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Post-Adoption Contact Between Siblings: Is "Avoidance of Harm" the Right Standard for New Jersey Siblings Adopted from Foster Care Parents?

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POST-ADOPTION CONTACT BETWEEN SIBLINGS: IS "AVOIDANCE OF HARM" THE RIGHT STANDARD FOR NEW JERSEY SIBLINGS ADOPTED FROM FOSTER CARE PLACEMENTS?

Kristen L. Settlemire*

INTRODUCTION 165
I. SOCIAL SCIENCE AND PSYCHOLOGICAL STUDIES ON THE SIBLING RELATIONSHIP 170
A. What Constitutes a Sibling Relationship? 170
B. The Sibling Bond 171
II. LEGISLATION AND CASE LAW ON THIRD PARTY VISITATION STATUTES 174
A. New Jersey Legislation 174
1. Child Placement Bill of Rights Act 174
2. New Jersey Adoption Act 175
3. Grandparent and Sibling Visitation Statute 176
B. Federal and New Jersey Case Law 178
1. *Troxel v. Granville* 178
2. *Moriarty v. Bradt* 181
3. *In re D.C.* 184
III. PROTECTING CHILDREN'S INTEREST: THE PRESUMPTION OF HARM STANDARD 186
A. D.C. Gives Minimal Deference to Expansive Research on the Sibling Bond 187
B. D.C. Could Potentially Chill Sibling Petitions for Visitation in New Jersey 188
IV. CONCLUSION 190

INTRODUCTION

Today, it is difficult to pinpoint what the "average" American family looks like.[1] While many children are raised in the typical two-

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parent household, others are brought up in single-parent homes and have grandparents, siblings, babysitters, and day care workers who play a dominant role in caring and providing for them.[2] While no legal right to visitation existed for third parties[3] at common law,[4] states began passing third party visitation statutes in the 1960s to protect children's relationships with third parties.[5] While all of these statutes currently allow grandparents to petition the court for visitation with their grandchildren,[6] some also permit siblings to ask for continued contact with their brother(s) and/or sister(s).[7] As a result, trial judges are forced to decide whether to grant third party petitions for visitation with a child over the objection of the child's legal parents.[8]

Many children and adults seeking sibling visitation either are or have been in foster care or have a sibling presently in foster care.[9] As of September 30, 2009, nearly 500,000 children in the United States were in the foster care system.[10] Alarmingly, sixty-five to eighty-five percent of these children had at least one sibling, and roughly thirty percent of

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Wake Forest University, *cum laude*, 2007. I would like to thank Professor Solangel Maldonado for her valuable insight and guidance throughout the writing process and my family for their continued love and support.

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

[2] *Id*. at 63-64; SUSAN SCARF MERRELL, THE ACCIDENTAL BOND 12 (1995).

[3] In visitation and child custody disputes, a third party is considered to be any person other than a child's biological or adoptive parents. See Argenio v. Fenton, 703 A.2d 1042, 1044 (Pa. Super. Ct. 1997) ("Disputes involving custody of a minor child, other than those involving a parent against another parent, are considered to be 'third-party' disputes.").

[4] *See, e.g.*, *In re* Ash, 507 N.W. 2d 400, 402 (Iowa 1993) ("Custodial parents have a common law veto power over visitation between the child and all other third parties, except the non-custodial parent.").

[5] *Troxel*, 530 U.S. at 64; Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post*-Troxel?, 43 ARIZ. L. REV. 751, 772 (2001).

[6] *Troxel*, 530 U.S. at 74 n.1.

[7] Examples of states permitting siblings to petition the court for visitation include Louisiana, New Jersey, and New York. LA. CIV. CODE ANN. art. 136 (West 1999) (relatives by blood or affinity, former stepparents, or stepgrandparents); LA. REV. STAT. ANN. § 9:344(C) (West 2000) (grandparents and siblings); N.J. STAT. ANN. § 9:2-7.1(a) (West 2010) (grandparents and siblings); N.Y DOM. REL. LAW § 71 (McKinney 1999 & Supp. 2003) (siblings).

