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We All Need Somebody to Lean On: Using the Law to Nurture Our Children, Beginning with Third-Party Visitation

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**We All Need Somebody to Lean On:
Using the Law to Nurture Our Children,
Beginning with Third-Party Visitation**

**By John A. Pappalardo,*
with Cassidy Allison** & Samantha A. Mumola*****

Abstract

Perhaps one of the single most important aspects of a healthy childhood is emotional support from healthy caregivers. As it stands, New York's visitation law prohibits third-party caregivers from stepping in and providing children with this important psychological and emotional need by automatically denying them standing to seek visitation in court. In New York, third-party standing for visitation is denied solely on a procedural basis, irrespective of the child's personal familial situation, namely whether their parents are completely

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unavailable. Specifically, when a child's parents become unavailable due to death, incarceration or otherwise, and such child becomes a ward of the foster care system, the child's aunt, uncle, or other third-party caregiver cannot petition for visitation of that child under current New York law. As a result, the child is effectively deprived of necessary emotional connections unless the third-party caregiver decides to formally adopt him or her. New York's Domestic Relations Law does not explicitly prohibit third-party visitation, but rather this current, nonsensical application of New York visitation law has developed through the judiciary, which is supposed to serve as these children's last line of defense. Thus, this piece respectfully calls for the court of this progressive State to join other neighboring states in fostering relationships between children and healthy caregivers by awarding standing for visitation to third-parties when both of the child's parents are completely unavailable to take care of them.

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I. An Introduction to Perpetual Disappointment and Abandonment

You are eight years old. When you were two, your father died in a tragic car accident as he was commuting home. Shortly after, your only living grandparent, your paternal grandmother,

passes away from heartbreak over her son. You can't remember the details of that year, but you do remember your mother heavily relying on her sister to make it through this tough time. Although only your aunt, she treated you and your siblings like her own children. She did not have the means to take care of you, your mother, and your siblings, as she had her own large family and simply did not have the space or finances. However, she did just about everything else for your family. In fact, the extent of your childhood memories involves your aunt and her husband, your uncle. When you were four, they taught you how to swing a bat and brought you to the movies. When you were five, they helped you with your reading homework and attended all of your school concerts. When you made a mistake, they spoke to you as if you were their equal. Any time you were sad, they were understanding and went out of their way to comfort you. They frequently provided for you and your siblings, including buying everyone school supplies and clothes every year. They sometimes even helped your mother with the grocery bill. Your aunt and uncle hosted all of the holidays and had your family over for dinner with your cousins every Sunday. You and your siblings loved them like your own parents, and they loved you back. You would never say it out loud because it would break your mother's heart, but you secretly wished they were your parents instead.

By the time you were six, your mother became physically abusive toward you and your siblings because she had never really dealt with the pain of losing your biological father. Having zero tolerance for this behavior, your aunt and uncle wanted to take in you and your siblings, but your mother refused to allow it. Angry and bitter, your mother rejected any attempt they made to see you. Your aunt and uncle looked into filing for visitation, but, before they were even given the opportunity to be heard by a judge, they were immediately denied standing by the court because they were not your biological parents. Shortly after their inquiry, your mother was incarcerated for strangling your sister, and, as a result, you and your siblings were taken into the state's custody.

Foster care was a foreign term to you; you had no idea what it meant, but you quickly found out; your life changed in the blink of an eye. Before arriving at your new group home, you

were forced to separate from your siblings because there weren't enough available beds in one facility. Being surrounded by strangers was a scary feeling for you. It was December, but the festive joy quickly disappeared from your life because you realized you will be spending the holidays without your family. You are confused because you know you haven't done anything wrong to deserve this, but yet you feel like you are being punished as if you have committed a crime.

A few months pass before you are told by a staff member that your mother has died from a drug overdose. This hits you hard and you suddenly start to feel entirely alone. The slight glimmer of hope that your mother would return for you has now completely extinguished. No one in the group home has the ability to make your extreme sadness go away because they can't relate to your circumstances. The only people who know what you're going through are your siblings and your aunt and uncle. You wish you were home right now. Where is your aunt and uncle? You thought they would have at least come to see you; you thought they cared. Little do you know that, as your only living family members, they tried to petition for visitation a second time when you were in foster care, but the court yet again refused to even hear their case based on the fact that they were not your biological or adoptive parents or grandparents. They weren't even allowed to visit you in foster care.

This fictional anecdote is loosely based on the facts in the New York Appellate Division case, *In re Katrina E.*¹ It is an illustration of the harsh emotional and psychological effects that current visitation laws potentially have on children raised by non-traditional families. One can only imagine what it is like to be an eight-year-old child forced to live in foster care because their parent(s) physically abused them; traumatic, confusing, and lonely are a few words that might come to mind. At eight years old, a child should only be exposed to trivial decisions such as whether they prefer sports over music, acting over singing, or playing outside over gaming. Their only worries should consist of whether their team is going to win the championship game, if their friends will be able to hang out with them this weekend, or if they will be able to perform well at their dance recital.

1. 636 N.Y.S.2d 53 (App. Div. 1996).

Children shouldn't have to think twice about relying on adults so they can be left free to live their lives as kids; they should be able to assume that their needs are going to be highly prioritized and taken care of by adults. However, it cannot be said that New York's judicial and legislative systems are facilitating this goal when the implementation of current visitation laws fail to endorse and promote relationships between children and third-party caregivers that are crucial to the development of the child and the betterment of our society.

The purpose of this note is to highlight the importance of a child's relationship with non-biological parental figures and urge members of New York's judicial and legislative systems to better protect the needs of children. More specifically, the goal is to bring attention to the nonsensical, tragic upshot of the automatic denial of third-party visitation. Part II of this note will explore the emotional and developmental needs of children in further detail. Parts III and IV will review New York's prior legal changes in the area of visitation law by analyzing past and current law, respectively, as well as illustrate the disconnect between children's emotional needs and the execution of current visitation laws. Finally, the judiciary's historical role in effectuating necessary change in the law will be examined in Part IV, as well as an argument that the current disconnect is the judiciary's obligation and responsibility to remediate.

