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Psychological Parentage, Troxel, and the Best Interests of the Child

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PSYCHOLOGICAL PARENTAGE, *TROXEL*, AND THE BEST INTERESTS OF THE CHILD

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I. INTRODUCTION

Imagine a nine-year-old child who is suddenly forbidden to see the only father he has ever known. Now imagine this happening with court approval, and without even an allegation of wrongdoing. As unlikely as it may seem, this scenario plays out regularly in America's family courts. Consider the case of Joshua Hollington. Soon after Ken Middleton and Elizabeth Johnson ended their long-term romantic relationship, Josh was born.[1] Ken immediately took an active role in Josh's life and supported him financially.[2] Although Elizabeth initially told Ken that he was not Josh's father, when Josh was three months old she showed Ken a picture of Josh and implied that he was in fact Josh's father, given their close resemblance.[3]

When Josh was a year old, however, a DNA test conclusively established that Ken was not Josh's biological father.[4] Despite Ken's learning he was not Josh's

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1. Middleton v. Johnson, 633 S.E.2d 162, 164 (S.C. Ct. App. 2006).
2. *Id.*
3. *Id.*
4. *Id.* The test instead revealed Eugene Hollington to be Josh's biological father. *Id.* Although Hollington was joined in this action, he neither appeared nor responded. *Id.* at 166.

father,[5] Ken felt such a strong bond with Josh that he continued to love Josh and to take care of him as if Josh were his own child.[6] In fact, when Josh was three, Elizabeth moved into a house Ken owned where Josh visited Ken daily and often spent the night at Ken's house. Essentially, Ken and Josh's mother had a joint custody arrangement: Josh stayed with his mother Monday through Wednesday and with Ken the rest of the week.[7] Moreover, Ken was very active in Josh's daily life and activities.[8] He drove Josh to school every day and even took Josh to his first day of kindergarten on his own. Teachers referred to Ken as Josh's father in front of Elizabeth.[9]

When Josh was nine, Elizabeth married another man.[10] Her new husband was not comfortable with Ken's presence in their lives and soon afterward Elizabeth terminated all of Ken's contact with Josh, even going so far as to inform the school that Ken was not allowed to see Josh.[11] In response to his losing all contact with Josh, Ken filed an action seeking visitation rights.[12] After a year of counseling sessions with Ken, Elizabeth, and Josh, the court-ordered psychologist issued a report recommending that Ken be granted visitation with Josh.[13] The psychologist found that losing contact with Ken had had a negative impact on Josh emotionally.[14]

The psychologist further concluded that Ken had been instrumental as a father figure in Josh's life.[15] She reported that both Ken and Josh described "a very close, happy relationship between them. Josh reminisce[d] much about [Ken] taking him to church, Boy Scouts, signing him up for and attending his basketball league, and other events."[16] She believed that severing Josh's contact with Ken would have "a profound impact . . . [that] reverberates throughout life."[17] In addition, Josh's losing contact with Ken could place Josh "at-risk regarding his ability to trust, [and to] form and maintain close relationships."[18] Despite the uncontroverted report from the psychologist, the family court denied Ken's

5. *Id.* Middleton testified that by the time the DNA test definitively established he was not Josh's father, he was "already committed to being Josh's father" and proceeded "to love and take care of Josh as though he were a son." *Id.*

6. *Id.*

7. *Id.* at 165.

8. *Id.* Ken enrolled Josh in Boy Scouts and basketball, going to every practice and game. He attended PTA meetings, open houses, field trips, and other school-related activities. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Ken Middleton initially sought custody of Josh, but amended his complaint at trial to seek only visitation. *Id.* at 166, n.1.

13. *Id.*

14. *Id.* at 172.

15. Aside from one visit when Josh was three days old, his biological father had never visited him. *Id.* at 166 n.2.

16. *Id.* at 166.

17. *Id.* at 172.

18. *Id.*

petition for visitation.[19] In reaching this decision, the court held that under the law "a fit biological parent has the fundamental right to make decisions concerning whether a third party may visit her child."[20] Furthermore, the family court noted that its decision rested on the settled state of the law, and in no way reflected a factual finding that Ken had done something wrong. In fact, the court found that Ken had done nothing "which would have a negative effect on the relationship between the child and his Mother."[21]

The scenario above repeats itself in different—but frighteningly similar—ways on a daily basis in the United States.[22] That is, a child's legal parent[23] suddenly—and permanently—removes a psychological parent[24] from his/her child's life. Psychological parents, seeking a way to maintain a connection with the child with whom they have developed a deep bond, learn that they have no legal recourse to maintain even minimal contact with the child. For many of these children, once their legal and psychological parents separate,[25] the psychological parent vanishes from their life, with no legal mechanism in place to continue the bond. The ramifications of this scenario are vast as we now face a generation of children who have been permanently separated from an adult who served as a parent to them.

This Article explores the many ways children are harmed by the law's failure to ensure that the bonds they have developed with their psychological parents are not broken. Moreover, it proposes ways that states can shape their laws to better protect children from the psychological harm of having an individual who has acted as their parent removed from their life. What is needed is a rule that allows continued contact between psychological parents and the children with whom they have formed attachment, without unnecessarily intruding on the fundamental liberty interest of parents at issue in *Troxel v. Granville*[26]—that is, "the interest

19. *Id.* at 166.

20. *Id.*

21. *Id.*

22. *See infra* Part III.

23. This Article adopts the American Law Institute's definition, which uses the term 'legal parent' to refer to "any individual recognized as a parent under other state law. Individuals defined as parents under state law ordinarily include biological parents, whether or not they are or ever have been married to each other, and adoptive parents." THE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 (1)(a) cmt. a (2000). The law makes no distinction in the visitation context between biological parents and those who have completed the legal adoption process. Schwartz v. Schwartz, 351 N.E.2d 900 (Ind. Ct. App. 1976); Jacobson v. Jacobson, 232 N.Y.S.2d 467 (N.Y. Sup. Ct. 1962); *see* Mason v. Dwinnell, 660 S.E.2d 58, 59 n.1 (N.C. Ct. App. 2008); *see also* Visitation Rights of Persons Other than Natural Parents or Grandparents, 1 A.L.R. 4th 1270 § 3[a] (2010).

24. A psychological parent is an adult who develops a parent-child relationship through daily contact, interaction and emotional bonding with a child. *See infra* Part III.B.

25. Other circumstances may also arise, such as death or institutionalization of a child's legal parent, which can result in a permanent separation from a psychological parent, with neither the child nor the psychological parent having legal recourse.

26. 530 U.S. 57 (2000).

of parents in the care, custody, and control of their children."[27] The child's need to have a continuous unbroken relationship with adults with whom they have formed an attachment requires that the state provide the opportunity to maintain important familial relationships with more than just their legal parents."[28] In resolving disputes over custody and visitation, courts should recognize "the reality of children's lives, however unusual or complex."[29] Professor Katharine Bartlett explains why this is particularly important:

> Near consensus does exist . . . for the principle that a child's healthy growth depends in large part upon the continuity of his personal relationships. When divorce, death of a parent, foster care, or adoption intrude on a child's family life, such continuity is inevitably interrupted. Although some children may not experience lasting emotional or social harm from these crises . . . it seems reasonable to adopt as an operating principle the notion that a break in family continuity is detrimental to a child."[30]

Specifically, Part II of this Article lays out the legal landscape regarding visitation by non-legal parents and other third parties. It then describes the landmark United States Supreme Court case, *Troxel v. Granville*, which concerned grandparents' visitation rights.[31] *Troxel*, however, has far-reaching ramifications for any third party seeking to maintain a relationship with a child through court-ordered visitation. This Part also provides a general overview of third-party visitation statutes and cases post-*Troxel*.

Next, Part III discusses the changing landscape of the American family and illustrates the widespread phenomena of psychological parents being forced to leave the children they have parented with no way to continue that relationship. It also explains the psychology of attachment theory[32] and how the removal of a psychological parent from the child's life often leaves a permanent scar on the

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27. *Id.* at 65.

28. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882 (1984).

29. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 469 (1990). Furthermore, in doing so, courts can rely upon psychiatric experts who have an important role to play in third party visitation cases. *See* Andre P. Derdeyn & Mark Jennings, *Forensic Community Child and Adolescent Psychiatry, in* HANDBOOK OF CHILD AND ADOLESCENT, DAY TREATMENT AND COMMUNITY PSYCHIATRY 115, 119 (Harinder S. Ghuman & Richard M. Sarles eds., 1998) (discussing how "an important role of the psychiatric consultant is to focus the court on factors which directly relate to the child's well-being. The psychiatric consultant, by taking the child's view and by being well-informed on child development and relevant empirical research can address the question of whether the parent's behavior is likely to be harmful to the child . . . may defuse inflammatory, distracting issues and help maintain the focus of the inquiry on the child's best interests.").

30. Bartlett, *supra* note 28, at 902.

31. *Troxel*, 530 U.S. at 57.

32. *See infra* Part III.B.

child, causing the child to suffer lifelong depression, face difficulty establishing relationships, and harbor feelings of helplessness.

