

SIBLING SEPARATION: HOW CAN WE PRESERVE THESE RELATIONSHIPS?

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INTRODUCTION

What happens to families when parents are deemed unfit or are no longer able to care for their children? Often the children are taken from their families and placed in foster care and if efforts at reunification fail, these children are released for adoption. Often overlooked in these situations is the fact that these children rarely enter the system alone; sibling groups are extremely common. While many courts and social service agencies attempt to keep these children together, sibling groups are frequently separated into different foster families and adoptive families never to see one another again. In fact, in 1994 alone there were approximately 35,000 siblings placed in different out-of-home placements. This represents around forty percent of all sibling groups.¹ Current federal law often frustrates the ability of social workers and courts to keep sibling groups together. The Federal Adoption Assistance and Child Welfare Act (FAACWA) requires that permanent planning be the center of the child protection and has shortened the time within which reunification must occur from three years to one year, resulting in an increase in parental termination cases. Further, this law lists adoption as the preferred permanent plan, which causes problems for sibling groups, because there are not enough adoptive homes that are willing to adopt

¹ William Wesley Patton, *The Status of Siblings' Rights: A View into the New Millennium*, 51 DePaul L. Rev. 1 (2001)

groups of siblings.² This paper will review the harm that these children suffer as a result of being separated from their siblings, their current legal rights with respect to siblings, and the role that social workers, lawyers, and child advocates should play in situations of sibling separation, and finally, in the event that children are separated, proposals for ensuring that they can maintain contact with one another.

IMPACT ON CHILDREN OF SEPARATION FROM SIBLINGS

Historically, the emotionally well being of children was largely ignored. Children were thought to be quite malleable and adaptable and it was assumed that they were more able to forget or overcome traumatic events than adults were. However, we are now beginning to realize that bonds formed in very early childhood are extremely important to social functioning throughout the life of an individual.

Children who enter foster care are already at a disadvantage. In most cases they have been removed from their parents because their parents were abusive or neglectful. Despite the abuse and neglect, most of these children have bonded to their parents and are severely traumatized by being taken from their homes and parents. When they are further separated from the rest of their family members (brothers and sisters) their anxiety is compounded.

Aside from the parent child relationship, the sibling relationship is said to be the most important relationship in a child's development.³ As noted psychologist Michael D. Kahn stated, "The sibling relationship is too valuable to

²See id. at 2

ignore. It is the longest lasting relationship of a person's life. It outlasts relationships with parents and spouses. It's a relationship that's too valuable to lose out on."⁴ Siblings play an important role in socializing one another. Psychologists have found: "from these social interactions, the child develops a foundation for later learning and personality development. Experiences in the areas of sex-role, moral, motor, and language development are all found in the context of social interactions."⁵

Additionally, studies on attachment demonstrate that the sibling bond may be as important in childhood development as the bond between parent and child. "Attachment research offers a rich empirical basis for evaluating the nature and importance of bonding. Attachment describes an enduring emotional bond manifest by efforts to be in close proximity, especially in times of stress."⁶ Self-esteem, capacity for intimacy, basic trust in relationships, and adaptivity throughout adult life are all characteristics that are founded upon early childhood attachments.⁷ When children do not form these basic attachments early in life, the result may be disastrous for the individual and their ability to function in society. Studies show that individuals who were deprived of these attachments are "disproportionally represented among the ranks of the unemployed, the mentally ill, drug abusers, and criminals."⁸

³ Joel V. Williams, Sibling Rights to Visitation: A Relationship Too Valuable to be Denied, 27 U. Tol. L. Rev. 259, 260 (1995)

⁴ See id.

⁵ Id. at 261

⁶ William Wesley Patton and Dr. Sara Latz, Severing Hansel from Gretel: An Analysis of Siblings' Association Rights, 48 U. Miami L. Rev. 745, 761 (1994)

⁷ Troy D. Farmer, Protecting the Rights of Hard to Place Children in Adoptions, 72 Ind. L. J. 1165, 1174 (1997)

⁸ Id.