II. The Instinctual and Universal Need for Emotional Connections

It is a psychological certainty that all children instinctively share particular emotional needs which must be satisfied in order to foster their healthy development.² An emotionally stable child requires continuity, love, care, support, guidance, and understanding—attributes that are primarily achieved through communication with healthy adults.³ “Communication

2. See generally EILEEN JOHNSON, *THE CHILDREN'S BILL OF EMOTIONAL RIGHTS: A GUIDE TO THE NEEDS OF CHILDREN* (2011) (explaining children's innate emotional needs and what occurs when these needs are not met).

3. See JOHNSON, *supra* note 2, at 5 (stating “children are vulnerable beings who are dependent on other beings—adults”); Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal*

. . . is one of the most vital aspects of human life[;] . . . [d]evelopment of one's ideas and thought processes [is] contingent on being listened to and validated by respected caregivers.”⁴ Studies have shown there is a significant benefit that comes from continued contact with third parties functioning as parents, and, contrariwise, if this bond is terminated, children are likely to suffer “emotional distress and possible substantial psychological harm.”⁵ Thus, it is a proven theory that children who are able to form meaningful connections with those who love and care for them are more likely to become high-functioning members of society.⁶

Conversely, it is close to inevitable that children who are forced to grow up without healthy parents develop emotional issues, whether they surface now or later in life.⁷ When children and adolescents are not fortunate enough to maintain emotional connections with healthy adults, they commonly react to such lack of emotional satisfaction by acting out, entering into a depression, developing and experiencing anxiety, and/or emotionally withdrawing from their present circumstances.⁸

Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879, 902–11 (1984) (highlighting and substantiating the significance of continuity in a child's life, even at the risk of some uncertainty or instability); Sally F. Goldfarb, *Visitation for Non-Parents after Troxel v. Granville: Where Should States Draw the Line?*, 32 Rutgers L.J. 783, 791 (2001) (“Child development experts point to the importance of ensuring continuity of a child's relationships with caregiving adults.”).

4. JOHNSON, *supra* note 2, at 12.

5. Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference after Troxel v. Granville*, 88 IOWA L. REV. 865, 892 (2003).

6. See JOHNSON, *supra* note 2, at 21; Bartlett, *supra* note 3, at 902–11 (explaining that separation from caregivers is detrimental to children).

7. Andrea Brandt, *4 Ways That Childhood Trauma Impacts Adults*, PSYCHOLOGY TODAY (Jun. 1, 2017), <https://www.psychologytoday.com/us/blog/mindful-anger/201706/4-ways-childhood-trauma-impacts-adults> (stating “[w]hether you witnessed or experienced violence as a child or your caretakers emotionally or physically neglected you, when you grow up in a traumatizing environment you are likely to still show signs of that trauma as an adult”).

8. See MARION BOWER & JUDITH TROWELL, *THE EMOTIONAL NEEDS OF YOUNG CHILDREN AND THEIR FAMILIES: USING PSYCHOANALYTIC IDEAS IN THE COMMUNITY* 13 (Marion Bower & Judith Trowell eds., 1996) (listing various coping mechanisms that humans instinctively use to deal with emotional conflicts including repression, which leads to being “cut off and out of touch”

It is important to note that these responses are not necessarily intentional, but rather instinctive defense mechanisms to protect their well-being.⁹ When left uncorrected, emotional instability and trauma is likely to have a “lifelong and often irrevocable impact in shaping the nature of the adult.”¹⁰ This is because a child’s brain is different from an adult’s in that it is more susceptible to influence,¹¹ making emotional damage more difficult to overcome.¹² Issues that are suppressed by children will pave the way for criminal or self-destructive behavior,¹³ as the same repressed emotional traumas will without doubt resurface at a later time in life.¹⁴

and displacement, which leads to aggressively (and seemingly irrationally) acting out one’s anger onto others); JOHNSON, *supra* note 4, at 21 (cautioning that not only is a child is subject to developing anxiety, hyper-vigilance, or depression when their first cries are ignored by parents, but also a “[l]ack of emotional responsiveness . . . can result in shyness, insecurity, anger, and anti-social or self-destructive behavior”).

9. Megan Glynn Crane, *Childhood Trauma's Lurking Presence in the Juvenile Interrogation Room and the Need for A Trauma-Informed Voluntariness Test for Juvenile Confessions*, 62 S.D. L. REV. 626, 643 (2017) (“where a child endures repeated or chronic stress, the body suppresses the stress response in order to normalize cortisol levels”); Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111, 137 (2000) (stating that children repress feelings as an unconscious defense mechanism when negative emotional feelings become too painful to handle).

10. JOHNSON, *supra* note 2, at viii.

11. Patrick Harty, Book Note, *The Moral and Economic Advantages of Raising the Age of Criminal Responsibility in New York Among Juvenile Offenders, and Plans for Rehabilitation*, 33 TOURO L. REV. 1099, 1099 (2017) (stating “research has shown that adolescents . . . are . . . more susceptible to outside influences”).

12. JOHNSON, *supra* note 2, at 5, 6.

13. Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 337 (2002) (stating “[t]he emotional unconscious also appears to be the basis for self-destructive habits that can possibly lead to criminal behavior”); Mark Tran, *Diagnosed Depression Linked to Violent Crime, Says Oxford University Study*, GUARDIAN (Feb. 25, 2015, 5:31 AM) (stating that, according to psychiatric experts, “[p]eople diagnosed with depression are roughly three times more likely than the general population to commit violent crimes”).