Finally, Part IV proposes a model for states to follow in making determinations regarding third party visitation, particularly in the case of psychological parents. This model focuses on the circumstances under which not only a psychological parent, but the child herself should be granted standing to petition for visitation and rebut the presumption that the parent is acting in the best interests of his child by denying or limiting visitation.

II. TRADITIONAL VISITATION RIGHTS OF NON-LEGAL PARENTS

Visitation by non-parents is most significantly limited by parents' fundamental right under the Fourteenth Amendment's Due Process clause to raise their children as they see fit.[33] Although the United States Supreme Court has delineated this right as "fundamental," parents' rights *vis a vis* their children are not absolute.[34] As early as 1944, the Court recognized, for example, the state's authority to limit parental freedom by requiring school attendance and creating child labor laws.[35] In spite of the Court's recognition of these limits, since World War II Americans have increasingly looked to the Constitution to define and create families.[36] This desire has been bolstered by shifts in constitutional

33. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (striking down a state law mandating attendance at public school after eighth grade because the parents were entitled to decide whether to send their child to public or private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state law prohibiting the teaching of a foreign language to children before eighth grade, finding the parents had a liberty interest in hiring the plaintiff to instruct their child in a foreign language); *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (considering a challenge by Amish families to compulsory education law and stating that the "[h]istory and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). Even at common law, parents were given the right to control with whom their children associated. *See* Michael v. Hertzler, 900 P.2d 1144, 1146 (Wyo. 1995).

34. Interestingly, with regard to children's rights, prior to the nineteenth century, western societies provided no legal protection for children. Shelley A. Riggs, *RESPONSE TO TROXEL V. GRANVILLE: Implications of Attachment Theory for Judicial Decisions Regarding Custody and Third-Party Visitation*, 41 FAM. CT. REV. 39, 39 (Jan. 2003). During the nineteenth and twentieth centuries, the state, acting in its position as *parens patriae*, began instituting laws and enforcement mechanisms to protect the physical well-being of children. The *parens patriae* doctrine concept refers to the king's guardianship and physical protection and control over people who had no other protector. Derdeyn & Jennings, *supra* note 29, at 117.

Furthermore, this growing phenomena of visitation requests by nonparents, including grandparents, step-parents, or third parties, some of whom may have fulfilled the role of psychological parent at an earlier time, forces courts and legislatures to determine whether parents' rights are contingent upon their marital status and whether their rights can be infringed upon "by the demands of outsiders." Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgment of Parents' Constitutional Rights?* 10 SETON HALL CONST. L.J. 1085, 1085 (2000).

35. Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

36. Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 337 (2002).

jurisprudence in the second half of the twentieth century.[37]

Constitutional doctrine, however, provides courts with little specific guidance in handling family law matters.[38] The primary problem with looking to the Constitution is that there are two parallel sets of cases. One set speaks clearly about the right to protect an adult's choices within a family setting (the right to privacy on reproductive issues, for example),[39] grounded in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[40] While this line of cases, although politically controversial, arguably reflected a coherent position held by the Court, "the implications of those decisions for children born to or socialized by adults enjoying or suffering from far-reaching domestic choices was not, when the decisions were made, completely acknowledged or understood."[41] As these cases were not decided in light of the parent-child relationship, it is unclear how far a parent's right to make choices for his or her child extends under this doctrine.

The second set of cases directly address issues of children and their relationships to their parents.[42] In these cases, the Court has been much less clear and created somewhat of a quagmire. Here, the Court has "wavered between defining children as individuals (at least for certain purposes) and presumptively catering to their interests through the notion that their parents will best affect their welfare."[43] The Court has simultaneously "presumed childhood to be and to remain a status, declaring, in effect, that the Constitution requires the state to recognize (and then largely exit from) a universe of status so that parents—properly in charge of that universe—can govern it as they see fit."[44]

Irrespective of the Supreme Court's early and mid-twentieth century recognition of parents' rights with regard to their children, however,[45] during the last quarter-century, the family court's traditional deference to legal parents shifted toward a "best interests of the child" analysis.[46] During this time, many states

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37. EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY 13 (1986).

38. *Id.* at 4.

39. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164–66 (1973); Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (invalidating state prohibition on the distribution of contraceptives to unmarried individuals); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (invalidating state prohibition on the distribution of contraceptives to married individuals). *Griswold* also can be seen as unequivocally supporting the right of family members "to make intimate family decisions without state interference." Dolgin, *supra* note 36, at 363.

40. Dolgin, *supra* note 36, at 338.

41. *See* BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE 107–28 (1997).

42. Dolgin, *supra* note 36, at 365 n.124 (describing how "[t]he Court, reflecting society, has been far more uncertain and confused in these cases than in those involving adults" in the "right to privacy" line of cases).

43. *Id.* at 338.

44. *Id.*

45. *See supra* note 33.

46. All states currently apply a standard that requires judges to determine which custodial arrangement will serve a child's "best interest." HOMER J. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 19.4 (1988); Moore v. Moore, 386 S.E.2d 456, 458 (S.C. 1989) ("[T]he best interest

enacted laws that placed a child's presumed best interests before the rights of legal parents.[47] In making determinations about custody, although purporting to act in the "best interests" of the child, judges have often been reluctant to even acknowledge the importance of taking into consideration the psychological ramifications of the decision on a child.[48] Instead, the state often draws an arbitrary line between the child's physical and psychological well-being.[49] For example, when the child's physical well-being is endangered by a legal parent, the child's right to protection is of the utmost importance, often trumping the right of the legal parent.[50] On the other hand, courts rarely find that the psychological harm suffered at the hands of a legal parent trumps the legal parent's right to parent a child as she sees fit.[51] As one can imagine, courts are even less likely to credit the psychological bond between a child and a third party in a "best interests of the child" analysis.

A. THIRD PARTY VISITATION

At common law, third parties[52] had no legal right to visitation.[53] In fact, as late as the 1960's third party visitation statutes did not exist.[54] By the mid-1990's, however, all states had passed statutes allowing for grandparent visitation, and almost half had granted third parties—most of whom were either stepparents or blood relatives—standing to seek visitation if it was in the best interests of the child.[55] Although courts' reception to third-party claims were sometimes

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of the child is the primary and controlling consideration in a child custody controversies"). Despite the universal application, the standard has been heavily criticized. *See* Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11 (1987) (discussing the fallibility of the "best interest of the child" standard because it is "indeterminate," "unjust," "self-defeating," and can be "overridden by the public interest"); *see also* Robert H. Mnookin, *Child Custody Adjudications: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975).

47. *See, e.g.*, Everett Waters & Donna M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks of Doing the Right Thing for the Wrong Reasons*, 12 N.Y.U. REV. L. & SOC. CHANGE 505, 506 (1983–1984).

48. *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 4 (1979).

49. *Id.*

50. *Id.*

51. *Id.*

52. "Third party" here refers to any person other than the legal parent and includes stepparents and grandparents as well as others. *See, e.g.*, Webb v. Webb, 546 So.2d 1062 (Fla. Dist. Ct. App. 1989); Brewer v. Brewer, 533 S.E.2d 541 (N.C. Ct. App. 2000).

53. *See, e.g.*, Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 865 (2003); *see also* In re Adoption of C.A., 137 P.3d 318 (Colo. 2006); In re C.T.G., 179 P.3d 213, 216 (Colo. App. 2007); In re Hood, 847 P.2d 1300, 1303 (Kan. 1993); Kulla v. McNulty, 472 N.W.2d 175, 181–82 (Minn. Ct. App. 1991).

54. Kristine L. Roberts, *State Supreme Court Applications of* Troxel v. Granville *and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 1, 15 (2003). In 1966, New York state became the first state to enact a third party grandparent visitation statute. *Id.* at 15 n.16.

55. *See, e.g.*, Maldonado, *supra* note 53, at 867–68, 868 n.6.

mixed,[56] overall, by the late 1990's there was an increasing trend for state courts to give standing to and award visitation to attachment figures other than legal parents.[57]

The U.S. Supreme Court's grant of certiorari in *Troxel v. Granville* raised expectations that the Justices would provide clear guidance on how and when states could interfere with legal parents' decisions regarding visitation between their child and third parties,[58] and how the "best interests of the child" standard should be applied in the third party visitation context. When the Court ultimately issued its opinion, however, it refused to do so. Rather, the Supreme Court unabashedly declared "[w]e do not, need not, define today the precise scope of the parental due process right in the visitation context."[59]

B. *TROXEL V. GRANVILLE*

In *Troxel v. Granville*, the Court was confronted with a petition to obtain visitation rights filed by the grandparents of two minor children pursuant to a Washington state visitation statute.[60] The Washington statute provided that "*[a]ny 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 interests of the child whether or not there has been any change of circumstances."[61]

The Troxels, the paternal grandparents in the case, had filed a request for expanded visitation from the trial court,[62] asking that the court grant them two weekends of visitation per month and two weeks of visitation during the summer.[63] The visitation request came after the children's father, their son, committed suicide, and the children's biological mother opposed overnight visitation.[64] After a two-day trial, the Washington Superior Court ordered visitation one weekend per month, one week during the summer, and four hours on each of the grandparent's birthdays.[65] The trial court ultimately held that

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56. *See, e.g.*, John DeWitt Gregory, *Blood Ties, A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 372 (1998).