Although the majority of these studies were based on the attachment between parents and children, it is important to note that in families with a great deal of instability, such as those where children must be removed to foster care, younger children may form a primary bond with an older sibling. Sibling bonds are of further importance when children encounter the stress of being severed from their biological parents. Children under this type of stress may form a sub-family with one child assuming parental responsibility for others.⁹ As a result, for these children, the sibling bond is actually even stronger than the bond between the child and the parent. These ties are further strengthened when the children are placed in a new situation, such as foster care. “They may cling together to reduce some of the overwhelming strangeness.”¹⁰

Children separated from their siblings may have lifelong feelings of loss and depression that are never resolved. More siblings separated from their natural families search for their biological siblings than search for their birth parents. Additionally, one of the main reasons that children report for running away from their foster families is to see their biological siblings.¹¹

Even courts have noted the importance of the sibling bond, in the opinion *Obey v. Degling*, 337 N.E.2d 601(N.Y. 1975), the judge noted, “Young brothers and sisters need each other’s strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful. The importance of rearing brothers and sisters together and thereby nourishing their familial bonds is also strengthened by the likelihood

⁹ See id. at 175

¹⁰ Id.

that the parents will pass away before their children. In the final analysis, when these children become adults, they will have only each other to depend on.”¹²

In another opinion, *In Re Patricia A.W.* 89 Misc. 2d 368 (N.Y. Fam. Ct. 1977), the court stated, “Surely, nothing can equal or replace either the emotional and biological bonds which exist between siblings, or the memories of trials and tribulations endured together, brotherly or sisterly quarrels and reconciliations, and the sharing of secrets, fears and dreams. To be able to establish and nurture such a relationship is, without question, a natural, inalienable right which is bestowed upon one merely by virtue of birth into the same family.”¹³

In short, it appears that psychologists, psychiatrists, social workers, researchers, and courts are all in agreement that siblings are important to one another. In light of this agreement, why then are 35,000 siblings separated annually? The answer lies in the legal rights afforded to children as siblings or the lack thereof. Often, financial and legal issues overwhelm the courts and the goal of keeping siblings together falls by the wayside.

SIBLINGS’ CURRENT LEGAL RIGHTS

There is no doubt that the issue of siblings’ rights has come to the legal forefront in the last decade. For example, in 1999, state legislators considered sibling visitation, siblings’ desire to locate one another after separation, tax advantages for sisters and brothers who care for siblings, expedited termination of parental rights, and siblings’ rights to recover personal

¹¹ *Id.*

¹² Barbara Jones, Do Children Possess Constitutional Rights? 78 Cornell L. Rev. 1187, 1190 (1993)

¹³ See *id.*

injury and wrongful death damages.¹⁴ Additionally, five states now have laws that specifically grant standing to siblings to petition the court for visitation (Washington, Indiana, Kentucky, New Hampshire, and Utah)¹⁵

Unfortunately many of these proposals are never enacted. For example, in 1993 legislators in California proposed a bill that would require visitation for all siblings separated as a result of child abuse or neglect. It stated, “the Legislature declares that it is the policy of the State of California that it is in the best interest of these children that they have regular and frequent visitation with their siblings.”¹⁶ However, when a fiscal analysis was done on the bill, the legislators determined that such a measure would cost \$9,000,000 to administer annually. After that analysis, the bill was changed so that such visits were only required if they would not cost the state any money.¹⁷

As mentioned in the introduction, the FAACWA, is the federal law that governs adoptions and states must comply or risk the loss of federal funds. This law has a negative impact on siblings’ rights. The law is based on the goal of permanent and stable placement of children, therefore states have dramatically shortened the amount of time within which families may be reunified prior to the severance of parental rights.¹⁸ Additionally, adoption is the preferred model of stable custody for children separated from their biological parents. Because of

¹⁴ William Wesley Patton, *The Status of Siblings’ Rights: A View into the New Millennium*, 51 *DePaul L. Rev.* at 3

¹⁵ *Id.*

¹⁶ William Wesley Patton and Dr. Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings’ Association Rights*, 48 *U. Miami L. Rev.* 745, 751 (1994)

¹⁷ See *id.* at 752

¹⁸ See *id.*

this policy, sibling groups are often split up, as it is more difficult to find adoptive families for groups of children.¹⁹

Federal and state case law on this matter typically varies on the types of decisions issued in these cases. The Supreme Court recently declined to decide whether siblings have the right to associate. In the Adoption of Hugo, a four-year-old boy with special needs was living as a foster child in the home of the woman who had already adopted his older sister. The foster mother was interested in adopting Hugo after caring for him for two years, however the juvenile court judge ordered that Hugo's paternal aunt, who had previously raised a special needs child, be granted custody.²⁰ The trial court found that Hugo had bonded with his sister as well as his foster mother, however they noted that this bond was only one factor to be considered in the best interests of the child consideration.²¹ The Massachusetts Supreme Court affirmed the lower court's ruling and rejected the argument that sibling association is a fundamental liberty interest. Thereafter, the United States Supreme Court denied certiorari.²²