14. JOHNSON, *supra* note 2, at 7.

Although it is ideal for biological parents to be the caregivers that fulfill their children's emotional needs, this is frequently not the case. In fact, it is becoming more common for children to form close connections with extended family members and biological strangers than ever before.¹⁵ In many cases where there is an absence of adequate parental care, other non-parental third parties, such as aunts, uncles, grandparents, neighbors, family friends, stepparents, and foster parents, step in and establish supportive and emotionally beneficial connections to children who would otherwise have no one to love and care for them. Although not considered traditional, relationships between non-parental caregivers and children can be considerably beneficial to children.¹⁶ "As the child grows, his emotional life depends on the strength of [the caregiver-child] connection;"¹⁷ maintaining such relationship is in the best interest of the child. Thus, the relationship between a caregiver and a child should be highly valued by our court system notwithstanding the parties' biological affiliation.

III. A Brief History of Visitation Rights in America

Historically speaking, visitation disputes regarding minor children have been brought by many different people such as grandparents, *de facto* parents, stepparents, and even third parties in general. As far back as 1966, we can see the conflicting opinions throughout the courts as to visitation and how it applies to Grandparents and third-parties. Specifically, grandparents' visitation rights have drastically changed over the past years, showing an increase in the opinion that visitation does not necessarily take away from parent custodial rights. When comparing pre-1990s to the present, we went from a time

15. See generally John DeWitt Gregory, *Redefining the Family: Undermining the Family*, 2004 U. CHI. LEGAL F. 381, 385 (2004) (stating that "we are in a transitional stage along the continuum from sanctioning only biologically based families to legally recognizing functional families") (quoting James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 B.Y.U. L. REV. 923, 936 (2001)).

16. Maldonado, *supra* note 5, at 870.

17. JOHNSON, *supra* note 2, at 21.

where most courts had differing opinions on grandparent visitation, to now, when every state has some type of law allowing grandparents to have visitation rights.¹⁸

Grandparents have had standing to petition for visitation in some courts as far back as 1966.¹⁹ Courts have stated that they “[do] not believe that visitation rights to a grandparent would in effect diminish the custody of the respondent,” and that the *visitation should be granted when in the best interest of the child*.²⁰ Although some courts have determined that visitation for grandparents was acceptable, state supreme courts continued to have mixed rulings until the 1990s.²¹ Some examples over the years are: (1) in 1992, the Kentucky Supreme Court held that the parental rights were not violated by grandparent visitation,²² (2) in 1993, the Missouri Supreme Court held that if you were granting grandparent visitation in the best interest of the child, then it was not a constitutional violation,²³ (3) in 1996, the Supreme Court of Florida held that when a child is residing with both parents, and one of the parents was against the visitation, then the visitation statute as it relates to grandparents violated the parent’s constitutional right to the upbringing of their child,²⁴ and (4) in 1998, the Oklahoma Supreme Court held that the grandparent visitation statute was unconstitutionally applied and, therefore, violated the Parents’ right to the management of their minor Child because the statute allowed the disruption of an intact nuclear family against the wishes of both parents.²⁵ These differing opinions across the states as it applies to grandparent visitation is an illustration of how, over time, courts are slowly adapting to new social norms in the context of families and the upbringing of their children.

18. Maldonado, *supra* note 5, at 892.

19. *See generally*, Anonymous v. Anonymous, 269 N.Y.S.2d 500 (Fam. Ct. 1966).

20. Anonymous v. Anonymous, 269 N.Y.S.2d 500 (Fam. Ct. 1966).

21. Bartlett, *supra* note 3, at 902–11 (explaining that separation from caregivers is detrimental to children).

22. King v. King, 828 S.W.2d 630, 630 (Ky. 1992).

23. Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993).

24. Beagle v. Beagle, 678 S.O.2d 1271, 1276 (Fla. 1996).

25. Herbst v. Sayre, 971 P.2d 395 (Okla. 1998).

When looking back on the 1991 well-known case, *Alison D. v. Virginia M.*, one can see that the Court decided on the issue of visitation as it applies to same-sex couples, which, if decided in this manner today, would be shocking.²⁶ In this case, two women were in a romantic relationship and decided to have a child by means of artificial insemination.²⁷ Together, the couple agreed on the terms of conception, birth, and all other child rearing decisions.²⁸ Further, they agreed to share joint responsibilities in raising this child.²⁹ However, when the child was four years old, the parents decided to end their relationship.³⁰ The visitation between the child and the Petitioner continued for a few years, but once the relationship between both mothers diminished, the Respondent cut all ties with the Petitioner and did not allow contact with the child.³¹ The Court of Appeals affirmed the lower Court's decision holding that the Petitioner was a biological stranger to the child and did not meet the requirements of a "parent" under New York's Domestic Relations Law.³² Therefore, she could not petition for visitation with the child.³³

Third-party visitation has also been highly debated in the past, even in cases where the third party is one who assumes the parental role in a child's life.³⁴ In 1987, *Ronald FF. v. Cindy GG.* was brought by a petitioner who raised a child for the first year of the child's life, signed the child's birth certificate, and held himself out as the father to this child.³⁵ The Court held that, not only could the Petitioner not have visitation, but also that he did not have the standing to even petition for it because he was not a biological parent to the child.³⁶

26. 572 N.E.2d 27, 28 (N.Y. 1991).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991).

33. *Id.*

34. *Ronald FF. v. Cindy GG.*, 511 N.E.2d 75, 76 (N.Y. 1987).

35. *Id.*

36. *Id.* at 77.

IV. Where Current Visitation Law Is Failing Our Children

Currently, third party visitation is still not acknowledged in the State of New York, even though many states across the United States are creating statutes that would allow this to occur.³⁷ New York has two statutes that apply to standing in regards to petitioning for visitation.³⁸ Section 71 of the Domestic Relations Law allows for siblings to have standing for visitation.³⁹ The statute provides:

Where circumstances show that conditions exist which equity would see fit to intervene, a brother or sister or, if he or she be a minor, a proper person on his or her behalf of a child, whether by half or whole blood, may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child is he may require, for visitation rights for such brother or sister in respect to such child.⁴⁰

Section 72 of the Domestic Relations Law allows standing to grandparents for visitation.⁴¹ The statute provides:

Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that

37. *See generally* Romasz v. Coombs, 55 N.Y.S.3d 770 (App. Div. 2017).