[8] Marrus, *supra* note 5, at 772.

[9] I thank Professor Solangel Maldonado for this observation. Conversation with Solangel Maldonado, Professor, Seton Hall University School of Law (Jan. 10, 2011).

[10] The exact number of children in the foster care system was 423,773. *The AFCARS Report*, U.S. DEP'T OF HEATH AND HUMAN SERV., http://www.acf.hhs.gov/ programs/cb/stats_research/ afcars/tar/report17.htm (last visited Mar. 1, 2011).

those children had four or more siblings.[11] Having recognized the importance of the sibling relationship,[12] New Jersey requires in its Child Placement Bill of Rights Act[13] that the State make "best efforts" to place siblings together when they are removed from their homes.[14] However, if this is not possible, the State must facilitate regular visitation between siblings.[15] After adoption, New Jersey's Grandparent and Sibling Visitation Statute affords siblings the opportunity to petition the court for continued visitation with their brother(s) and/or sister(s), subject to a best interests inquiry.[16]

In interpreting third party visitation statutes, courts have taken widely different approaches. In *Troxel v. Granville*, the seminal case concerning third party visitation, the Supreme Court analyzed the constitutionality of a Washington statute allowing "'any person' to petition a superior court for visitation rights 'at any time,' and authoriz[ing] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.'"[17] The Court held that the statute was unconstitutional because it failed to give any "special weight" to the mother's decision concerning what was in the best interests of her daughters.[18] After *Troxel*, the New Jersey Supreme Court addressed grandparent visitation under the State's Grandparent and Visitation Statute in *Moriarty v. Bradt*.[19] The Court ultimately rejected *Troxel's* "special weight" determination and instead adopted an avoidance of harm standard, a much higher threshold than that set forth by the Supreme Court.[20] Several years later, the New Jersey Supreme Court extended *Moriarty's* avoidance of harm standard to sibling petitions in *In re D.C.*, holding that sibling visitation cannot be denied under the Grandparent and Sibling Visitation Statute if the child at issue

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[11] *The Sibling Bond: Its Importance in Foster Care and Adoptive Placement*, NAT'L ADOPTION INFO. CLEARINGHOUSE (Oct. 12, 2010), http://naic.acf.hhs.gov/pubs/f_siblin.cfm.

[12] N.J. STAT. ANN. § 9:6B-2(a)-(b) (West 2010).

[13] The Child Placement Bill of Rights Act addresses the rights of children removed from their homes by the State. N.J. STAT. ANN. § 9:6B-4 (West 2010).

[14] N.J. STAT. ANN. § 9:6B-4(d) (West 2010).

[15] N.J. STAT. ANN. § 9:6B-4(f) (West 2010).

[16] N.J. STAT. ANN. § 9:2-7.1(a) (West 2010).

[17] *Troxel*, 530 U.S. at 60.

[18] *Id*. at 69-70.

[19] Moriarty v. Bradt, 177 N.J. 84, 88 (2003).

[20] *Id*. at 115.

would be harmed by the court's refusal to grant such contact.[21]

In looking at the approach outlined in *Troxel*, as compared to *Moriarty* and *D.C.*, serious questions emerge whose answers could pose sober realities for New Jersey siblings seeking to maintain contact with their brother(s) and/or sister(s) after their adoption by non-relatives. For example, *Troxel* and *D.C.* set forth two completely different standards concerning third party visitation. *Troxel* does not require evidence that the child will suffer harm if contact with the third party is denied.[22] Rather, it merely obligates the court to give special weight or deference to the parent's determination that visitation with the petitioner would not be in the child's best interests.[23] However, *Moriarty* requires evidence that the child will be harmed before the court can order contact with the petitioner over the objections of the child's legal parent,[24] and *D.C.* applies this avoidance of harm standard to siblings.[25] These different standards require lawmakers to examine which standard furthers the child's best interests, in light of the differing definitions of sibling relationships and the sibling bond. Moreover, under the "stringent" avoidance of harm inquiry, many siblings may not have sufficient resources to show that a child would suffer harm, even if harm to the child would likely occur.