On the other hand, in *Rivera v. Marcus*, the United States Court of Appeals for the Second Circuit held that the State of Connecticut violated the due process rights of Rivera when the state removed her half-brother and half-sister from her home without explanation, and placed them in a foster home.²³ Rivera was subsequently denied visitation with her siblings and was not even told where

¹⁹ *Id.*

²⁰ *In the Adoption of Hugo* 700 N.E.2d 516 (Mass. 1998), cert. denied, 256 U.S. 1034 (1999).

²¹ *Id.*

²² *Id.*

²³ 696 F.2d 1016 (2d Cir. 1982).

or with whom they were residing.²⁴ The court stated that Rivera “possessed an important liberty interest in preserving the integrity and stability of her family.” They also held that her due process rights had been violated by the removal of her siblings and that the two children possessed a “liberty interest in maintaining, free from arbitrary state interference, the family environment that they had known since birth.”²⁵ Clearly this court assigned constitutional protection to a sibling relationship.

In contrast, the court in *Black v. Beame*, the United States District Court for the Southern District of New York held that there is no constitutional obligation on the part of the state to “insure a given type of family life.”²⁶ This case involved a sibling group of fifteen. Four of the siblings were placed in foster care voluntarily by their mother. The eleven children remaining in the home brought suit against the State of New York under § 1983 for failure to provide them with aide sufficient to keep their family together.²⁷ They asserted that it was the duty of the state to provide the family with the services that they needed in order to keep their large family together. The court held that the state did not owe the Blacks a statutory and constitutional responsibility to supply the children with services that would ensure that they could be kept together.²⁸

In one interesting and noteworthy case, a New York family court took the issue of sibling bonding into consideration when making their decision regarding

²⁴ *Id.* at 1018

²⁵ See e.g. *Id.*

²⁶ Joel V. Williams, *Sibling Rights to Visitation: A Relationship Too Valuable to be Denied*, 27 U. Tol. L. Rev. 259, 260 (1995) citing 419 F. Supp 599 (S.D.N.Y. 1976), *aff'd* 550 F.2d 815 (2d Cir. 1977).

²⁷ *Id.*

²⁸ *Id.*

an adoption. In *In re Adoption of Anthony*,²⁹ the court implied that it would not have been able to grant the adoption petition without including a visitation provision for Anthony's natural siblings, since Anthony's best interests called for continued contact with them. Adoption statutes did not authorize the court to provide for post-adoption visitation, but the court relied on its equity power to do so, and was subsequently able to grant the adoption.³⁰

These cases demonstrate the haphazard way in which issues of sibling separation are handled. Each court is given the discretion to weigh the issue of sibling attachment as they see fit. There are no constitutional guarantees that siblings will be able to remain together.

CONSTITUTIONAL RIGHTS

In light of the conflicting decisions made by courts around the nation, it is clear that the Supreme Court needs to recognize the rights of siblings. Statutes that attempt to protect this relationship are inadequate and frequently discarded when it is determined that such plans are too expensive. Thus it is left to the Supreme Court to recognize the existence of a fundamental right to a sibling relationship. To do so would not be in conflict with past Supreme Court decisions.³¹

In *Roberts v. United States Jaycees*³² the Supreme Court stated that the Bill of Rights offers certain "highly personal relationships a substantial measure

²⁹ 113 Misc.2d 26, 448 N.Y.S.2d 377 (Fam. Ct. 1982).

³⁰ Judy Nathan, *Visitation After Adoption: In the Best Interests of the Child*. 59 N.Y.U.L. Rev. 633 (1984).