57. Derdeyn & Jennings, *supra* note 29, at 119. This shift took place as "[p]arenthood itself [was] increasingly seen as a functional status, rather than one derived from biology or legal entitlement." Marsha Garrison, *Law Making for Baby Making: an Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 893 (2000).

58. *See, e.g.*, Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-*Troxel*?*, 43 ARIZ. L. REV. 751, 793 (2001); *see also* Linda Greenhouse, *Case on Visitation Rights Hinges on Defining Family*, N.Y. TIMES, Jan. 4, 2000, at A14.

59. Troxel v. Granville, 530 U.S. 57, 73 (2000).

60. WASH. REV. CODE § 26.10.160(3) (1994).

61. *Id.* (emphasis added).

62. The children's mother did not completely oppose visitation between the Troxels and their granddaughters; she instead asked the court to limit the Troxels' visitation to one day per month with no overnight visits. *Troxel*, 530 U.S. at 61.

63. *Id.*

64. *Id.*

65. *Id.*

visitation was in the children's best interests, supporting its decision by finding that the Troxels "are part of a large, central, loving family, all located in the area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music."[66] The mother appealed. The Washington Supreme Court overturned the lower court's decision,[67] holding that the grandparents could not obtain legal visitation with their granddaughters under the state statute because the statute unconstitutionally infringed on the mother's right to raise her children "free from state interference."[68]

The Troxels appealed the Washington Supreme Court decision to the U.S. Supreme Court, which granted certiorari.[69] Justice O'Connor, writing for the plurality,[70] held that the Washington statute was invalid, but only as applied to the facts of the specific case. Justice O'Connor began her discussion by delineating many of the demographic changes that led to third parties participating in childrearing in increasing numbers, acknowledging that "demographic changes of the past century make it difficult to speak of an average American family."[71] She opined that non-parent visitation statutes such as Washington's statute emerged in part as a result of these changes,[72] as well as states' recognition that it benefits the welfare of children to continue relationships with grandparents and certain third parties who have undertaken duties "of a parental nature" in many households.[73] Furthermore, Justice O'Connor discussed how, to varying degrees, the state's non-parental visitation statutes recognize that children should have "the opportunity to benefit from relationships with statutorily-recognized third parties."[74] That said, she posited that such recognition "can place a substantial

66. *Id.* at 61–62.

67. In re Custody of Smith, 969 P.2d 21, 21 (Wash. 1998) (en banc). On appeal, the court consolidated three cases involving whether nonparents had standing to request visitation under Wash. Rev. Code § 26.10.160(3). *Id.* at 23.

68. *Id.* at 27. In a 5–4 decision, the court found that, given this fundamental constitutional right, the state must establish that it had a compelling state interest in interfering with a parent's right, and that the statute was narrowly tailored to meet that interest. *Id.* The court then concluded that since the U.S. Constitution only permits a state to interfere with the right of a parent to raise his children only to prevent harm or potential harm to a child, the Washington statute failed because it required no demonstration of harm. *Id.* at 29. Finally, it found the statute, by allowing "any person" at "any time" to petition for visitation, and only subjecting that person to a "best interests" standard, the statute was overly broad, finding "[it] is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." *Id.* at 30–31.

69. Troxel v. Granville, 527 U.S. 1069 (1999).

70. The Supreme Court produced a divergent set of six opinions: a four-justice plurality opinion by Justice O'Connor, joined by Justices Breyer and Ginsburg, as well as Chief Justice Rehnquist; two concurring opinions by Justices Souter and Thomas; and three dissenting opinions, by Justices Kennedy, Scalia, and Stevens.

71. *Troxel*, 530 U.S. at 63–64. Justice O'Connor referred to U.S. Census Bureau figures which demonstrated an increase in the number of single parent families, as well as the number of children who live in grandparent-headed households. *Id.* at 64.

72. *Id.*

73. *Id.*

74. *Id.*

burden on the traditional parent-child relationship."[75]

In addressing the parties' constitutional claims, Justice O'Connor discussed the substantive component of the Due Process clause that protects against government interference with certain fundamental rights and liberty interests, speculating that the liberty interest that parents have in the "care, custody and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court."[76] She concluded that it is beyond a doubt that the Due Process clause of the Fourteenth Amendment protects this fundamental right.[77]

Justice O'Connor criticized the Washington visitation statute as "breathtakingly broad," claiming the language of the statute "effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parents' children to state court review."[78] Under the Washington statute, a state court judge could overturn the fit custodial parent's decision regarding whether a third party can visit with her child, and instead substitute the judge's determination of the child's best interests for the parents.[79] According to Justice O'Connor, such a substitution is precisely what took place in *Troxel*.[80] Furthermore, the trial court's order "was not founded on any special factors" that would justify the state infringing into a parent's right to bring up her children as she saw fit.[81] Justice O'Connor concluded her opinion by explicitly stating that "we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to

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75. *Id.*

76. *Id.* at 65 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (fundamental liberty right to "establish a home and bring up children"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (fundamental liberty right to "direct the upbringing and education of children under their control"); Prince v. Massachusetts, 321 U.S. 158, 158 (1944). The Court further cites to Stanley v. Illinois, 405 U.S. 645, 651 (1972), Wisconsin v. Yoder, 406 U.S. 205, 232 (1972), Quilloin v. Walcott, 434 U.S. 246, 255 (1978), Santosky v. Kramer, 455 U.S. 745, 753 (1982), Parham v. J.R., 442 U.S. 584, 602 (1979) and Washington v. Glucksberg, 521 U.S. 702, 720 (1997) to support its position that there is a fundamental right of parents to make decisions concerning the care, custody, and control of children. *Troxel*, 530 U.S. at 66. In fact, only *Stanley* and *Glucksberg* discuss fundamental rights. The other cases refer to the tradition and history of respecting parents and families.

77. *Troxel*, 530 U.S. at 66.

78. *Id.* at 67.

79. *Id.*

80. *Id.* at 68.

81. *Id.* at 67. The Court articulated three reasons to support this position. First, there were no allegations, nor did a court ever find, that the mother was unfit; therefore, under *Parham*, 442 U.S. at 602 (finding that a fit parent is presumed to act in his or her child's best interests), the mother was presumed to have acted in the best interests of her children. Second, the trial court failed to give any "special weight at all" to the mother's opinion as to what was best for her children *vis* a *vis* visiting with their grandparents. *Troxel*, 530 U.S. at 69. Justice O'Connor went even further and found that the trial court judge placed the burden of proving that visitation would *not* be in the best interests of her children on the mother. *Id.* Third, the mother had never sought to discontinue all of her children's visitation and contact with their grandparents, but sought only to limit the amount of time her children visited with them. *Id.* at 68–69.

the children as a condition precedent to granting visitation."[82]

C. POST-*TROXEL* AND THE UNANSWERED QUESTIONS

Troxel illustrates the inability of constitutional law to resolve most family disputes because the task necessitates a much more coherent theory of childhood and of the parent-child relationship than the Court (and society more generally) has developed. According to Professor Janet Dolgin, "[f]ar more than cases involving familial choices by adults, cases involving children and the parent-child relationship have resisted satisfactory resolution by constitutional principles because they involve precisely those aspects of the larger 'debate about family' that most bewilder Americans."[83]

Furthermore, the *Troxel* plurality decision provides little practical guidance to either legislatures or lower courts when they construct or interpret nonparental visitation statutes. First, the lack of a majority opinion gives much greater latitude to legislatures and lower courts.[84] Additionally, the plurality deliberately declined to articulate a standard,[85] finding that the constitutionality would depend on the specific way in which the statute was applied.[86] Indeed, many commentators believe that the significance of *Troxel* lies largely "in what it fails to do, and in what it implies about the law's confused understanding of family."[87]

Troxel does, however, require that courts give "at least some special weight" to fit parents' decisions restricting or denying third parties visitation with their children.[88] Although the plurality never defined "special weight," most courts have agreed that a parent's decision concerning visitation is entitled to a presumption that the parent was acting in the child's best interests when denying the third party visitation.[89] But the Supreme Court opinions in *Troxel* left open the question of "whether visitation rights may be awarded grandparents or other

82. *Troxel*, 530 U.S. at 73.

83. Dolgin, *supra* note 36, at 370.

84. *Id.*

85. *Troxel*, 530 U.S. at 73.

86. *Id.* (noting that the constitutionality of the application of the best interests standard depends on more specific factors). This creates obvious problems, however, as courts without guidance are much more likely to reach inconsistent results. *See, e.g.*, Roberts, *supra* note 54, at 27 (analyzing state supreme court decisions post-*Troxel* and discussing how decisions with very similar facts result in different outcomes).

87. *See, e.g.*, Dolgin, *supra* note 36, at 369; Marrus, *supra* note 58, at 793 (finding the "Troxel plurality's fact specific approach resulted in a strangling particularity that made the opinion largely irrelevant."). Some have argued, however, that "the plurality's few references to state statutes and court opinions regarding grandparent visitation suggest some guidelines for the states." Roberts, *supra* note 54, at 21 (discussing references Justice O'Connor made to specific state statutes in *Troxel*).

88. *Troxel*, 530 U.S. at 70.