This Note argues that while the avoidance of harm standard is possibly suitable in some third party visitation cases, such as those involving a grandparent, it is not appropriate in post-adoption sibling visitation cases because of the special bond shared between siblings, the critical role that siblings play in a child's development, and the potential chilling effect that this standard could have on sibling visitation. Instead, the New Jersey Supreme Court should adopt a presumption that denying sibling contact after adoption will cause the child harm. This presumption is supported by social science and psychological studies and will deter the potential chilling effect of the avoidance of harm standard on sibling visitation petitions.

Part I of this Note discusses how states define sibling relationships and what the sibling bond entails. It will show that states often vary in how they classify "siblings" and that children's definitions differ

[21] In re D.C., 203 N.J. 545, 573 (2010).
[22] *Troxel*, 530 U.S. at 73.
[23] *Id.* at 69.
[24] *Moriarty*, 177 N.J. at 115.
[25] *In re D.C.*, 203 N.J. at 573.

markedly from state designations. Furthermore, it will describe the bond shared between siblings, one that is emotionally powerful and vitally important throughout both childhood and the duration of one's life.[26] This bond frequently intensifies between siblings who are subject to abuse and neglect by their parents because they learn from a young age that they must rely upon their brother(s) and/or sister(s) in order to deal with their shared problems at home.[27]

Part II of this Note examines New Jersey's Child Placement Bill of Rights Act and Grandparent and Sibling Visitation Statute. It will also analyze the *Troxel*, *Moriarty*, and *D.C.* decisions to illustrate the different standards applied by the United States Supreme Court and the New Jersey Supreme Court in third party visitation cases.

Finally, Part III will evaluate the issues raised between the Troxel and D.C. inquiries and discuss two specific problems that emerge. First, applying the avoidance of harm standard in cases of sibling visitation does not give enough deference to the extensive research on the sibling bond and largely ignores the fact that the sibling relationship becomes more important for children who have been exposed to abuse and neglect by their parents.[28] Second, the *D.C.* holding could chill sibling petitions for post-adoption visitation. Siblings may feel overwhelmed by the "stringent" burden that the avoidance of harm standard imposes and choose not to pursue visitation because of the grey area in current legal analysis. Because of these problems, the avoidance of harm standard is not appropriate for cases involving post-adoption sibling visitation.[29]

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[26] *Sibling Issues in Foster Care and Adoption*, CHILD WELFARE INFO. GATEWAY (Dec. 2006), http://www.childwelfare.gov/pubs/siblingissues/siblingissues.pdf.

[27] NAT'L ADOPTION INFO. CLEARINGHOUSE, supra note 11.

[28] Mary Anne Herrick & Wendy Piccus, *Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System*, 27 CHILD. AND YOUTH SERV. REV. 5, available at http://media-server.amazon.com/exec/drm/amzproxy.cgi.

[29] This paper takes no position on whether the avoidance of harm standard is appropriate in some sibling visitation cases. Rather, it is concerned only with post-adoption sibling visitation because in these cases, the sibling provides the child's single connection to his or her natural family. Additionally, the child needs the sibling more than in cases where he or she is still living with the natural family.

I. SOCIAL SCIENCE AND PSYCHOLOGICAL STUDIES ON THE SIBLING RELATIONSHIP

A. What Constitutes a Sibling Relationship?

Across the country, states vary in how they define sibling relationships and in their policies regarding sibling placement and visitation.[30] Some states provide that children who have a biological parent in common constitute siblings, while others maintain that step-siblings are, in fact, siblings.[31] The primary difficulty with current state definitions is that they often leave out groups that children identify as siblings, such "fictive kin"[32] and foster care co-residents.[33] Moreover, judicial enforcement of state statutes permitting sibling visitation often depends on whether the siblings have an established, personal relationship before their entrance into state custody.[34] In New York, for example, courts hold that although the legislature favors the sibling relationship once siblings are placed outside the home, the State is not required to place siblings together if they have never met and does not

[30] CHILD WELFARE INFO. GATEWAY, *supra* note 26.