³¹ Barbara Jones, *Do Children Posses Constitutional Rights?* 78 Cornell L. Rev. at 1208 (1993)

³² 468 U.S. 609 (1984)

of sanctuary from unjustified interference by the State.”³³ They held that family relationships receive protection under the Bill of Rights because, “family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one’s life.”³⁴ Clearly, the relationship between siblings falls within this description of family life. What is more, even non-biologically related step-siblings and adoptive siblings fit within this definition. Hence, under the Roberts court’s analysis of an intimate human relationship, the Constitution should protect siblings from undue state intrusion.³⁵

Another Supreme Court case, *Smith v. Organization of Foster Families*,³⁶ provides a three part analysis of “family” that is protected from state interference by the Due Process Clause of the Fourteenth Amendment. The three guidelines set forth by the Court in this case in order to define the breadth of familial relationships protected by the Due Process Clause are: 1) the existence of a biological relationship, 2) the existence of emotional attachments derived from the intimacy of daily association, and 3) the origin of the relationship as entirely apart from the power of the State.³⁷ Again, this analysis can easily be applied to the sibling relationship; siblings share a biological relationship, most siblings share emotional bonds stemming from daily interactions, and they are family

³³ *Id.* at 618

³⁴ *Id.* at 619-20

³⁵ Barbara Jones, *Do Children Possess Constitutional Rights?* 78 *Cornell L. Rev.* at 1209-1210

³⁶ 431 U.S. 816 (1977)

³⁷ *Id.* at 822

members by birth and not state decree.³⁸ Therefore, under the analysis of this court, siblings should be protected by the Due Process Clause.³⁹

Even if the Supreme Court does find that siblings have Constitutional rights within the Fourteenth Amendment, it must next find that this right rises to the level of a fundamental right. The concept of what defines a fundamental right is somewhat unclear, yet to classify a right as “fundamental” is to bestow upon it great power.⁴⁰ The Supreme Court gives fundamental rights extreme deference and protection against state interference. To interfere with a fundamental right, a state must have a compelling governmental interest and it must use narrow tailoring to achieve its objective. Usually, the judiciary creates fundamental rights, although the Constitution does not specifically mention very many rights.

The Supreme Court has proclaimed that First Amendment rights, the right to vote, the right to privacy or personal autonomy, and the right to travel between states are fundamental rights. Additionally, they have defended fundamental rights in the areas of family relations and privacy by relying on substantive due process analysis rather than on specific, enumerated constitutional guarantees.⁴¹

When defining previously undefined fundamental rights, the Supreme Court typically relies on history and natural law, as well as on similarity to a previously recognized fundamental right. Under these principles, the Supreme Court should recognize that siblings’ rights are fundamental because they

³⁸ Barbara Jones, Do Children Possess Constitutional Rights? 78 Cornell L. Rev. at 1209

³⁹ See *Id.*

⁴⁰ *Id.* at 212 “the nature, scope and source of these rights is unclear”

⁴¹ *Id.*

naturally share emotional bonds and affection.⁴² Also, siblings have a tradition and history as family, that the Supreme Court has deemed “a relation as old and fundamental as our entire civilization.”⁴³

Another argument in support of siblings’ rights as fundamental rights stems from the preexisting fundamental right to family privacy. Because the court has already recognized fundamental rights in the family context such as the freedom of personal choice and marriage, they should find that sibling relationships deserve that same protection.

Although siblings’ rights have been discussed in the federal and state courts, there is no clear consensus as to what rights siblings have and if they are afforded any constitutional protection. Some state and federal courts have issued opinions that seem to give constitutional rights to siblings, while others have not.

Perhaps the most telling decision on the topic of parental rights and visitation is the 2000 Supreme Court case, *Troxel v. Granville*.⁴⁴ In this case, the Supreme Court upheld the Washington Supreme Court, which struck down Washington’s rather liberal visitation statute. Washington rev. code §26.10.160(3) permits “[a]ny person” to petition for visitation rights “at any time” and authorizes state superior courts to grant such rights whenever visitation may serve a child’s best interest. Petitioners Troxel petitioned for the right to visit their deceased son’s daughters. Respondent Granville, the girls’ mother, did not oppose all visitation, but objected to the amount sought by the Troxels. The

⁴² Id.

⁴³ Moore, 431 U.S. 504 (1981).

superior court ordered more visitation than Granville desired, and she appealed. The state court of appeals reversed and dismissed the Troxels' petition. In affirming, the state supreme court held, *inter alia*, that §26.10.160(3) unconstitutionally infringes on parents' fundamental right to rear their children.