38. N.Y. DOM. REL. LAW §§ 71, 72 (McKinney 2010).

39. N.Y. DOM. REL. LAW § 71 (McKinney 2010).

40. N.Y. DOM. REL. LAW § 71 (McKinney 2010).

41. N.Y. DOM. REL. LAW § 72 (McKinney 2010).

conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.⁴²

Neither statute “expressly . . . exclude[s] other classes of individuals.”⁴³ One could certainly argue that to do so would create a biological hierarchy where there is a divine presumption that a grandparent or sibling has been more influential in a child’s life than an aunt, uncle, or family friend. With that said, ever since the Supreme Court of the United States decided in *Troxel v. Granville*, states have been unsure how to apply third-party visitation statutes.⁴⁴ In *Troxel v. Granville*, paternal grandparents sought visitation of their grandson after his father, their son, had passed away.⁴⁵ At the time, Washington had a visitation statute that said any person, at any time, can petition the Court for visitation.⁴⁶ The trial court granted visitation to the grandparents, but the Supreme Court of Washington reversed, stating that the statute infringed on the

42. N.Y. DOM. REL. LAW § 72 (McKinney 2010).

43. John A. Pappalardo, *New York State’s Refusal to Promote Visitation Between Foster Care Children and their Extended Family*, 23 WESTCHESTER B. J. 189, 191 (LEXIS 1996).

44. See generally Emily Buss, *Adrift in the Middle: Parental Rights after Troxel v. Granville*, 2000 SUP. CT. REV. 279 (2000).

45. 530 U.S. 57, 61 (2000).

46. *Id.*

parents fundamental right to the upbringing of their child.⁴⁷ When the case reached the Supreme Court of the United States, it rendered an opinion specifically on the Washington statute, stating that it was “breathtakingly broad” and did not give any special weight to parents.⁴⁸ Ever since this opinion was written, states have been unsure how to construct and implement third-party visitation statutes.⁴⁹

One case in which a court has gotten it right is *Brooke S.B. v. Elizabeth A.C.C.*⁵⁰ This is a case where the Court had the gumption to overturn *Alison D.*⁵¹ In *In re Brooke*, two women were engaged to be married and jointly decided they wanted to have a child.⁵² Together, they decided that the Respondent would be artificially inseminated with the Child.⁵³ Petitioner was consistently engaged in the Respondent’s pregnancy, as she helped to take care of Respondent, attended routine doctors’ appointments and an emergency room visit when Respondent experienced some complications.⁵⁴ After Respondent gave birth to their son, the couple raised him together for approximately a year. The Child even referred to the petitioner as “Mama B.”⁵⁵ One year after the Child was born, the parties decided to end their relationship. At first, the Respondent allowed the Petitioner to have visitation with their son, and the petitioner remained involved in his life.⁵⁶ However, after some time, the Respondent cut all contact with Petitioner and isolated her from the Child.⁵⁷ As a result, Petitioner proceeded to file for visitation and custody of their son, even though the precedent in *Alison D.*, discussed *supra*, held that she did not have standing to do so.⁵⁸ The Family Court expressed that this case was “heartbreaking” but that the petitioner did not adopt the child and therefore was

47. See generally *id.*

48. *Id.* at 67.

49. Buss, *supra* note 44.

50. 61 N.E.3d 488 (N.Y. 2016).

51. *Id.* at 490.

52. *Id.* at 490–91.

53. *Id.* at 491.

54. *Id.*

55. *Id.*

56. *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 491 (N.Y. 2016).

57. *Id.*

58. *Id.*

not a parent as the statute intended.⁵⁹ The attorney for the child appealed the case and the Appellate Division unanimously affirmed the decision, stating that there was no biological relationship nor an adoption and therefore had no standing to seek custody or visitation.⁶⁰ Instead of disallowing visitation rights to third parties, it decided that when a partner can show by clear and convincing evidence that the parties agreed to conceive and raise the child together, then the partner has standing to seek visitation as a parent.⁶¹ When comparing where we were to where we are, yes we have improved in this area, however, we still have a long way to go.

A puzzling aspect of current visitation law in New York is that the State does not allow third parties to have standing to petition for visitation, but courts are still actively awarding visitation to third parties during custody proceedings.⁶² *Strobel v. Danielson* is a case where the father of the child murdered the mother of the child.⁶³ The father was sent to prison and would remain there for the rest of his life,⁶⁴ leaving the child with no parents or custodian.⁶⁵ Both the grandmother and the aunt of the child petitioned the Court for full custody⁶⁶ under Domestic Relations Law 240, which states that anyone with an important role in the child's life may petition for custody in extraordinary circumstances, which were met in this case.⁶⁷ Prior to the hearing, the Family Court "awarded the grandmother sole custody of the child, with scheduled visitation to the aunt."⁶⁸ This is a situation where the aunt did not have standing to petition for visitation, but was granted it once she petitioned for custody and lost in her attempt to gain it over the grandmother.⁶⁹ It is unexplainable why New York courts think that it is sensible to order visitation to third parties during

59. *Id.*

60. *Id.*

61. *Id.* at 501.

62. *See generally* *Strobel v. Danielson*, 74 N.Y.S.3d 387 (App. Div. 2018).

63. *Id.* at 388.

64. *Id.* at 389.

65. *Id.*

66. *Id.* at 389.

67. N.Y. DOM. REL. LAW § 240 (McKinney 2015).

68. *Strobel*, 74 N.Y.S.3d at 389.