[31] Arizona law states that "'sibling' includes a person who shares a common biological parent, stepparent, or adoptive parent." ARIZ. REV. STAT. § 8-543(F) (LexisNexis 2010). Likewise, under California law, "'sibling' means a child related to another person by blood, adoption, or affinity through a common legal or biological parent." CAL. WELF. & INST. CODE § 362.1(3)(c) (West 2010). Furthermore, Iowa law provides that "'[s]ibling' means an individual who is related to another individual by blood, adoption, or affinity through a common legal or biological parent." IOWA CODE § 232.2(52) (2010).

[32] In child advocacy, the phrase "fictive kin" is used to describe relationships where a child has a strong, enduring bond with another child who is not, in fact, their biological sibling. CHILD WELFARE INFO. GATEWAY, supra note 26.

[33] Children are generally less formal in their distinctions concerning who is or is not their brother or sister. Specifically, children who are part of the foster care system often develop connections with children who may or may not be their biological siblings. These children have been found to view any of the following as their sibling: "full or half-siblings, including any children who were relinquished or removed at birth; step-siblings; other close relatives or non-relatives living in the same kinship home; foster children in the same family; orphanage mates or group-home mates with a close, enduring relationship; and children of the partner or former partner of the child's parent." CHILD WELFARE INFO. GATEWAY, *supra* note 26; Aron Shlonsky et al., *The Other Kin: Setting the Course for Research, Policy, and Practice with Siblings in Foster Care*, 27 CHILD. AND YOUTH SERV. REV. 697, 707, *available at* www.elsevier.com/locate/childyouth.

[34] CHILD WELFARE INFO. GATEWAY, *supra* note 26.

have to facilitate sibling contact.[35] Although the New Jersey Legislature has not specifically defined a "sibling relationship," it has set forth procedures in its Child Placement Bill of Rights Act and Grandparent and Sibling Visitation Statute governing sibling visitation pre- and post-adoption.[36] These provisions will be discussed in-depth later in this Note.

B. The Sibling Bond

Over the past two decades, the relationship between siblings has increasingly become recognized as playing a part in a child's growth.[37] Until the 1980s, little research existed concerning the bond between siblings.[38] However, as social scientists began realizing the importance of this relationship, research on the impact that sibling relationships have on a child's emotional welfare gained traction.[39] Today, researchers and courts alike acknowledge the significance of the sibling bond and the influence it has on a child's development.[40]

Brothers and sisters share a bond unlike that experienced between any other persons.[41] Sibling relationships frequently span the course of a lifetime,[42] and for many individuals, "it is the longest lasting relationship [they] have, longer than the parent/child or husband/wife relationship."[43] Research shows that children who maintain a positive relationship with their sibling(s) possess a higher degree of self-worth, are less likely to experience loneliness, and behave better than siblings who do not.[44] Specifically, recent studies from the United Kingdom suggest that both younger and older individuals who grow up with a sister are happier and more optimistic than those who do not, particularly if they have divorced parents.[45] These psychologists contend

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[35] Shlonsky et al., *supra* note 33, at 703.

[36] N.J. STAT. ANN. § 9:6B-4 (West 2010); N.J. STAT. ANN. § 9:2-7.1 (West 2010).

[37] Sonia J. Leathers, *Separation from Siblings: Associations with Placement Adaptation and Outcomes Among Adolescents in Long-Term Foster Care*, 27 CHILD. AND YOUTH SERV. REV. 793, 794, available at www.elsevier.com/locate/childyouth.