They reasoned that the federal constitution permits a state to interfere with this right only to prevent harm or potential harm to the child, it found that §26.10.160(3) does not require a threshold showing of harm and sweeps too broadly by permitting any person to petition at any time with the only requirement being that the visitation serve the best interest of the child.⁴⁵ Although this decision does not directly reflect on the issue of siblings rights, it does seem as though the Supreme Court would require a showing of harm before a child could petition a court to visit a sibling. Without a decision on point, it is difficult to predict exactly how the Supreme Court might rule on the issue of sibling visitation. Government limits parental freedom in many ways that affect children's welfare in the absence of specific harm, including the power to require vaccinations, to control school attendance, to prohibit child labor, and to require the use of seatbelts and car seats.

Perhaps the Supreme Court in the future will not view sibling visitation as a severe restriction on the right of parents to control the upbringing of their children. Instead, they might classify visitation as only a slight burden on that right -- one that ranks far below taking a child away from a dangerous home, or awarding custody to one parent or another. Because this is only a slight burden

⁴⁴ Troxel v. Granville,

⁴⁵ See *id.*

on parental autonomy, constitutional law doctrine dictates only that the state justify it with a "rational" reason. Preserving the right of children to maintain strong bonds with siblings easily qualifies as such a reason, making sibling visitation statutes constitutional under this standard.⁴⁶

Given the Supreme Court's decision in *Troxel*, it's likely that parents will attempt to challenge the laws in states with statutes like these. And, given the breakdown of votes on the Supreme Court, the Court may come to a different conclusion in the future.⁴⁷

ROLE OF SOCIAL WORKERS, LAWYERS, AND CHILD ADVOCATES

In consideration of the fact that the Supreme Court has recently rejected an opportunity to make a ruling on siblings' rights in *Hugo*, it seems unlikely that the Court will issue an opinion on this issue in the near future. However, siblings are still being separated from each other within the foster care system and by adoption daily. This leaves social workers, lawyers, and advocates for children's rights to try and resolve this important issue within the existing legal framework and by creating a new framework.

The first step that must be taken is to reject the notion that adoption in its traditional form is the best solution following termination of parental rights. Most current adoption laws are based on the adoption model of the mid-twentieth century. This was a time in America when most adoptions that came to the attention of the state, were of Caucasian infants by infertile couples. Most of the infants were born to unwed, young mothers. At that time in history, there was a

⁴⁶ <http://www.nolo.com/lawcenter/ency/article.cfm/objectID/1019223D-59A2-4A25-9B6DA99AD0406A0F>

great deal of shame and stigma attached to infertility and illegitimacy. The complete severance of the child from the birth family provided protection for both families from the social disapproval associated with the whole process.⁴⁸

Today, adoption looks much different. Although there have been changes to adoption laws, many are still based on the old notion that allows the adoptive family to sever all ties with members of the child's original birth family. However, demographics and social changes have made the majority children available for adoption older, non-white, sibling groups, many with special needs.

Therefore, the concept of the "traditional" adoptive home should not be the favored option for all of these children. For example, in Los Angeles County in 1989 there were 30,000 children in out-of-home placements under the jurisdiction of the Juvenile Court. However, fewer than 4% were placed in adoptive homes.⁴⁹ Currently, in order to receive federal funding, states must have adoption as their permanent goal. States lose funding if children are left in indeterminate placements; therefore, the decision to place children in adoptive homes actually has more to do with financial interests of the state than with the best interests of the individual child.⁵⁰

This presumption of adoption results in lower self-esteem among hard to place children. It also devalues long term guardians or foster parents, when in

⁴⁷ See *id.*

⁴⁸ Annette Ruth Appell, *Blending Families through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U.L. Rev at 1006-1007 (1995).

⁴⁹ William Wesley Patton and Dr. Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. Miami L. Rev. at 753

⁵⁰ See *id.*

fact, they may be the best providers for the children under the circumstances.⁵¹ Caseworkers are forced to consider that the “best interests” of the child means a traditional adoption into a family of strangers, when in fact other options may provide the child with more stability and allow them to remain within his or her kinship network of origin.⁵² Lobbyists for children’s rights must work with legislators so that federal law does not require adoption in all situations, particularly when siblings are involved.

Social workers may be able to affect the outcome of sibling placement simply by doing all they can to place sibling groups together upon entering the foster care system. The longer that siblings remain in different placements, the greater the likelihood that they will never be reunited, on the other hand, most siblings that are initially placed together stay together permanently.⁵³

Furthermore, social service agencies can encourage kinship care. In the United States, prior to World War II, there was not a great demand for children to adopt. Although some children were placed in orphanages, relatives took in most orphans or children whose parents could no longer care for them. This allowed children to maintain sibling bonds, as well as bonds to other members of their extended families. There is a current trend to return to this concept. From 1988 to 1995 kinship foster care increased by forty percent.⁵⁴ Children placed with relatives experience less foster care drift, and relatives are more willing to

⁵¹ Troy D. Farmer, Protecting the Rights of Hard to Place Children in Adoptions, 72 Ind. L. J. at 1174

⁵² See id.