69. *See generally id.*

custody proceedings, but will not allow these same third parties to petition for visitation without having a custody petition filed.⁷⁰

Another instance in which New York courts will grant visitation to third parties is under the doctrine of equitable estoppel. Equitable estoppel is a doctrine imposed by the law as a matter of fairness.⁷¹ Its purpose is to “preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted.”⁷² Under this doctrine, the Court generally requires a showing of an agreement between the parties, usually predating the birth of the child in question, which displays the intent to raise the child as a cohesive family.⁷³ The Court imposes the doctrine “to prevent the enforcement of rights which would work a fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party’s words or conduct, has been misled into acting upon the belief that such enforcement would not be sought.”⁷⁴ In matters where a prior agreement can be substantiated, the court will give great deference to the parties’ agreement. For example, if three people agree to conceive and raise a child together as one family unit, courts will uphold the agreement under the doctrine of equitable estoppel.⁷⁵ The application of this doctrine can be beneficial to the child because it maintains the third-party parental relationship; however, equitable estoppel is a difficult standard to overcome because there must be a prior agreement between the parties. Without this agreement, third parties would be left without standing; there is no way that a third-party parent can turn back time and create this agreement. Therefore, there are an infinite number of cases where equitable estoppel does not apply.

70. *Id.*

71. Christopher YY. v. Jessica ZZ., 69 N.Y.S.3d 887, 894 (App. Div. 2018).

72. *Id.*

73. Janis C. v. Christine T., 742 N.Y.S.2d 381, 382 (App. Div. 2002).

74. *Id.*

75. *See, e.g.,* David S. v. Samantha G., 74 N.Y.S.3d 730 (2018).

V. The Judiciary's Responsibility to Fix the Callous Disconnect

As one can see, despite a magnitude of research regarding the needs of children, there is an extreme disconnect between what is best for child development and visitation law as it stands today. It is important to mention the dissenting opinion in *Alison D.*, where, at the time, soon-to-be Chief Judge Judith Kaye stated “the impact of today’s decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development.”⁷⁶

As discussed, *supra*, third parties, *no matter how interested or involved they are in the child’s life*, (to the extent they are not a grandparent or sibling) are automatically denied standing to seek visitation merely because of the nature or type of their biological ties to the child. The only time a court awards a non-biological parent visitation is as a lesser award when petitioning for custody or under the incredibly difficult doctrine of equitable estoppel. This means that, under current law, even when a biological parent is *completely unavailable* to the child, whether it be by death, neglect, or a prior termination of parental rights, courts will still refuse to so much as consider a visitation petition from anyone who is not a parent, grandparent, or sibling unless there was prior written consent by the biological parent to the formation of the third-party parental relationship with the child under the incredibly difficult doctrine of equitable estoppel.⁷⁷

Although it is well established that there should be great weight given to the rights of biological and adoptive parents when ruling on third-party visitation,⁷⁸ the concept that a child, with *unavailable* parents and grandparents, is automatically precluded from maintaining a healthy relationship with a non-parental caregiver is an illogical and nonsensical application of the law proven to be severely injurious to society.⁷⁹ As a result,

76. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 30 (N.Y. 1991).

77. For example, when a couple agrees to conceive with the help of a surrogate. See 3 NY FAM. CT. LAW & PRAC. § 16:54.

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

79. JOHNSON, *supra* note 2, at 21; Bartlett, *supra* note 3, at 902–11 (stating that “[a]n absence of permanence in a [child’s life] may cause him [or her] to have difficulty learning self-control and absorbing a value system”).

loving and caring relationships with non-parental adults are eliminated from a child's life even if they do not have anyone else to turn to. In its application of the law, courts are essentially making a statement that they would rather the child not be visited by anyone than be visited by someone who is not a parent, grandparent, or sibling; the idea is preposterous! When parents and grandparents are unavailable, the placement of a third party non-biological parental figure into a child's life is something that cannot be automatically ruled out and must be entertained within the best interests of the child(ren). If we take away the only connections that these children have, we are leaving them with a slim chance to recover from their situations and become productive adults. Additionally, their emotional and psychological issues will go untreated and be passed down to future generations.

Given the court's responsibility to protect the best interest of children,⁸⁰ as well as its interest in maintaining a safe and productive society, it is incumbent upon our judicial system to create an environment which nurtures the relationships between our youth and their parental figures by allowing third parties standing to petition for visitation upon a showing of parental unavailability. The future of our youth relies on this judicial change in the way visitation law is applied. Disappointingly, however, the current hardline prohibition against standing for third-party visitation does the exact opposite.

A. Why the Judiciary?

During the formation of our country in the eighteenth century, our founding fathers created a bedrock foundation consisting of three separate branches of government, all of which were to function independently of each other while at the same time retain the ability to check and monitor the other

80. *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY (2016) (stating that courts are responsible for considering the best interest of the child when ruling on placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights).

branches.⁸¹ Ever since, the judiciary has been charged with the responsibility to safeguard the rights that were given to Americans under the Constitution.⁸² Specifically, the protection of constitutional rights is achieved through judicial review, a power established by the Supreme Court in *Marbury v. Madison* which consists of the ability to assess the constitutionality of legislative and executive actions.⁸³

As Alexander Hamilton once stated, “there is no liberty, if the power of judging be not separated from the legislative and executive powers;”⁸⁴ steadfast protection of the People’s constitutional rights can only be accomplished through impartial application of the law. Described as the “crown jewel”⁸⁵ of our government, judicial independence is essential to democracy, liberty, and freedom; it is what generates fair and impartial trials.⁸⁶ Once outside forces infiltrate the judicial system, decisions are no longer made with freedom in mind;⁸⁷ the decisions become predetermined rather than resolved on the merits.⁸⁸ In order for the system of checks and balances to properly work, the judiciary must be able to “check” the law when situations before it present themselves as unfair.