89. *See, e.g.*, Harrington v. Daum, 18 P.3d 456, 460 (Or. Ct. App. 2001); Maldonado, *supra* note 53, at 870. Hence, "courts cannot apply a presumption in favor of visitation, meaning that courts cannot place on a fit parent the burden of proving that visitation is not in the children's best interest." *Id.* at 880. Biological parents therefore "do not have the burden of disproving that visitation would be in their children's best interests." *Id.*

parties solely because to do so would be in the best interests of the child, or whether instead there must be a showing of harm to the child, or some variant thereof, absent third party visitation."[90]

And the post-*Troxel* universe has proved even more challenging to third-party "parents," with many state courts finding their third party visitation statutes unconstitutional.[91] Some of these cases involved same-sex couples who raised a child together but could not adopt.[92] Others involved other third party non-parents who the courts found to be "psychological" or "de facto" parents in relation to the child.[93] Most courts, in the wake of *Troxel*, found that merely presenting credible evidence that third party visitation would be in the child's best interests was not enough to rebut the presumption that the fit parent was acting in the child's best interests when denying third party visitation.[94]

For example, an Oregon appellate court refused to grant visitation to the boyfriend of the children's deceased mother, finding that "no interest of petitioner or the children can overcome a father's right to decide the issue of visitation."[95] The trial court had found that it was in the best interests of the children to have visitation with the boyfriend,[96] relying on the boyfriend's "ongoing personal relationship" with the children, as well as their extensive history together.[97] Nevertheless, the appellate court reversed, finding that although both parties were acting in good faith in furthering what they believed to be the best interests of the child, it did not overcome the father's constitutional rights.[98] Similarly, the South Carolina Supreme Court refused to grant visitation to a third party over the objection of a fit legal parent.[99] The court recognized the concept of a psychological parent, and found that the unrelated custodians had established a psychological parent-child relationship;[100] however, the court determined that the relationship was not strong enough to overcome the presumption that custody would be awarded to an otherwise fit legal parent.[101]

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90. Marrus, *supra* note 58, at 802.

91. *See, e.g.*, Belair v. Drew, 776 So.2d 1105, 1107 (Fla. Dist. Ct. App. 2001); Wickham v. Byrne, 769 N.E.2d 1, 8 (Ill. 2002); Santi v. Santi, 633 N.W.2d 312, 320 (Iowa 2001). In general, state courts struggled with the difficulty of defining when a third party should have standing to seek visitation with respect to a child. *See* HOMER H. ESTIN, JR. & ANN LACQUER ESTIN, DOMESTIC RELATIONS 1031 (7th ed. 2005).

92. *See, e.g.*, T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001).

93. *See, e.g.*, C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000).

94. *See, e.g.*, Harrington v. Daum, 18 P.3d 456, 461 (Or. Ct. App. 2001); Moore v. Moore, 386 S.E.2d 456 (S.C. 1989).

95. *Harrington*, 18 P.3d at 461.

96. *Id.* at 457.

97. *Id.* at 458.

98. *Id.* at 461.

99. *Moore*, 386 S.E.2d at 456.

100. *Id.* at 459.

101. *Id.*

Two groups that have been particularly affected by the limits placed on third party visitation are stepparents[102] and grandparents."[103] Even in the context of legal stepparents, courts have generally been unwilling to grant visitation. Despite findings that stepparents can be as effective as natural parents in the role they play as parents and their contribution to the well-being of children,[104] stepparents are, in general, "legal strangers to their stepchildren."[105] They traditionally have no visitation rights and no legal or decision-making authority, such as in terms of which schools their step-children attend or what medical treatment is appropriate.[106] If the natural parent dies or if the child's natural parent and the stepparent divorce, the stepparent has no visitation or custody rights,[107] and the child has no legal right to support from,[108] or visitation with, the stepparent.[109]

Finally, grandparents—the exact individuals involved in the *Troxel* case—find the courts generally unwilling to grant visitation,[110] even though state legislatures

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102. Given the increase in the number of states allowing same sex marriage in the last decade, the term "stepparents" now encompasses an increasing number of same sex couples.

103. This is not to downplay the serious effect this has had on other third parties, particularly on same sex couples.

104. According to a study of "Stepfathers and the Mental Health of their Children" conducted at Western Behavioral Sciences Institute, stepfathers can be as effective as natural fathers in the role they play as parents, and stepchildren as happy as those in intact two-parent natural families. GERALD R. LESLIE, THE FAMILY IN SOCIAL CONTEXT 584 (5th ed. 1982). For descriptions of other studies of stepparent families and child well-being, see *id.* at 599–603.

105. M. MAHONEY, STEPFAMILIES AND THE LAW (1995). In fact, up until the mid-nineteenth century, even legal adoption by stepparents was not an option. Only "biological parentage within the marriage" resulted in legal parental rights. Mary Ann Mason et al., *Stepparents: De Facto Parents or Legal Strangers?*, 23 J. FAM. ISSUES 507, 508 (2002); M. GROSSBERG, GOVERNING THE HEALTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA (1985). In contrast, in Great Britain stepparents can "apply for parental rights." *See* M. Fine, *Social Policy Pertaining to Stepfamilies: Should Stepparents and Stepchildren Have the Option of Establishing a Legal Relationship, in* STEPFAMILIES; WHO BENEFITS, WHO DOES NOT? (A. Booth & J. Dunn, eds. 1994). There, stepparents can obtain parental rights without having to terminate the parental rights of one of the biological parents. *Id.*

106. Furthermore, stepchildren are often excluded from medical insurance and death benefits. *See* Mason et al., *supra* note 105, at 507.

107. Mary Ann Mason & J. Mauldon, *The New Stepfamily Requires a New Public Policy*, 52 J. SOC. ISSUES 11, 12 (1996).

108. Family income and the economic well being of families decreases dramatically when a remarriage ends in divorce. *See* Christine Bachrach, *Children in Families: Characteristics of Biological, Step-, and Adopted Children*, 45 J. MARRIAGE & FAM. 171 (1983).

109. Mason et al., *supra* note 105, at 507.

110. At common law, grandparents had no right to visitation with their grandchildren. *See, e.g.*, Loftin v. Smith, 590 So.2d 323 (Ala. Civ. App. 1991); Cox v. Stayton, 619 S.W.2d 617 (Ark. 1981); Tamargo v. Tamargo, 348 So.2d 1163 (Fla. Dist. Ct. App. 1977) (without statutory authority, court could not award grandparent visitation if a fit parent had been awarded custody); Hillman v. Vance, 910 So.2d 43 (Miss. Ct. App. 2005); *but see* In re Marriage of Balzell, 566 N.E.2d 20 (Ill. App. Ct. 1991) (grandparent may seek visitation rights under common law in Illinois). Furthermore, grandparents generally have no constitutionally protected interest in visiting their grandchildren. *See* Ward v. Ward, 537 A.2d 1063 (Del. Fam. Ct. 1987); *see also* Frame v. Nehls, 550 N.W.2d 739 (Mich. 1996); In re Adoption of Taylor, 678 S.W.2d 69 (Tenn. Ct. App. 1984).

appear to be much more sympathetic to their plight.[111] By the early 1990s, every state had enacted a statute giving grandparents the right to seek visitation with their grandchildren, at least in some situations, provided it was in the best interests of the child.[112] The enactment of these "grandparent visitation statutes"[113] responded largely to two trends: (1) demographic changes to the nuclear family and the increase in the number of grandparents as part of medical increases that allow for longer life expectancy; and (2) the increase in the success of lobbying efforts of organizations like the American Association for Retired Persons ("AARP"). Several commentators have noted that grandparent visitation statutes "are due largely to the well-organized efforts of grandparents and their supporters."[114] That said, the majority of these statutes were initially enacted pre-*Troxel* and their constitutionality remains in doubt in a post-*Troxel* universe.

III. THE IMPORTANCE OF PSYCHOLOGICAL PARENTS: THE SOCIOLOGICAL AND PSYCHOLOGICAL CONTEXT OF PARENTING

The tremendous shift in the last fifty years from the traditional nuclear family to a more complex set of familial relationships[115] requires a deeper and more

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111. Starting in the early 1960s, largely as a result of judicial pressure, lobbying from various interest groups, and the changing structure of the family, state legislatures began passing statutes allowing grandparents to seek visitation of their grandchildren. Marrus, *supra* note 58, at 772 (citing Joan Aldous, *Public Policy and Grandparents: Contrasting Perspectives*, *in* HANDBOOK ON GRANDPARENTHOOD 230, 232 (Maximiliane E. Szinovacz ed., 1998)). These statutes set forth standards for determining the substantive issue of whether to grant visitation. *Id.*

112. *See* In re C.T.G., 179 P.3d 213, 216 (Colo. App. 2007); *see also* Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 331 (1994).

113. For an in-depth discussion of the history of grandparents' visitation statutes, see Marrus, *supra* note 58; Edward M. Burns, *Grandparent Visitation Rights: Is it Time for the Pendulum to Fall?* 25 FAM. L.Q. 59, 61 (1991); Aldous, *supra* note 111 (discussing legislative history of grandparents' visitation statutes); Roberts, *supra* note 54, at 16.

114. Roberts, *supra* note 54, at 16 n.29 (citing Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 564 (1994)); *see also* Bostock, *supra* note 112, at 331–41 (describing how the original expansion of grandparent visitation statutes was due to the "might of the senior lobby"); Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 295–98 (1985).