⁵³ See id. at 1

keep large groups of siblings together than are non-relative foster parents. The stability and the ability to keep siblings together are positive aspects of kinship care.⁵⁵ Social workers should explore all such kinship options thoroughly before separating siblings into different foster homes.

Alternatively, children who are separated by the system need to be able to have frequent and lengthy visits with their siblings as well as telephone access so that they maintain some bond. Historically, once children have been adopted, their new parents are given complete control over their lives. If the new parents do not want the child to maintain any contact with siblings or other biological relatives, that is their right. This policy ignores the rights of the child being adopted, and it also ignores the rights of the siblings who have not been adopted to see and maintain a connection with a blood relative. Social workers must be vigilant in making sure that foster parents allow children to contact their siblings if they are placed in other foster homes.

Lawyers for these children need to insist that they be allowed to maintain contact with their siblings. Some states have gone so far as to make sibling contact a variable in adoption placement, favoring a potential adoptive family that promises to continue sibling visitations over one that does not.⁵⁶ West Virginia even requires that any party who opposes post-adoption sibling visitation must offer clear and convincing evidence of why such visits should not occur.⁵⁷

⁵⁴ Id. at 27

⁵⁵ Id. at 28

⁵⁶ William Wesley Patton, *The Status of Siblings' Rights: A View into the New Millennium*, 51 DePaul L. Rev. at 27

⁵⁷ Id.

Another step that lobbyists can take is to advocate a sibling visitation rights statute such as the one proposed by Williams (*see Appendix I*). Such a statute would ensure that siblings could petition the court to visit one another as long as such visitation was not harmful. Presently, without such statutes, most courts would rule that one sibling does not have standing to petition the court for visitation of another sibling. There are currently excellent models for such legislation found in all fifty states: grandparent visitation statutes. It is noteworthy that both courts and legislatures have been willing to step in and grant visitation rights to grandparents, even in cases where it is against the wishes of parents (adoptive and natural). Even before this legislation was passed, courts relied on the “best interest of the child” analysis to support this visitation in the absence of statute.⁵⁸ For example, in *Weichman v. Weichman*,⁵⁹ a Wisconsin court found that grandparents had standing to petition the court to visit their grandson in while his father was overseas in the military despite the objections of his mother. The court opined that a child experiencing the trauma of divorce should have their rights to extended family bonds strengthened by the court.⁶⁰

Curiously, courts do not extend this reasoning to visitation by siblings following an adoption. Perhaps this is because siblings in these situations are typically minors, who are perceived by the courts as being less able to make decisions concerning what is in their own best interests.⁶¹ Probably the most compelling reason for this discrepancy is the fact that grandparents typically have

⁵⁸ Ellen Marrus, “Where Have You Been Fran?” The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation. 66 *Tenn. L. Rev.* 977 at 1008 (1999).

⁵⁹ *Weichman v. Weichman*⁵⁹ 184 N.W.2d 882 (Wis. 1971)

⁶⁰ See *id.* at 880

the monetary and political resources to support a campaign to help them gain these rights.⁶² Children, and young adults, on the other hand, have little political clout and typically have even fewer resources. Additionally, courts may tend to view youngsters as troublemakers and afford them less respect than grandparents, whom they assume have the best interests of the child at heart.⁶³

Ironically, the very statutes that expand the rights of grandparents, and occasionally other adult family members, have actually been used against siblings seeking visitation. In the case of *Lihs v. Lihs*, the Iowa Supreme Court refused to grant judicial access to siblings because of the Iowa state statute that specifically mentioned grandparent visitation, but remained silent on the issue of sibling visitation.⁶⁴

Many questions arise out of a proposal to statutorily grant siblings access to one another after adoption. First, there may be concerns about granting children too much power, particularly over adults. Second, there may be constitutional issues arising from a parent's constitutional right to raise their child as they see fit. Third, will a law such as this actually be an effective way of ensuring that siblings can maintain a relationship prior to separation by adoption.