Furthermore, history indicates that it is not uncommon for the judiciary to provoke change in the law, especially in the areas that contain cracks which need filling. In the 1950s, it was the Court that provoked the desegregation of schools by making an unparalleled decision in *Brown v. Board of Education*,⁸⁹ which was subsequently followed by the legislature’s anti-discrimination laws. In the early 2000s, the Court contributed

81. Janet Stidman Eveleth, *Preserving Our Judicial Independence*, 37-AUG MD. B.J. 58, 60 (2004); J. Zak Ritchie, *The Separation of Powers and the Judicial Rulemaking Power: The Judicial Authority of the Supreme Court of Appeals Includes Legislative Privilege*, 2018-SUM W. VA. L. 34 (2018).

82. *Id.* at 58.

83. 5 U.S. 137 (1803).

84. Symposium, *The Ethics of Judicial Selection*, 43 S. TEX. L. REV. 141, 148 (2001).

85. *Id.* at 142–43; see also Eveleth, *supra* note 81, at 62.

86. Eveleth, *supra* note 81, at 62.

87. *Id.*

88. *Id.*

89. 349 U.S. 294 (1955).

to marriage equality through unprecedented opinions,⁹⁰ and now same-sex marriage is recognized throughout the United States.⁹¹ Likewise, unmarried fathers have obtained certain rights through innovative decisions from the judiciary.⁹² For example, until the 1970s, when children in Illinois were born out of wedlock to unavailable mothers, they automatically became wards of the state without even so much as a hearing on the unwed father's fitness as a parent.⁹³ It was only in 1972, due to the Court's landmark decision in *Stanley v. Illinois*, that an unwed father's right was finally upheld to participate in their child's life in a situation where the mother was unavailable. There's a distinct parallel that can be drawn between the situations in *Stanley* and the current third-party visitation crisis: courts have the important responsibility of protecting the child's best interest absent a parent's availability.

The Court in *Troxel v. Granville* denied standing to third parties because it backed a presumption that *available* parents make decisions that are in the best interest of the child.⁹⁴ However, a situation in which the parents are *completely unavailable* is much different than that presented in *Troxel* because no parent is available to make decisions, eliminating the court's presumption. When there aren't any available parents,

90. See generally *United States v. Windsor*, 570 U.S. 744 (2013) (overruling the Defense of Marriage Act, which defined a marriage, for the purposes of the federal government, as a union between one man and one woman); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling sodomy laws); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a state constitution which prevented homosexuals from being placed in a protected class).

91. See *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (declaring that the Constitution guarantees a right to same-sex marriage).

92. See, e.g., *In re Raquel Marie X*, 559 N.E.2d 418 (holding unconstitutional Domestic Relations Law § 111(1), which provided that, "while an unwed mother's consent is always required[,] an unwed father's consent to the adoption of his under-six-month-old child is required only where he has openly lived with the child or the mother for six continuous months immediately preceding the child's placement for adoption, openly acknowledged his paternity during such period, and paid reasonable pregnancy and birth expenses in accordance with his means").

93. Deborah Davis Alleman, *Adoption: The Constitutional Rights of Unwed Fathers*, 40 LA. L. REV. 923, 925 (1980).

94. *Troxel v. Granville*, 530 U.S. 57 (2000); Maldonado, *supra* note 5, at 870.

courts become the child's last line of defense. They are wholly responsible for protecting their best interests, which, when a child does not have any parents, indisputably consists of the maintenance of any and all third-party caregiving relationships. Thus, visitation laws must be expanded to allow third parties a chance to intercede and complete the job of child rearing when parents cannot.

Courts must immediately prompt legal change in these unjust visitation laws. Judges must eliminate the unnecessary hardline rule against non-parental standing and instead grant standing to third parties upon a determination that the parents of a child are unavailable, whether it be by death, neglect, or termination of parental rights. It is only fair to a child who has no one else available to protect him or her. Our judicial system is doing a complete disservice to our children by refusing to extend visitation rights to third parties. We owe it to these deserted children to *at least consider* their relationship with the third-party caregiver and explore their next-best avenues when parents are unavailable.

B. Weighing the Pros and Cons

Although change should not be made without an examination of its potential negative effects, no consequence of third-party visitation can be worse than setting up a child for failure. Firstly, and most importantly, courts would not be undermining legislative intent when altering their application of visitation law. This is because New York's Domestic Relations Law does not explicitly prohibit third-party visitation; rather, this irrational application has developed over time through case law. Therefore, courts will be able to grant standing to third parties without defying statutory law.

One could make the argument that expanding standing for visitation petitions would inevitably create more filed petitions or be more expensive for courts; however, this should not deter change because, ultimately, the best interests of the child must be the main concern. "Procedure by presumption is always cheaper and easier than individualized determination. But when . . . the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present

realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.”⁹⁵

A child absolutely should never be precluded from obtaining visitation with their third-party caregiver just because courts do not feel like handling more petitions. This is no excuse, especially for an institution which was empowered and charged with the responsibility to care for the best interests of our youth.

Additionally, this change in the law will not hurt children because, even if standing to petition is granted to third parties, courts will still be there to filter out harmful third-party relationships and only grant visitation when in the best interest of the child. The thing that is being sought is *standing* to petition for visitation, or, in other words, a mere consideration, and not an automatic denial, of children’s relationships with non-parental caregivers. These caregivers deserve their day in court, at a minimum for the children’s sake.

It can also be argued that allowing standing for third parties to petition for visitation will effectively deter the same parties from applying for custody of the same children, thus creating a reliance on the foster care system while at the same time enjoying the fruits of their visitation rights. Additionally, a child may feel confused about why their aunt or uncle only wishes to visit them and not actually take custody of them. Albeit a practical argument, this should not prevent a child from the benefits that come from a meaningful parent-like relationship through visitation. Maybe the aunt and uncle do not have the financial means to take the child in, but would like to provide him or her with emotional support. The law simply cannot get in their way, as the child is receiving more support than he or she would have had there been no standing for visitation at all. The courts have to support adults who wish to continue healthy relationships with children without assuming all of the encumbering parental responsibilities. It must facilitate such an arrangement, not impede it!