[38] NAT'L ADOPTION INFO. CLEARINGHOUSE, *supra* note 11.

[39] NAT'L ADOPTION INFO. CLEARINGHOUSE, *supra* note 11; In re D.C., 203 N.J. at 560.

[40] *In re D.C.*, 203 N.J. at 561.

[41] NAT'L ADOPTION INFO. CLEARINGHOUSE, *supra* note 11.

[42] Shlonsky et al., *supra* note 33, at 698.

[43] NAT'L ADOPTION INFO. CLEARINGHOUSE, *supra* note 11.

[44] CHILD WELFARE INFO. GATEWAY, *supra* note 26.

[45] Deborah Tannen, *Why Sisterly Chats Make People Happier*, N.Y. TIMES, Oct. 25,

that although sisters tend to discuss more personal topics with one another than with their brothers, these sibling communications nevertheless strengthen connections with one another.[46]

The sibling bond changes and develops over the course of one's life, largely because brothers and sisters are constantly evolving.[47] According to one author, "[o]ur siblings . . . affect us from earliest childhood onward in a variety of ways: [w]e share space in the family with them, we learn from them and teach them, we divide up parental loyalties with them, we envy them, admire them, dominate them, hate them, love them."[48] Throughout their early years, a child's interaction with his or her brother(s) and sister(s) sets the groundwork for a large percentage of his or her later intimate relationships.[49] Siblings comprise a child's initial peer group, and children develop social skills from negotiating with their brothers and sisters.[50] It is through these interactions that they, as children, develop their ability to connect with their larger world.[51] During adolescence, siblings generally attempt to exercise their independence and individuality, which commonly strains their once-close ties.[52] However, during adulthood, the sibling bond will frequently re-develop and grow stronger than ever before.[53] The bond generally becomes strongest when brothers and sisters reach old age.[54] This is largely because siblings often become each other's companions once again, as they are alone with their parents and spouses having already passed away and/or their children having left home to venture into adulthood.[55] At this point in their journeys, some siblings choose to live together for the rest of their lives.[56]

Although children who are raised in functional families bond with their sibling(s),[57] the sibling relationship often takes on more importance

2010, http://www.nytimes.com/2010/10/26/health/26essay.html.

[46] *Id*.

[47] MERRELL, *supra* note 2, at 11.

[48] *Id.*

[49] *Id*.

[50] CHILD WELFARE INFO. GATEWAY, *supra* note 26.

[51] NAT'L ADOPTION INFO. CLEARINGHOUSE, *supra* note 11.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] NAT'L ADOPTION INFO. CLEARINGHOUSE, *supra* note 11.

for children who have been exposed to abuse and neglect by their parents.[58] Deprived children learn from a young age that they must rely upon their sibling(s) in order to deal with their shared problems at home.[59] When children are placed in the foster care system, they frequently experience significant grief because of the separation from, and loss of, continuous contact with their parents.[60] Many of these children want to maintain contact with their biological parents,[61] and "the continued presence of siblings may be vital for maintaining a sense of safety and emotional continuity in an unknown and potentially frightening situation."[62]

However, siblings who are separated from each other during this period, or at adoption, are forced to go through the grieving process for a second time, which can exacerbate their original feelings of guilt and loneliness and be even more devastating.[63] In 1999, researchers conducted a series of interviews with children entering the foster care system; they found that these children frequently experienced feelings of worry about their brother(s) and/or sister(s) and narrated their lives with detailed accounts of their sibling relationship(s).[64] Other studies indicate that "many children believe they have lost a part of themselves when they are separated from their brothers and sisters, and their grief at this loss is aggravated by the worry and guilt they feel when they enter care."[65] Furthermore, siblings separated from one another often struggle with creating and maintaining a positive self-identity, which causes them to feel worthless, unwanted, or unlovable.[66] Thus, child advocacy scholars contend that maintaining the sibling relationship is extremely important for children who are removed from their homes because it allows them to preserve a sense of stability in a chaotic set of circumstances.[67]