First, legislatures and courts are very reluctant to take action that might disrupt parental authority. Concerns about a slippery slope might arise; if children can sue to visit siblings, what is to stop them from suing for all sorts of

⁶¹ Ellen Marrus, "Where Have You Been Fran?" The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation. 66 *Tenn. L. Rev.* 977 at 1008 (1999).

⁶² See *id.* at 1008.

⁶³ See *id.* at 1014.

⁶⁴ 504 N.W.2d 890 (Iowa 1993).

other rights like more allowance or extra ice cream?⁶⁵ Clearly we cannot have our court dockets cluttered with such frivolous issues. In response to these concerns, one should note that most children do not have the financial resources or the knowledge to bring such a suit. A statute allowing for sibling visitation does not mean that children will become the legal equals of adults. Merely giving children access to the courts does not even guarantee that visitation will automatically be granted. Giving children standing only allows their cases to get to the fact-finding stage. At that point a judge may weigh all of the evidence and find that sibling visitation is not in the best interest of one or both of the siblings, and may deny visitation.⁶⁶ Just as with the grandparents rights statutes, judges will retain their broad discretion, and will have the power to keep a sibling visitation statute from falling down a “slippery slope.”

Second, the issue of parental Constitutional rights arises. Adoptive parents may argue that they have a fundamental right to raise their children free from governmental interference. In circumstances where a statute infringes on a fundamental right, the state must prove that they have a compelling governmental interest. Here, the protection of the sibling relationship, which is important to a child’s mental and emotional well-being, could satisfy that interest. If courts and legislatures are willing to usurp parental rights in favor of grandparents, it only makes sense that the same judicial access should be

⁶⁵ See id. at 1015

⁶⁶ See id. at 1017

extended to siblings. This is especially so, since siblings are more likely than grandparents to have a relationship that involves daily intimate contact.⁶⁷

Third, the effectiveness of a statute such as this is questionable. Can such a statute truly help siblings to maintain a bond after adoption? With the implementation of such a statute this remains to be seen. As mentioned above, children rarely have the financial resources or the legal expertise to successfully bring such a petition. For such a statute to be effective, child advocates, social workers, and those dedicated to providing legal services to those lacking in resources would have to make a dedicated effort to helping children take advantage of such a law. On the other hand, such a statute may have some indirect side effects that could be beneficial for siblings. Knowing that such an option existed for siblings could make adoptive parents more likely to be flexible in granting visitation. Additionally, a new law such as this could generate public attention to the issue of siblings and adoption and could result in more adoptive parents willing to adopt siblings as a group. Although the provisions of a sibling visitation statute would not rise to the level of fundamental Constitutional rights for siblings, such laws would be a step in the right direction.

Another tactic that lawyers can use to help keep siblings together is to remind judges that judges can rely more on their powers of equity and make less formalistic decisions when it comes to siblings, much like the above mentioned New York court in *In re the adoption of Anthony*. Formalism is the notion that statute or law should be strictly adhered to, without any room for judicial discretion. Justice Scalia, a major proponent of formalism explains formalism as

⁶⁷ See *id.* at 1017

a theoretical formula that must be universally applied. Deviation from this formula is not allowed, regardless of the circumstances. Scalia warns that without formalism, there will be no uniform application of the laws and the justice system will become unpredictable.⁶⁸

Perhaps formalism is an appropriate perspective when dealing with areas of the law that lend themselves more readily to mathematical formulas; such as tax. However, in the area of domestic relations, particularly relating to child custody, there are simply too many variables to be able to apply formalism. The Indiana Court of Appeals stated, “When the judicial system becomes involved in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided.”⁶⁹ In cases where judges must decide what is in the “best interest” of the child, there is a great deal of discretion. In *L. v. G.* the New Jersey Supreme Court found that children “possessed the natural, inherent and inalienable right to visit with each other.”⁷⁰ In this case the adult children in the family sought visitation with their minor siblings and their father and stepmother contested. The court held that parents opposition should never be the reason why sibling visitation is not granted. They considered the best interests of the children, and not of the parents.⁷¹ More courts should abandon the notion of formalism when it comes to decisions regarding siblings. They should use their discretion based on

⁶⁸ Susan Solle, *Sibling Relationships Should Not Be Denied By Formalistic Judges: Scruggs v. Saterfiel*, 693 SO.2d 294 (Miss. 1997). At 664 (1998).