Furthermore, "[w]hile grandparents were advocating for their visitation rights with their grandchildren, other nonparents were fighting for similar rights, not only lobbying for nonparent visitation laws, but also by taking advantage of common law exceptions such as equitable estoppel and in loco parentis in suits for visitation and custody." Roberts, *supra* note 54, at 16; *see also* Polikoff, *supra* note 29, at 471–72 (describing nonparents' efforts to use common law theories to establish custody of and visitation with children); Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?*, 32 RUTGERS L.J. 783, 811 (2001) (opining that there is no rational reason to distinguish between grandparents and third parties who have acted as a psychological parent and developed a significant attachment to the child).

115. *See* Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 n.4 (1991) [hereinafter "*Looking for a Family Resemblance*"]; *see also* Troxel v. Granville, 530 U.S. 57, 63 (2000) (commenting that "demographic changes in the past century make it difficult to speak of an average American family"); *but see* STEPHANIE COONTZ, THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES 95 (1997)

nuanced view of the children's psychological well-being when those family bonds rupture. For example, the composition of the average family has changed from one composed of children raised by two married legal[116] parents to children raised by their legal mothers and a non-biological second parent. Consequently, once the relationship between the legal mother and the second parent ends, the second parent's legal rights to maintain contact with the child are completely different.[117] Therefore, when a non-biological/non-legal parent leaves the home, the likelihood of the child permanently losing all contact with that parent is significantly higher.

Even if limiting visitation to biological parents—or deferring to their wishes regarding visitation with their children—made sense fifty years ago, in light of current trends in family structure and information about the bonds children form, limiting visitation in these ways is now potentially devastating to many children and the non-traditional families in which they reside. The "best interests of the child" require courts to consider these bonds and not simply defer to a parent's right to raise their children as they see fit, including limiting visitation by psychological parents.

A. THE CHANGING COMPOSITION OF THE AMERICAN "NUCLEAR" FAMILY[118]

There is no question that American families[119] have undergone "dramatic social, demographic, and economic changes" during the last half century.[120] For example, in recent years the percentage of children living with two biological

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(describing how in 1940, one in ten American children lived with neither biological parent, while by 1990 only one in twenty-five lived with neither biological parent); *see also* Martha Minow, *All in the Family & In All Families: Membership, Loving and Owing*, 95 W. VA. L. REV. 275, 279 (1993) (discussing "Only One U.S. Family in Four is 'Traditional,'" N.Y. TIMES, Jan. 30, 1991, at A19).

116. For purposes of this article, "biological parent" also includes adoptive parents since states treat biological and adopted children the same under the law.

117. *See supra* Part III.

118. George Murdock is credited with having created the term "nuclear family," describing it as a "husband-wife-child" triad which acts as a "basic building block upon which most families are built." Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 227 (2008) (citing Bron B. Ingoldsby, *Family Origin and Universality*, *in* FAMILIES IN MULTICULTURAL PERSPECTIVE 83, 84 (Bron B. Ingoldsby & Suzanna Smith eds. 1995)); *but see*, Barbara Bennett Woodhouse, *"It All Depends on What You Mean By Home": Toward a Communitarian Theory of the "Nontraditional Family,"* 1996 UTAH L. REV. 569, 589 (challenging Murdock's description of the nuclear family as the foundation of the family).

119. Furthermore, the United States Census Bureau follows a "nuclear family" model when, in the U.S. Census, it defines family as "a group of two people or more (one of whom is the householder) related by birth, marriage or adoption and residing together; all such people (including related subfamily members) are considered as members of one family." U.S. Census Bureau, *Current Population Survey (CPS)—Definitions*, October 19, 2012 http://www.census.gov/cps/about/cpdsdef.html.

120. NAT'L COMM'N ON CHILDREN, *Beyond Rhetoric: A New American Agenda for Children and Families* 15 (1991), http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/23/24/71.pdf; *see also* L. E. Hess, *Changing Family Patterns in Western Europe: Opportunity and Risk Factors for Adolescent Development*, *in* PSYCHOSOCIAL DISORDERS IN YOUNG PEOPLE: TIME TRENDS AND THEIR CAUSES 104–93 (Michael Rutter & D.J. Smith eds., 1995).

parents has dropped.[121] According to the U.S. Census, in 1970, 40% of the nation's households consisted of a couple who was married and living with minor children. By 1980, that number had decreased to 31%, and by 1990 it stood at 26%.[122] The number of married couples who live in homes with their own minor biological children has also decreased significantly.[123] Not surprisingly, this decrease has been accompanied by an increase in the number of single parent,[124] stepparent,[125] and unmarried cohabitating households among both heterosexuals and homosexuals.[126] For example, by 1996, the number of single parent households comprised 28% of households in the United States, more than double the number in 1970.[127] Moreover, the number of unmarried heterosexual couples who are cohabitating, with or without children, increased from 523,000 in 1970 to 9,700,000 in 2000;[128] this is in addition to the 1,200,000 same sex couples living together in 2000.[129] Such dramatic demographic shifts require corresponding shifts in the way that our legal system defines and recognizes families.

Furthermore, divorce is now a "normative event in family life."[130] Estimates are that currently 38% of white children and 75% of African-American children born to married parents will see their parents divorce by the time they turn sixteen.[131] Since U.S. Census figures show that 80% of divorced individuals remarry,[132] the widespread nature of divorce means that more and more children are raised in stepparent families. For example, by 1985, the number of children living in stepparent households increased to 6,789,000, an 11.6% increase from

121. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION PROFILE OF THE UNITED STATES: DYNAMIC VERSION, THE LIVING ARRANGEMENTS OF CHILDREN IN 2005 1 (2005), http://www.census.gov/population/pop-profile/dynamic/LivArrChildren.pdf; *see also* Roberts, *supra* note 54, at 16 n.27 (2003).

122. Martha L. Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 273–74 (1991).

123. *Looking for a Family Resemblance*, *supra* note 116, at 1640; Kristy M. Krivickas & Daphne Lofquist, *Demographics of Same-Sex Couple Households with Children* (U.S. Census Bureau Fertility & Family Statistics Branch, Working Paper No. 2011-11).

124. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, NO. 163, CHANGES IN AMERICAN FAMILY LIFE 13 (1989) (fig. 11).

125. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, NO. 162, STUDIES IN MARRIAGE AND THE FAMILY 28–29 (1989) (table A).

126. *Looking for a Family Resemblance*, *supra* note 116, at 1640 n.4.

127. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, 1997 POPULATION PROFILE OF THE UNITED STATES 27 (1998).

128. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS (2000); *see also Looking for a Family Resemblance*, *supra* note 116, at 1640 n.4.

129. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS (2000).

130. Riggs, *supra* note 34, at 39; *see also* U.S. Census Bureau, *The Living Arrangements of Children in 2005*, 5 (2005), http://www.census.gov/population/pop-profile/dynamic/LivArrChildren.pdf (among all children under age 21 living in families 27% had a parent living somewhere else).

131. Robert E. Emery & Rex Forehand, *Parental Divorce and Children's Well-being: A Focus on Resilience*, *in* STRESS, RISK AND RESILIENCE IN CHILDREN AND ADOLESCENTS: PROCESSES, MECHANISMS AND INTERVENTIONS 64, 66 (Robert J. Hagerty et al. eds., 1994).

132. *See* Bartlett, *supra* note 28, at 881 n.8 (1984).

1980 alone.[133]

The legal system has only recently started to recognize the fundamental demographic changes to the family, and "the definitions of 'family,' 'spouse,' and 'parent' in many legal contexts still encompass only the traditional nuclear family and its members."[134] As Justice Kennedy recognized in his dissent in *Troxel*,[135] the Court's holding of the plurality opinion emanated from an assumption that the biological parent had been the primary caregiver but the third parties did not have an established relationship with the child.[136] That assumption, then, "appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households."[137]

B. ATTACHMENT THEORY AND PSYCHOLOGICAL PARENTS

Proponents of attachment theory opine that children whose family lives are disrupted, and who lose day-to-day contact with one of their parents, often form even deeper attachments to adults other than their legal parents.[138] These adults become "attachment figures" in the children's lives. According to John Bowlby, who pioneered the study of attachment theory, "[a]n attachment figure [is] any person perceived as stronger and better able to cope with the world and someone who provides consistent protection and care."[139] Mary D.S. Ainsworth, a Bowlby protégé, conducted the first observational studies of mothers and children focusing on attachment theory.[140] In doing so, she determined that attachment is more than merely a close bond because it involves security and comfort "which when present enables the child to confidently engage in activities outside of the relationship."[141] She further found that an adult becomes an attachment figure for a child when that adult has established a bond that is a "relatively long-enduring tie in which the [adult] is important as a unique individual, interchangeable with none other."[142] Inexplicable separation tends to cause distress and permanent loss

133. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, NO. 162, STUDIES IN MARRIAGE AND THE FAMILY 28–29 (1989) (table A).

134. *Looking for a Family Resemblance, supra* note 116, at 1640.

135. Troxel v. Granville, 530 U.S. 57, 94 (2000) (Kennedy, J., dissenting).

136. *Id.* at 98.