The New Jersey Legislature and courts view the sibling bond as

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[58] Herrick & Piccus, *supra* note 28, at 3.
[59] *Id.*
[60] NAT'L ADOPTION INFO. CLEARINGHOUSE, *supra* note 11.
[61] Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 328 (2008).
[62] Shlonsky et al., *supra* note 33, at 698.
[63] NAT'L ADOPTION INFO. CLEARINGHOUSE, *supra* note 11.
[64] Herrick & Piccus, *supra* note 28, at 5.
[65] *Id*.
[66] *Id*.
[67] Herrick & Piccus, *supra* note 28, at 8.

unique and important, evidenced by the Legislature's addition of siblings to its Visitation Statute in 1987 and New Jersey courts' decisions on this subject.[68] Indeed, New Jersey courts have heeded to the case law and scholarly writings valuing the nurturing and sustaining of sibling relationships.[69] For example, in *L. v. G.*, the Superior Court determined that "[a] sibling relationship can be an independent and emotionally supportive factor for children in ways quite distinctive from other relationships, and there are benefits and experiences that a child reaps from a relationship with his or her brother(s) or sister(s) which truly cannot be derived from any other."[70] The court further stated that "[t]he bonds which develop between brothers and sisters are strong ones, and are, in most cases, irreplaceable."[71] Similarly, in *D.C.*, the New Jersey Supreme Court recognized the "critical" importance of the sibling bond for children who live in "chaotic circumstances."[72]

II. LEGISLATION AND CASE LAW ON THIRD PARTY VISITATION STATUTES

A. New Jersey Legislation

1. Child Placement Bill of Rights Act

In New Jersey, the Child Placement Bill of Rights Act governs sibling visitation once a child is removed from his or her home.[73] Under the Act, the Legislature recognized that a child placed outside his or her home possesses certain rights that are independent of those maintained by the child's parents or legal guardian and set forth the obligations that the applicable department has to the child.[74] Specifically, with regard to sibling relationships, the Act requires that the applicable department use its best efforts "to place the child in the same setting with the child's sibling if the sibling is also being placed outside his home."[75] However,

[68] *In re D.C.*, 203 N.J. at 561.
[69] In re Guardianship of A.M.S., 187 N.J. 556, 561 (2006).
[70] 203 N.J. Super. 385, 395 (1985).
[71] *Id*. at 398.
[72] *In re D.C.*, 203 N.J. at 561.
[73] N.J. STAT. ANN. § 9:6B-4(f) (West 2010).
[74] N.J. STAT. ANN. § 9:6B-2(a)-(b) (West 2010); N.J. STAT. ANN. §9:6B-3 (West 2010). "Applicable department" means the Department of Human Services, the Department of Children and Families, the Department of Health and Senior Services, or board of education.
[75] N.J. STAT. ANN. § 9:6B-4(d) (West 2010).

if the siblings cannot be placed together, the department must allow the child "to visit with [his] sibling on a regular basis and to otherwise maintain contact with [his] sibling" and to provide or arrange transportation for this contact to take place.[76]

Although New Jersey's Division of Youth and Family Services ("Division") previously contended that its requirement to facilitate sibling contact applies only during the time before parental rights have been terminated, the New Jersey Supreme Court interpreted the Act's legislative history to mean that the Legislature did not intend to disrupt sibling contact between pre- and post- termination of parental rights and that the Division's obligation to the child continues until the court finalizes his or her adoption.[77] The court found that under the Act, maintaining sibling contact while children are placed outside their homes is of extreme importance.[78] The Division has a responsibility "to nurture sibling bonds . . . whether or not a sibling has initiated the process [of seeking access] and whether or not termination has occurred."[79] Indeed, the Division recognizes the significance of this obligation, believing that "[m]aintaining contact with brothers and sisters supports the child's identity and links him to his past."[80] If the Division opposes visitation between the siblings for any reason, it must demonstrate that such visitation would be harmful to the child's health, physical welfare, psychological well-being, and safety and would be contrary to the child's individual mental or physical development, as set forth in the Act.[81]