⁶⁹ *Collins v. Gilbreath*, 403 N.E.2d 921, 923 (Ind. Ct. App. 1980).

⁷⁰ *L. v. G.* 497 A.2d 215 (N.J.Super.Ct.Ch.Div. 1985).

⁷¹ See *id.* at 218

what is in the best interest of the child to make decisions that truly benefit siblings.

CONCLUSION

All children need to grow up in a stable, nurturing environment so that they may grow up to be functioning, contributing members of society. When children are deprived of family, and their attachments are severed, they grow up without learning how to form human bonds. This deficit severely and negatively impacts the way in which they live the rest of their lives and also the way they fit in to society. When parental rights must be terminated, children are traumatized, there is no way to change that, however, children are further traumatized when their siblings are also removed from their lives. This trauma is often unnecessary and probably costs society more in the long run, than keeping siblings together. Since it seems that the Supreme Court is unlikely to grant siblings any sort of fundamental Constitutional right from state interference in their right to associate, it is left to the family court judges, lawyers, social workers and child advocates to try and keep these children together. Through the implementation of new laws, administrative procedures and policies, and a less formalistic approach to judicial decision-making society has the potential to make great strides in the lives of siblings who may otherwise have suffered.

APPENDIX I

MODEL SIBLING VISITATION RIGHTS STATUTE

Joel V. Williams, Sibling Rights to Visitation: A Relationship Too Valuable to be Denied, 27 U. Tol. L. Rev. 259, 296 (1995)

(1) Standing to Petition for Access and Basis for Decision

Where circumstances show that conditions exist in which equity would see fit to intervene, the (specific) courts of this state, on petition from any person who is a brother or sister regardless of degree of blood relationship or, if the person is a minor, upon petition by a parent, guardian, or proper person in behalf of the minor, may grant by order, reasonable visitation rights to the petitioner so as to allow the petitioner the right to visit any brother or sister, regardless of the degree of blood relationship, if the court finds that the applicant has proved by a preponderance of the evidence that granting visitation would be in the best interests of the child to be visited.

(2) Factors for Consideration

In making a determination whether visitation is in the best interests of the child to be visited, on an application filed pursuant to this section, the court shall consider the following factors:

- (a) The relationship between the child and the applicant;
- (b) The relationship between each of the child's parents or the person with whom the child is residing and the applicant;
- (c) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing and the willingness and ability of the party seeking visitation to facilitate and encourage a close and continuing relationship between the child and the parent or parents;
- (d) The time elapsed since the child last had contact with the applicant;
- (e) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;
- (f) Any history of physical, emotional, or sexual abuse or neglect by the applicant;
- (g) The moral fitness of the party seeking visitation;
- (h) The mental and physical health of the party seeking visitation;
- (i) The good faith of the applicant in filing the application;
- (j) The medical and other needs of the child related to health as affected by visitation;
- (k) The reasonable preference of the child, if the child has a preference, and if the child is determined to be of sufficient maturity to express a preference;
and
- (l) Any other factor relevant to the best interests of the child.

(3) Procedural Considerations

- (a) This statute shall pertain to all children, even those children in state custody.
- (b) If the parental rights of either or both natural parents of a child are relinquished or terminated, and the child is placed in the custody of a public agency or a private agency licensed to place children in homes, the district court in the county in which the child resides may grant to the children of either parent a reasonable right to visit their siblings during his minority, regardless of whether the petition is filed with the court before the date on which the parental rights are relinquished or terminated. In determining whether to grant this right to a petitioner, the court must find that the visits would be in the best interests of the child in light of the considerations set forth in subsection (2).
- (c) The Court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.
- (d) If any court has entered an order prohibiting a non-custodial parent of a child from any contact with a child or restricting the non-custodial parent's contact with the child, the following provision shall apply:
If the sibling who has been granted visitation privileges under this order uses the visitation privileges to facilitate contact between the child and the child's non-custodial parents, the visitation privileges granted under this order shall be permanently revoked.
- (e) No sibling of any minor child, regardless of blood relationship, convicted of any offense involving an illegal sex act perpetrated upon any victim, but not limited to offenses of the applicable statutes of this state, will be entitled to visitation rights while on parole or a mandatory supervised release for that offense. Upon discharge from parole or mandatory supervised release, visitation shall be denied until said person successfully completes a treatment program approved by the court, and the court determines that such individual should be granted visitation.