137. *Id.*

138. *See* Bartlett, *supra* note 28, at 881 (citing Looper v. McManus, 581 P.2d 487, 488–89 (Okla. Civ. App. 1978)) ("Those involved with domestic relations problems frequently see situations where one who is not a natural parent is thrust into a parent-figure role, and through superior and faithful performance produces a warm and deeply emotional attachment.").

139. Riggs, *supra* note 34, at 43 (citing JOHN BOWLBY, ATTACHMENT AND LOSS: VOL. 3. LOSS (1980)).

140. *See, e.g.*, MARY D.S. AINSWORTH, INFANCY IN UGANDA: INFANT CARE AND THE GROWTH OF LOVE (1967) (the first observational case studies involved twenty-six families in Uganda and were conducted between 1953 and 1955, although they were not published until 1967).

141. Riggs, *supra* note 34, at 43 (citing MARY D. S. AINSWORTH, *Attachments and Other Affectional Bonds Across the Life Cycle, in* ATTACHMENT ACROSS THE LIFE CYCLE 33 (Peter Marris, Joan Stevenson-Hinde, & Colin Parks eds., 1991) [hereinafter AINSWORTH, *Attachments*]).

142. *Id.* at 40–41.

would cause grief.[143]

Moreover, empirical evidence demonstrates that alternative (meaning "other than natural parent") attachments can have a significant positive effect on a child's socioemotional development.[144] These attachments have increased importance during and after a divorce when natural parents are often distracted by the tumult in their own lives and are unable to adequately tend to the needs of their children, who may be experiencing tremendous loss at the changes taking place in their lives.[145]

Of course, not all close relationships between adults and children result in "attachment relationships."[146] Researchers have struggled, however, with agreeing upon the specific criteria that an adult must fulfill in order to become an "attachment figure" in a child's life.[147] Carolee Howes has suggested five specific criteria to determine whether a relationship is one that involves an "attachment bond" and therefore results in an adult qualifying as an "attachment figure" in a child's life: (1) whether the adult provided emotional and physical care; (2) the quality of that care; (3) the amount and length of time the adult spent with the child; (4) consistency and continuity in the child's life; and (5) the emotional investment the adult had in the child.[148]

It is clear from these criteria that even biological parents do not automatically become attachment figures simply because they are a child's biological parents.[149] Instead, emotional attachment to any adult is the result of daily attention to emotional and physical care, such that comes from consoling, comforting,

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143. *Id.* at 43.

144. *Id.* at 44.

145. *Id.*; *see also* E. Mavis Hetherington, T.C. Law & Thomas G. O'Connor, *Divorce: Challenges, Changes and New Chances*, *in* NORMAL FAMILY PROCESSES 208, 208–34 (F. Walsh ed., 1993).

146. Riggs, *supra* note 34, at 43.

147. Two different research groups have proposed criteria for identification of the attachment figure beyond the natural mother. *Compare* Marinus van IJzendoorn, Abraham Sagi & M. Lambermom, *The Multiple Caregiver Paradox: Data from Holland and Israel*, *in* NEW DIRECTIONS FOR CHILD DEVELOPMENT: NO. 57. BEYOND THE PARENT: THE ROLE OF OTHER ADULTS IN CHILDREN'S LIVES 5–27 (R.C. Pianta ed., 1992) (creating five criteria for identifying classes or categories of attachment figures, such as child care providers) *with* Carollee Howes, *Attachment Relationships in the Context of Multiple Caregivers*, *in* HANDBOOK OF ATTACHMENT: THEORY, RESEARCH AND CLINICAL APPLICATIONS 672–75 (Jude Cassidy & Phillip R. Shaver eds., 1999) (creating criteria for identifying a class or category of attachment figure but also for differentiating between individuals within a category). This article focuses on Howes' criteria because it is important not only to determine whether a stepparent, grandparent, or other third party is possibly an attachment figure, but to determine which stepparent, grandparent, or third party actually is an attachment figure.

148. *See* V.L. COLIN, HUMAN ATTACHMENT (1996); *see also* Jude Cassidy, *The Nature of the Child's Ties*, *in* HANDBOOK OF ATTACHMENT: THEORY, RESEARCH AND CLINICAL APPLICATIONS 3–20 (Jude Cassidy & Phillip R. Shaver eds., 1999); Howes, *supra* note 148. Shelley Riggs also suggests that in our "extraordinarily diverse contemporary society," it is critical that these criteria be blind to gender, race, religion, and sexual orientation. Riggs, *supra* note 34, at 43.

149. GOLDSTEIN, ET AL., *supra* note 48, at 17; *see also* Thomas A. Coyne, *Who Will Speak for the Child?* 1969 ANNALS AM. ACAD. POL. & SOC. SCI. 34, 36 (1969) ("The ties that cement the members of a family into a unit of solidarity are not necessarily the result of a blood relationship; they arose and are formed by role-playing an intimate sharing.").

feeding, and stimulating through play.[150] Yet it is also clear that non-biological parents can, and often do, become attachment figures in children's lives.[151] An attachment figure can become a "psychological parent" when the adult develops a parent-child relationship with the child through daily contact, interaction, and emotional bonding.[152] Social scientists first began reporting in the 1970s that children can form "'psychological child-parent relationships' with the adults with whom they spent time on a routine basis and that continuity in relationships is important to child development."[153] This relationship "fulfills the child's psychological needs" for a parent, as well as their physical needs through caretaking.[154] It is only when these needs are provided for that the adult will build a psychological relationship to the child and will become a psychological parent.[155]

More specifically, a psychological parent is:

> [O]ne who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for an adult. This adult becomes an essential focus of the child's life, for he is not only the source of the fulfillment of the child's physical needs, but also the source of the child's emotional and psychological needs .... The wanted child is the one who is loved, valued, appreciated and viewed as an essential person by the adult who cares for him .... This relationship may exist between a child and an adult; it depends not upon the category into which the adult falls—biological, adoptive, foster or common law—but upon the quality and mutuality of the interaction.[156]

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150. GOLDSTEIN, ET AL., *supra* note 48, at 17.

151. *Id.* at 12–13 (describing that "children have no psychological conception of blood-tie until quite late in their development" and "[w]hat registers in [the minds of children] are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.").

152. Evans v. McTaggert, 88 P.3d 1078, 1082 (Alaska 2004) (quoting Carter v. Brodrick, 644 P.2d 850, 853 n.2 (Alaska 1982)).

153. Roberts, *supra* note 54, at 16 (citing GOLDSTEIN, ET AL., *supra* note 48, at 17–19); *see also* Bartlett, *supra* note 28, at 889–91.

154. *See, e.g.*, Suzette M. Haynie, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 705 n.3 (1986).

155. GOLDSTEIN, ET AL., *supra* note 48, at 17. Conversely, "an absent biological parent will remain, or tend to become, a stranger." *Id.*

156. *Evans*, 88 P.3d at 1082 (quoting Carter v. Brodrick, 644 P.2d 850, 853 n.2 (Alaska 1982)). Some courts have defined "psychological parent" differently, but they generally include similar requirements. For example, one court defined psychological parent as "a person who, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support." *In re* Clifford K., 619 S.E.2d 138, 157 (W. Va. 2005); *see also* Guardianship of Phillip B., 139 Cal. App. 3d 407, 420 (Cal. Ct. App. 1983) ("Whether an 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 an adoptive parent or by any other caring adult but never by an absent, inactive adult whatever his biological or legal relationship to the child may be.").

The question then becomes: what happens to a child when he is separated from that attachment figure? Social scientists have studied how and whether children adjust after their parents separate.[157] Studies confirm that the loss of—or sudden, long-term separation from—an attachment figure creates significant psychological harm in children[158] and can "seriously injure and fragment an individual's sense of self."[159] Once an adult has lived with and cared for a child for an extended period of time and become that child's psychological parent, removing that "parent" from the child's life results in emotional distress in the child and a setback of ongoing development.[160] For example, studies have linked infant attachment difficulties with school-age children's "capacity for intimacy, coping skills, self confidence, peer relations, and aggression."[161] For children under the age of five, disruptions in the continuity of the relationship with the psychological parent can affect basic, critical achievements, such as speech and toilet training.[162]

For school-age children, separation from psychological parents can lead to resentment toward the adults who have disappointed them in the past and can

157. Understanding this social science data can and should assist in developing an effective legal framework that applies to children of divorced parents. David Wexler and Bruce Welnick coined the term "therapeutic jurisprudence" as a way to encourage "the use of behavioral and social science research to examine the way in which legal rules and the behavior of actors within the legal system produce therapeutic or anti-therapeutic consequences." Daniel W. Shuman, Troxel v. Granville *and the Boundaries of Therapeutic Jurisprudence*, 41 FAM. COURT REV. 67, 68 (2003) (citing DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY xvii (1996)).

158. JOHN BOWLBY, ATTACHMENT AND LOSS: VOL. 3. LOSS (1980).

159. Riggs, *supra* note 34, at 41. "People with insecure attachment strategies may be at greater risk for emotional problems due to distortions in their thinking and difficulties regulating emotion." *Id.* (citing E.A. Carlson and L. Alan Sroufe, *Contribution of Attachment Theory to Developmental Psychopathology*, *in* DEVELOPMENTAL PSYCHOPATHOLOGY, VOL. 1: THEORY AND METHODS 581 (Dante Cicchetti & Donald J. Cohen eds., 1995)).

