that have approved second-parent adoptions have employed different mechanisms in doing so.[252] For example, in *In re Hart*, the Delaware Family Court read a statute's language allowing an "unmarried person" to adopt to include the plural—"unmarried persons."[253] The court reasoned that coupled with the statute's mandate to look to the best interests of the child, surely the legislature did not intend to exclude loving two-parent homes as an option for the "state's children."[254]

In another example, in *Matter of Jacob*, a New York court strictly construed the state's adoption statute's legislative purpose as advancing "the best interest of the child."[255] Consequently, the court found that the second-parent adoption was in the best interest of the child because it allowed the child to benefit from the legal protections associated with having two legal parents, such as eligibility under two parents' health insurance, life insurance

248. *See* Schacter, *supra* note 243, at 938.

249. *See* HRC Family Net, *Second-Parent Adoption*, (Sept. 24, 2002), *available at* http://www.hrc.org/familynet/chapter.asp?article=209 ("These states include: California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, [and] Vermont.").

250. *Id.* ("These 19 states include: Alabama, Alaska, Delaware, Georgia, Hawaii, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, Texas, [and] Washington.").

251. *See* Schacter, *supra* note 243, at 943-44.

252. *Id.* at 938.

253. *In re* Hart, 2001 WL 1773607, at *6, (Del. Fam. Ct. 2001).

254. *Id.*

255. *See* Matter of Jacob, 660 N.E.2d 397, 399 (N.Y. 1995) ("Our primary loyalty must be to the statute's legislative purpose—the child's best interest.").

benefits, and having two adults entitled to make emergency medical decisions.[256] Furthermore, the court added that allowing second-parent adoptions provided the child with security and avoided the disruptive visitation battle seen in situations where a co-parent had not attained legal parenthood, as in the case of a "psychological parent."[257]

Accordingly, the significance of a second-parent adoption, as it relates to this Note, is that if it is granted, co-parents do not have to worry about the implications of *Troxel* as "third-parties" or "psychological parents," and whether a court would allow them to maintain a continuing relationship with their children in the event of a separation.[258] Consequently, this is a better result for children of gay or lesbian parents because they are assured of the lasting security of having two legally recognized parents.[259]

## CONCLUSION

The Fourteenth Amendment of the United States Constitution guarantees parents a liberty interest in the care and custody of their children, and the Supreme Court of the United States has consistently confirmed this right.[260] However, courts have not found this right to be absolute.[261] When a state finds a compelling interest in intervening, it can invoke its *parens patriae* power to do so.[262] This state power becomes particularly significant in light of the changing demographics of the American family.[263] Parents' constitutional

256. *Id.*

257. *Id.* at 399-400.

258. *See* Shapiro II, *supra* note 240, at 26 (noting that second-parent adoptions transform a non-legal mother into a legal one). "Once a second-parent adoption is completed, the two women have legally indistinguishable rights. In the event of a custody dispute between them, a court would face a case involving two legal mothers with standing to sue for custody." *Id.*

259. *See* Policy Statement, American Academy of Pediatrics, *CoParent or Second-Parent Adoption by Same-Sex Parents*, (Feb. 2002), *available at* http://www.aap.org/policy/020008.html.

260. *See supra* Part I.

261. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74-75 (1976); *see also* Troxel v. Granville, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting) ("We have never held that the parent's liberty interest . . . is so inflexible as to establish a rigid constitutional shield . . . .").

262. *See* Tomaine, *supra* note 22, at 736 n.30.

263. *See Troxel*, 530 U.S. at 63.

protection over the care and custody of their children should be protected; additionally state courts should protect the relationship between children and their non-biological co-parents.[264] The Court applied this approach in *Troxel v. Granville* in finding middle ground between a "breathtakingly broad" Washington visitation statute and the decision of the Washington Supreme Court striking it down as facially unconstitutional, thus giving parents a virtual absolute veto over visitation claims by third parties.[265] Accordingly, *Troxel* strengthens biological parents' position in the face of challenges by grandparents or other third parties, but also helps psychological parents by allowing them to challenge visitation when an exceptional circumstance warrants interference.[266]

States need to formulate consistent, predictable strategies to protect the children of same-sex parents as well.[267] The de-facto parent doctrine is one mechanism by which a few courts have decided to protect the relationship a child has with his or her non-biological parent.[268] However, because the doctrine's scope is limited, the states should supplement it with a special standing requirement that recognizes and protects the child from losing a legitimate parent who has not been able to attain legal parenthood.[269]

In light of *Troxel* and the importance of protecting parental rights, the best case scenario for children is having two legally recognized parents.[270] Same-sex partners can accomplish this through second-parent adoption, although it is not available in all jurisdictions.[271]

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264. Brief of Amici Curiae Lambda Legal Defense and Educ. Fund et al. at 23, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-130).

> The parent's constitutional interest must cede enough to allow evaluation of whether the loss of a relationship the parent himself encouraged . . . is adverse to the child's interests. Such a threshold element provides sufficient consideration of parental liberty interests, balanced against the interests of the child in maintaining these significant bonds, to consider entry of a visitation order in favor of a nonparent.

*Id.*

265. *See Troxel*, 530 U.S. 57.
266. *See id.*
267. *See supra* Part V.
268. *See supra* Part III.
269. *See supra* Part IV.
270. *See supra* Part V.B.
271. *See id.*

Consequently, in light of the increasing number of gays and lesbians raising children, at some point the courts must address whether denying second-parent adoption is really in the best interest of the children.[272]

*Brooke N. Silverthorn*[273]

272. *See id.*

273. The author dedicates this Note to Bachi Quiñónez, as he is the inspiration for this topic.