A final argument could be that courts would be stepping into ambiguous, murky territory in attempting to classify the types of third parties that will be granted visitation and those who will

95. Stanley v. Illinois, 405 U.S. 645, 656–57 (1972).

be denied. However, this is a challenge that courts should be able to face, as it should not be much different than a visitation hearing for parents, grandparents, or siblings. More simply stated, it is their obligation to face such a challenge.

In the long run, allowing third-party standing upon a showing of parental unavailability will prove to be beneficial because it will provide hope and love to children who are orphaned, neglected, and abandoned – children who otherwise would have no one to emotionally support them and would probably otherwise seek fulfillment of their needs through other more dangerous avenues such as prostitution and drug dealing. Ideally, the maintenance of this support system will help the child grow into a productive member of society.

It can also be argued that children have a fundamental, constitutional right to the protection of their best interests.⁹⁶ If the right to conceive a child is a constitutional right, certainly the law should provide for the protection of the children so conceived. Additionally, if the Court has decided that the Constitution provides parents with the fundamental right to control the upbringing of their child, it should certainly also hold that these children have a fundamental right to be protected.

Furthermore, not only is the current application of visitation law a huge disregard toward the various situations that can occur in non-traditional families, but it also statistically provides a great disadvantage to African-American families, which have historically embraced and relied upon community parenting, or parenting which involves more than just two parents, for economic and other purposes.⁹⁷ There is no doubt

96. Carl Funderburk, *Best Interest of the Child Should Not Be an Ambiguous Term*, 33 CHILD. LEGAL RTS. J. 229, 247 (2013).

97. Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 57 (2007) (explaining the practice of *othermothering*, or when more than one woman takes on mothering responsibilities for a child, and its economic necessity in the African-American community); Krystal L. Sorrentino, *The Social Security Caste System and the Family Benefit: Whose Family Is it Really Benefitting?*, 24 QUINNIPIAC PROB. L.J. 137, 144–45 (2011) (“Traditionally, families of European descent tend[] to emphasize a ‘conjugal structure’ (kinship based on marriage), while families of African descent tend[] to organize based on ‘consanguineous’ ideals (kinship that is biologically based and centered on blood ties)” (citing Niara SUDARKASA, INTERPRETING THE AFRICAN HERITAGE IN AFRO-AMERICAN FAMILY ORGANIZATION, IN AMERICAN

that by ignorantly assuming that every family has one mother, one father, and four grandparents, at least one of whom will definitely be present to take care of the minor child(ren), courts are showing an implicit bias toward traditional, white families, sometimes called the “eurocentric family structure” or the “nuclear family.”⁹⁸ The judiciary should not be allowed to interpret the Constitution to tolerate political enforcement of white suburbia. Rather, the law should accommodate all different types of familial backgrounds established across all races and ethnic groups.

C. Learning from Our Neighbors

In comparison to other states, New York is way behind trending law, as many states throughout the country are moving toward fostering relationships between caregivers and children regardless of biological affiliation.⁹⁹ The recent trend to consider the best interest of the child as a paramount concern is reflected in case law, as well as the establishment of more lenient visitation statutes. As a historically progressive state, our legislature should follow the inclination of other states in working toward this noble objective.

In *Youmans v. Ramos*, the Supreme Judicial Court of Massachusetts affirmed the visitation rights of an 11-year-old child’s maternal aunt despite objections from the Child’s

FAMILIES 59-69 (Stephanie Coontz, Maya Parson & Gabrielle Raley eds., 1999)); *see also* Herbert Fain & Kimberly Fain, *Socio-Economic Status and Legal Factors Affecting African-American Fathers*, 21 BUFF. J. GENDER, L. & SOC. POL’Y 1, 19–20 (2013) (stating how, in African households, “raising children is more of a collective effort with strong neighborhood support-the ‘it takes a village’ model”) (internal quotation marks omitted).

98. The term “eurocentric family structure” was coined by Laura Ann Foster in 2001 when she wrote about race and gender discrimination for African American families in social security law. Laura Ann Foster, *Social Security and African-American Families: Unmasking Race and Gender Discrimination*, 12 UCLA WOMEN’S L.J. 55 (2001); *see also* Krystal L. Sorrentino, *The Social Security Caste System and the Family Benefit: Whose Family Is it Really Benefitting?*, 24 QUINNIPIAC PROB. L.J. 137, 144–45 (2011) (arguing that social security benefits are structured in a way which favors the traditional, nuclear family, thus creating a discriminatory impact toward African-American families).

99. *See, infra*, Section V(a).

biological father.¹⁰⁰ The lower court originally granted visitation to the Aunt because the Child had lived with her for many years, during which time she “long filled the role of the only parent for the child.”¹⁰¹ Because the father was stationed in the military, and because the Child’s twin sister was sick, the Aunt took care of the Child from infancy. The Child continued living with the Aunt after both her twin sister and her mother tragically passed away. Her aunt taught her how to walk, talk, and read, made and took her to all doctors’ appointments, took her to school and church, and ensured that she was participating in extracurricular activities.¹⁰² The Child called her Aunt “mom” and her cousins, the Aunt’s children, her “brothers” and “sisters.”¹⁰³ The Aunt was the only mother that the Child ever knew.¹⁰⁴

When the father came back from his deployment, he sought to enforce the custody agreement he had with his wife pursuant to which he would receive custody of the Child should she predecease him.¹⁰⁵ He argued that, “in the absence of a statute expressly permitting the order of visitation privileges to a nonparent, the judge had no legal authority to order the visitation.”¹⁰⁶ However, the Court disagreed, holding that the statute’s failure to expressly mention third parties was not a limitation on a judge’s authority to act in accordance with a child’s best interests.¹⁰⁷ Despite there being no precedent regarding *de facto* parenthood,¹⁰⁸ the Court affirmed the Aunt’s visitation rights *because it was in the Child’s best interest*.¹⁰⁹ It held that it was not a violation of the father’s right because the Court found the Child’s welfare to be the *controlling consideration*, paramount to a parent’s interest in the relationship with their child.¹¹⁰ The Massachusetts Court in this

100. 711 N.E.2d 165 (Mass. 1999).