Of course, harm can befall children who are subjected to contentious visitation battles where they may be called to testify. *See* David A. Martindale, Troxel v. Granville*: A Nonjusticiable Dispute*, 41 FAM. COURT REV. 88 (2003) (opining that litigating disputes between parents and third parties is advisable only under limited circumstances because the emotional benefits to children that are derived from interacting from the third parties is only realized when the relationships between the third parties and the remaining "nuclear family" are stable). However, it is clear that destroying existing bonds is also harmful.

160. GOLDSTEIN ET. AL, *supra* note 48, at 27 (describing how the reactions in children removed from psychological parents do not differ from those caused by separation from, or death of the natural or adoptive parents).

161. Riggs, *supra* note 34, at 41.

162. GOLDSTEIN ET AL., *supra* note 48, at 33. For specific examples of regression in young children following separation, see ANNA FREUD & DOROTHY BURLINGHAM, INFANTS WITHOUT FAMILIES: REPORTS ON THE HAMPSTEAD NURSERIES 182–83 (The Writings of Anna Freud, vol. III) (1973); *but see* Waters & Noyes, *supra* note 47, at 510 (discussing how the necessary limitations in conducting these studies in orphanages, foster homes or hospitals brings in possibilities other than separation for the difficulties these children later undergo). "These environments, and the circumstances that lead children into them, can have significant influences on a child's development." *Id.* Trying to determine whether certain maladaptive behaviors come from separation or loss or from other environmental factors becomes a challenge. *Id.*

make them adopt the attitude of not caring about anyone.[163] If such separations continue to happen, it can directly cause disruptive behavior in schools, including dissocial and delinquent behaviors.[164] Children's sense of timing is largely governed by their emotions, and, as such, they are extremely sensitive to separations from loved ones.[165] Young children are egocentric and have no ability to see events which occur both around them and to them as anything but centered on them and their needs.[166] Therefore, children do not have the same sense of time as adults.[167] Thus, from the perspective of the child, any lengthy separation is seen as intentional abandonment. Moreover, difficulty forming love relationships, anti-social behavior, and vulnerability to depression are often connected to a child's history of early separation and loss from the adults with whom the child has formed physical and psychological attachments.[168] Conversely, attachment security is correlated to mental health and "positive adaptation," whereas "insecure attachment appear[s] to be a risk factor for maladaptive functioning."[169]

IV. PROPOSAL

Because of the potential for substantial harm to result from the severing of the attachment bond with the psychological parent, it is critical to establish an avenue for maintaining the relationship between a child and the psychological parent with whom she has established the bond. While the language in the Washington state statute at issue in *Troxel* allowing "any person" at "any time" to request visitation may indeed have been "breathtakingly broad," allowing no person other than a legal parent to request visitation under any circumstances would in fact be "breathtakingly" narrow.

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163. GOLDSTEIN ET AL., *supra* note 48, at 34.

164. *Id.*

165. *Id.* at 11, 40–41. Goldstein, Freud, and Solnit discuss how children have a built-in sense of the passage of time depending upon the urgency of their emotional needs. Infants and toddlers cannot wait more than a few days before the separation from parents causes them to feel overwhelmed. For children under five, the absence of parents, psychological or otherwise, for more than two months is beyond comprehension and can do serious damage. *Id.* at 40–41.

166. *Id.* at 11 (discussing how, for example, children may view a move from one house to another as a "grievous loss" imposed on them; the birth of another child as "parental hostility" directed at them; and the emotional preoccupation or sickness of a parent as a direct rejection of them); *see also* PHILLIPE ARIES, CENTURIES OF CHILDHOOD (1962) (discussing how a child's egocentricity causes them to see other events as happening exclusively for their benefit).

167. FREUD & BURLINGHAM, *supra* note 162, at 183. Freud and Burlingham note that outside observers "seldom appreciate the depth and seriousness of [the grief of separation] of a small child. Their judgment is misled for one main reason. This childish grief is short-lived." *Id.* They then compare a child's grieving process to that of an adult: "Mourning of equal intensity in an adult person would have to run its course throughout a year; the same process in the child between 1 and 2 years will normally be over in 36 to 48 hours. It is a psychological error to conclude from this short duration that the reaction is only a superficial one and can be treated lightly." *Id.*

168. Waters & Noyes, *supra* note 47, at 507; *see also* GOLDSTEIN ET AL., *supra* note 48, at 12.

169. Riggs, *supra* note 34, at 42.

I propose that states adopt a test which allows not only the third party psychological parent to petition for visitation with a child but allows the child herself to petition for visitation with the psychological parent. This ensures that the child, who has the most to lose when permanently separated from a psychological parent, has a real opportunity to maintain that bond. The primary hurdles to crafting such a test are, of course, making sure that it is consistent with *Troxel* given the *Troxel* plurality's failure to articulate a specific standard, and defining which third parties are considered psychological parents. Moreover, the test needs to address not only who qualifies as a psychological parent so as to have standing to petition for visitation, but also what standard should be applied to determine whether visitation itself should be granted.[170]

The first requirement that a third party should satisfy to have standing to petition for visitation with a child is that he or she has an established "psychological parent" relationship with a child. Only those third parties who are significant attachment figures in the life of the child and meet the statutory requirements to establish that they have been a "psychological parent" to the child would have the opportunity to rebut the presumption that the legal parent's actions in denying or limiting visitation were in the best interests of the child.[171]

Determining who constitutes a "psychological parent" presents a challenge. It is, of course, the emotional attachment bond which lies at the heart of the importance of continuing the relationship between the alleged "psychological parent" and the child. Yet measuring emotional attachment is no easy task; courts have generally employed a subjective description of who should be a psychological parent,[172] such as "a person who, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support."[173]

The Wisconsin Supreme Court, however, attempted to move away from a totally subjective standard to a more objective standard when it established a four-part test for whether or not a "psychological parent relationship" has been

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170. From a practical standpoint, there may very well be significant overlap, but legally they are two separate questions. For example, the Washington statute at issue in *Troxel* gave standing to "any person" and simply applied a "best interests" of the child standard. *See* WASH. REV. CODE § 26.10.160(3) (1994).

171. Justice Kennedy's dissenting opinion in *Troxel v. Granville* recognized the importance of attachment and third party visitation:

> Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare. As the State Supreme Court was correct to acknowledge, those relationships can be so enduring 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.

530 U.S. 57, 99 (2000) (Kennedy, J., dissenting).

172. *See, e.g., supra* note 156 and accompanying text.

173. In re Clifford K., 619 S.E.2d 138, 157 (W. Va. 2005).

created sufficient to allow a third party standing to petition for visitation:[174] (1) the legal parent consented to and encouraged the psychological parent relationship with the child; (2) the petitioner and child lived together in the same household; (3) the petitioner took significant responsibility for the child's "care, education and development," including financially supporting the child without expecting compensation; and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship "parental in nature."[175]

While there are some inherent advantages to such an objective factor test, the application of the Wisconsin test as it stands leaves too many children still at risk for losing the possibility to maintain that attachment bond with the psychological parent. Therefore, the test I propose would include prongs one and four, with some slight variations. I would, however, significantly modify the third factor and exclude the second factor entirely. As applied, the second and third factors unnecessarily restrict individuals who would otherwise qualify as psychological parents based on the strong attachment formed with the child. Specifically, the second factor limits the third parties who can petition for visitation to those with whom the child has lived, thereby restricting any psychological parents, including grandparents with whom the child has never lived. As for the third factor, the requirement that the psychological parent take significant responsibility for financially supporting the child is misguided. Should the other factors be met, it is difficult to imagine that a child should not be allowed visitation because the adult was unable for any number of reasons to provide financial support. Lastly, I would add a provision that the child could petition for visitation with a psychological parent who met this test.

As for the first prong of the test, the requirement that the parent "consented and encouraged the psychological parent relationship," the consent aspect is "critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child."[176] This disallows the prospect of an adult who is a stranger to the legal parent but who has befriended

174. This test was ultimately adopted by the South Carolina appellate court when it overturned the family court's decision in *Middleton v. Johnson*. 633 S.E.2d 162, 169 (S.C. Ct. App. 2006). That court, after applying Wisconsin's four-part test, granted visitation with Josh to Ken Middleton. Several states have subsequently adopted Wisconsin's test. *See id.*; V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).

175. In re Custody of H.S.H.-K., 533 N.W.2d 419, 435–36 (Wis. 1995). Although not taking on the more complicated task of defining a "psychological parent," the American Law Institute has defined a "de facto parent" as a person "other than a legal parent" who, "for a significant period of time not less than two years," both "lived with the child" and "regularly performed a majority of the caretaking functions" (or at least as much as the parent with whom the child lived). THE PRINCIPLES OF THE LAW OF FAM. DISSOLUTION § 2.03(c)(1) (2002). Furthermore, the de facto parent must have performed these functions "for reasons primarily other than financial compensation" and "with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions." *Id.*

176. *V.C.*, 748 A.2d at 552 (explaining the first prong of the Wisconsin test).

or otherwise become involved in the child's life from having standing to petition for visitation. It also respects the legal parents' underlying right to determine with whom their child associates. Furthermore, given the potential for harm a child will experience when a relationship with a psychological parent is terminated, "when a biological/adoptive parent invites a third party into a child's life and allows him or her in essence to become a psychological parent, the biological parent's rights to sever that relationship are 'necessarily reduced.'"[177] The legal parent's permitting the psychological parent-child relationship to develop is relevant because the legal parent has control over whether or not to invite anyone into the private sphere between the parent and the child.[178] In addition, once the legal parent has consented to the psychological parent relationship, "the right of the legal parent [does] not extend to erasing a relationship between [the third party] and her child which [the legal parent] voluntarily created and actively fostered."[179] When a parent allows a third-party to assume a role that is that of a "psychological parent," she voluntarily makes her own parental rights with respect to the child "less exclusive and less exclusory" than they otherwise would have been.[180]

Although there are important reasons not to allow a third party who is a stranger to the parent, or whom the parent has not consented to, those reasons do not extend to the requirement that the legal parent have "encouraged" the psychological parent relationship. First, and most importantly, attachment relationships often form, or are strengthened, when there are significant disruptions in the home life.[181] It is not uncommon for a psychological parent to step in and fill a void in the home during a difficult time. Depending on the nature of the disruption of the home, the legal parent may not be in a position psychologically to "encourage" the relationship. Yet the child's ability to continue the relationship with the psychological parent pursuant to a visitation order should not hinge on whether the legal parent is in a position to have "encouraged" the relationship. Second, requiring that the legal parent encouraged the relationship injects a subjectivity that is difficult for courts to administer. Once it is established that the legal parent consented to the relationship, it is difficult to see what is gained by requiring a court to look into whether the relationship was "encouraged" as well.

I would adopt the fourth prong as articulated by the Wisconsin Supreme Court. I agree that the length of time of the relationship must be adequate for a psychological attachment and bond to have developed. Moreover, "the finding of the existence of the [parent-child] bond reflects that the singular emotional and spiritual connection ordinarily only expected in the relationship of a legal parent

177. *Middleton*, 633 S.E.2d at 169.
178. *Id.*
179. *J.A.L.*, 682 A.2d at 1322.
180. Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I. 2000).
181. *See supra* note 139 and accompanying text.

and child, has been created between an adult and child who have neither blood nor adoption between them."[182]

On the other hand, the third prong—that is, requiring that the third party and the child have lived together—is unnecessarily limiting. Although a requirement that the psychological parent and the child have lived together further protects the rights of the legal parent by limiting those third parties who can seek legal visitation,[183] and ensures that the role of the psychological parent is as close as possible to that of a "traditional parent," it does little to protect the child from the harm of having the attachment bond severed with those third parties, such as grandparents, with whom the child has never lived. While this could potentially give rise to visitation requests from individuals who are in more casual romantic relationships with the legal parent, such individuals would still need to meet the fourth prong, that is, that he or she "has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship "parental in nature."[184] Therefore, the fact that the third party and the child lived together in the same household is a relevant consideration and certainly would go far toward establishing that the third party was a "psychological parent," it is the depth of the attachment bond that should be the focus; thus, a third party who has otherwise taken substantial responsibility for the child's "care, education and development" should not be precluded from petitioning for visitation because they never lived together.

Arguably, the third prong is the most important because it ensures that a true "psychological parent" bond with all the ensuing attachments has developed, and the "psychological parent" has indeed taken on the responsibilities of parenthood.[185] On the other hand, while it is important that the third party not have received financial gain or recompense for any caretaking,[186] the requirement that the psychological parent financially support the child is unnecessarily limiting and misguided. The attachment bond itself should be first and foremost and should not depend on a potential psychological parent's ability to provide financial support. Nor should it depend on the legal parent's willingness to receive financial support. Such a requirement could exclude a stepmother who has stayed at home and raised a stepchild but has not provided financial support. It could similarly exclude grandparents on a fixed income who do not have the

182. In re E.L.M.C., 100 P.3d 546, 557 (Colo. App. 2004) (Long, J., concurring) ("[I]nherent in the bond between child and psychological parent is the risk of emotional harm to the child should the relationship be curtailed or terminated.").

183. *Middleton*, 633 S.E.2d at 169 (noting that in the court's opinion, when both legal parents are involved in the child's life, "a third party's relationship could never rise to the level of a psychological parent, as there would be no parental void in the child's life"); *see also In re E.L.M.C.*, 100 P.3d at 550 (discussing the importance of protecting the legal parent against claims by "neighbors, caretakers, babysitters, nannies, nonparental relatives, and family friends").

184. In re Custody of H.S.H.-K., 533 N.W.2d 419, 436 (Wis. 1995).

185. *Middleton*, 633 S.E.2d at 169.

186. This would prevent a paid nanny or au pair, as well as a foster parent, from qualifying as a "psychological parent." *Id.*

means to provide financial support to the child, but have developed strong attachment bonds with the child by providing much-needed emotional support and caretaking.

That said, no one stands to lose more—both practically and psychologically-than the child who is forever cut off from an adult who has served as a psychological parent. Therefore, I would specifically include a provision allowing not only the third party psychological parent, but the affected child herself to petition[187] for visitation with a "psychological parent" who meets the proposed test. Doing so would not only serve to potentially sustain the bond with the psychological parent, but could empower the child who could otherwise be overcome with grief at the loss of the psychological parent. Because it is the loss of the attachment bond shared with the psychological parent that is at issue, the statute would limit the request for visitation to third parties with whom the child, or the child through his guardian ad litem, professes to have a psychological parenting relationship.[188]

As for the standard to be applied to the court's visitation, given *Troxel*'s assertion that the legal parent's wishes regarding visitation be given "special weight,"[189] I would propose that the court apply a rebuttable presumption that the legal parent's wishes regarding a psychological visitation request are in the best interests of the child. That said, in determining whether the petitioner has rebutted the presumption under the proposed test, the court would be required to make specific findings regarding the psychological harm likely to befall the child should she be permanently separated from the third party psychological parent as a result of the denial of the visitation request. This is more than just an element of an otherwise general "best interests of the child" test. Given the social science research on attachment theory,[190] there is such a high likelihood that a child may suffer devastating consequences when an attachment bond is severed, that a cursory review cannot suffice. In instances where a third party has established standing to petition for visitation, the court must fully develop the record regarding the history of the relationship and the void that would be created should the psychological parent disappear from the life of the child.

There are, of course, instances where granting visitation to a bona fide psychological parent might not be in the best interests of the child even when the attachment bond is strong, and the child may suffer psychological harm should that bond be broken. For example, if a legal parent has been the victim of

187. Through a guardian ad litem. *See* Michael H. v. Gerald D., 236 Cal. Rptr. 810, 812 (Cal. Ct. App. 1987) (court appointed a guardian ad litem to represent the interests of the child in her petition for visitation, among other things, with her biological father even though he had been found not to be her *legal* father).

188. Should a court decide to grant the child's request for visitation with the third party, this decision would not compel the third party necessarily to comply with the visitation order. It merely provides a much-needed potential avenue for the relationship to continue.

189. Troxel v. Granville, 530 U.S. 57, 99 (2000); *see also supra* note 89 and accompanying text.

190. *See supra* Part III.B.

domestic violence at the hands of the third party (such as a former partner or spouse), that third party should generally not be granted visitation even if he or she met the other requirements. The potential for harassment in those instances may be so large that despite the bond with the child, visitation would still not be in the "best interests of the child" because it would place too much strain on the legal parent, which would in the end affect the child negatively.

V. CONCLUSION

Given the changing demographics of the last fifty years, children are more likely than ever before to be raised in homes by "parents" with whom they have no relationship under the law. In the absence of a legally-cognizable parental relationship, courts have struggled with balancing the fundamental constitutional interests of legal parents in the "care, custody, and control of their children" with a duty to protect children from the often devastating harm of losing all contact with an individual who has acted as a parent figure in the child's life. In the landmark *Troxel v. Granville* case, the U.S. Supreme Court, in a plurality opinion, struck down a Washington state visitation statute allowing *any person* to petition for visitation at *any time* as "breathtakingly broad," but failed to articulate a clear standard under which third parties could petition for visitation, if at all.

Without such a provision, however, thousands of children across the country face the frightening possibility that their legal parents may suddenly and permanently remove a psychological parent from their lives, often with devastating effects to the child. Therefore, what is needed is a provision that allows both children and third parties standing to petition for visitation when that third party meets the qualifications to be deemed a psychological parent. Furthermore, once the court has found that there is standing, it would then make a separate determination as to whether to grant visitation. In doing so, in recognition of the legal parent's constitutional rights as a parent, the court would employ a rebuttable presumption that the parent's wishes are in the best interests of the child. In assessing, however, whether the petitioner has rebutted the presumption, the court would be required to make specific findings of fact as to the psychological harm the child would likely suffer should visitation be denied and all contact with the psychological parent cut off. Only when states require their courts to specifically focus on this specific potential harm, rather than merely engage in a generalized "best interests of the child" analysis, will the child's interest in not having the attachment bond with the psychological parent severed be protected.