101. *Id.* at 166.

102. *Id.* at 167.

103. *Id.*

104. *Id.*

105. *Id.* at 168.

106. *Youmans v. Ramos*, 711 N.E.2d 165, 167 (Mass. 1999).

107. *Id.* at 170.

108. *Id.* at 175. (Lynch, J., dissenting).

109. *Id.* at 170–71.

110. *Id.* at 170–73.

case made it clear that “[i]n every [future] case in which a court order has the effect of disrupting a relationship between a child and a parent, the question [is] whether it is in the *child’s* best interest to maintain contact with that adult;”¹¹¹ “[t]o that governing principle, every other public and private consideration must yield.”¹¹²

In this case, Robin McAllister, the biological mother of the child at issue, restricted visitation with the former Stepfather, Mark McAllister.¹¹³ Robin and Mark raised this child together from birth to when the child was approximately seven years old.¹¹⁴ Throughout this time frame, the child’s biological father continued to pay child support and exercised parenting time up until the child was two years old, and then again when Robin and Mark filed for divorce. When the biological mother restricted visitation with the stepfather, he filed for custody. The District Court awarded the mother decision-making responsibilities and primary residential responsibility for the child but awarded the stepfather reasonable visitation and that none of the rights afforded to the stepfather should affect the legal rights to the biological father of the child. The mother appealed this decision and the Supreme Court of North Dakota affirmed the District Court’s judgment. The Supreme Court stated that when dealing with granting visitation to non-parents, “the rational of awarding custody to grandparents is the existence of exceptional circumstances that will further the best interest of the child” and that “it is appropriate to extend the application of that same rational to the award of visitation to a non-parent.” The Court went on further to explain that due to the relationship between the child and the stepparent, it is an exceptional circumstance that justifies this award of visitation to further the best interests of this child. This isn’t a case of the court taking away the rights of any parent, but more so a court protecting the emotional needs of a child by fostering a parent-like relationship that was formed throughout the child’s lifetime.

111. *Id.* at 171 (emphasis in original).

112. *Youmans v. Ramos*, 711 N.E.2d 165, 171 (Mass. 1999) (quoting *Richards v. Forrest*, 180 N.E. 508, 511 (Mass. 1932)).

113. *McAllister v. McAllister*, 779 N.W.2d 652 (N.D. 2010).

114. *Id.*

In Connecticut, there is one statute regarding visitation with a minor child which states specifically that:

Any person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm.¹¹⁵

Connecticut weighs different factors to determine what type of relationship the child and adult have.¹¹⁶ These factors include, but are not limited to, the length of the relationship, the parent-like activities that they partake in, the death of one of the child's parents, the fitness of the adult looking for visitation, and the fitness of the custodian of the child.¹¹⁷ This type of statute is a way to actually consider the relationship with the child and determine if visitation is in the child's best interest.

Louisiana takes a more restrictive stance in the way it allows people to petition for visitation, but it still allows for third-party visitation.¹¹⁸ Louisiana's statute provides that "[u]nder extraordinary circumstances, any other relative, by blood or affinity, or a former stepparent or stepgrandparent" may be granted visitation rights "if the court finds that it is in the best interest of the child."¹¹⁹ This is more restrictive in terms of who can petition due to the need of a blood or affinity relation,¹²⁰ yet it is still less restrictive than New York, who won't even hear the petition and dismisses it as procedurally defective.

Wisconsin has taken an even more restrictive stance, and yet it still allows more people than New York to petition for

115. CONN. GEN. STAT. ANN. § 46b-59 (West 2018).

116. *Id.*

117. *Id.*

118. LA. CIV. CODE ANN. art. 136 (2018).

119. *Id.*

120. *Id.*

visitation.¹²¹ Wisconsin's visitation statute provides that grandparents and stepparents can file for visitation.¹²²

Comparing these statutes to New York, where there is no statute providing visitation for anyone other than the parents, grandparents, and siblings, we can see that most states are moving toward allowing third party visitation as long as it is in the best interest of the child.

When looking at different statutes that states have in relation to third party visitation, the most compelling and reasonable statute seems to be Delaware.¹²³ In the State of Delaware, a person had grounds for obtaining third-party visitation with a child when:

(1) Third-party visitation is in the child's best interests; and, (2) One of the following as to each parent: a. The parent consents to the third-party visitation; b. The child is dependent, neglected or abused in the parent's care; c. The parent is deceased; or d. The parent objects to the visitation; however, the petitioner has demonstrated, by clear and convincing evidence, that the objection is unreasonable; and has demonstrated, by a preponderance of the evidence, that the visitation will not substantially interfere with the parent/child relationship.¹²⁴

As you can see by the statute, it covers all bases to ensure that either the parent agrees or their relationship will not be interfered with, as well as situations where the child could be living in foster care, all while making sure that it is within the child's best interest.¹²⁵

121. WIS. STAT. ANN. § 54.56 (West 2015).

122. *Id.*

123. DEL. CODE ANN. tit. 13, § 2412 (West 2006).

124. *Id.*

125. *Id.*

VI. Conclusion

In order to uphold the duty given to the judiciary to protect the best interests of the children, New York courts must strongly elicit change in the way that current visitation laws are applied to situations where the parents are unavailable and there is an existence of a third party parental figure in the child's life. It is time to look beyond unjust precedents, which have essentially held that it is in the child's best interest to have no one visit them than someone who is not their parent, grandparent, or sibling. It is time that courts begin to rule using common sense. Every child should have a right to be fought for; courts should give caregivers of abandoned children a chance to be heard in court and not deny them standing based on the sole reason that they do not fit within an arbitrary box created by poor past legislative and judicial decisions.