2. New Jersey Adoption Act

New Jersey's Adoption Act applies not only in cases involving children voluntarily relinquished at birth, but also in ones where the court has terminated a parent's rights and the child is subsequently adopted.[82] The Act defines when it will enter a judgment of adoption and specifies what rights are conferred upon the adoptive family as a new

[76] N.J. STAT. ANN. § 9:6B-4(f) (West 2010).
[77] *In re D.C.*, 203 N.J. at 562-564.
[78] *Id*. at 564.
[79] *Id*.
[80] *Id*. at 565.
[81] *Id*.
[82] N.J. STAT. ANN. § 9:3-44 (West 2010).

unit.[83] Consequently, once a child is adopted, the Child Placement Bill of Rights Act no longer applies, and the Grandparent and Sibling Visitation Statute governs sibling petitions for visitation.[84]

Under the Act, the court must find "that the parent has substantially failed to perform the regular and expected parental functions of care and support of the child, although able to do so, or that . . . [this] inability . . . is unlikely to change in the immediate future" in order for it to enter a judgment of adoption.[85] Once an adoption is finalized, all of the biological parents' rights and responsibilities to the adopted child are terminated, except those specified before the entry of judgment has been entered.[86] At that time, the adopting parent possesses the same relationships, responsibilities, and rights as the biological parent previously did.[87] It is the policy of New Jersey courts to ensure that the new adoptive unit is "given the right to grow and develop as an autonomous family."[88]

3. Grandparent and Sibling Visitation Statute

At common law, third parties were not permitted to petition the court for visitation with a child, as visitation was seen exclusively as a parental right.[89] This conception changed as social scientists put research forward that a child's relationship with his or her grandparents was unique and had a significant, emotional influence on the child's development.[90] In 1972, New Jersey adopted its first Visitation Statute, which allowed grandparents to petition the court for visitation with a grandchild.[91] Although the original Visitation Statute allowed visitation between a child and his or her grandparent(s) only if the child's parents were deceased or divorced,[92] the statute was later amended to afford standing "to grandparents to seek visitation when 'either or both of the parents of a minor child . . . is or are deceased, or divorced or living

[83] N.J. STAT. ANN. § 9:3-50 (West 2010).
[84] N.J. STAT. ANN. § 9:2-7.1(a) (West 2010).
[85] N.J. STAT. ANN. § 9:3-46(a)(1)-(2) (West 2010).
[86] N.J. STAT. ANN. § 9:3-50(c)(1) (West 2010).
[87] N.J. STAT. ANN. § 9:3-50(b) (West 2010).
[88] In re Adoption of a Child by W.P. and M.P., 163 N.J. 158, 175 (2000).
[89] *In re D.C.*, 203 N.J. at 558.
[90] *Id*. at 559.
[91] *Id*.
[92] *Id*.

separate and apart in different habitats False"[93] This limitation was eliminated in 1993, thus opening the door for all grandparents to petition the court to visit their grandchildren over the parent's opposition.[94]

In 1987, the New Jersey Legislature recognized the impact that sibling relationships have on a child's emotional well-being and expanded its Visitation Statute to include siblings.[95] Under the State's current Grandparent and Sibling Visitation Statute, a sibling of a child adopted by non-relatives may petition the court to maintain contact with the child.[96] The burden is on the sibling requesting visitation to demonstrate, by a preponderance of the evidence, that allowing contact is in the child's best interest.[97] In making its decision whether to permit visitation, the court is to consider the following factors:

> (1) The relationship between the child and the applicant; (2) the relationship between each of the child's parents or the person with whom the child is residing and the applicant; (3) the time which has elapsed since the child last had contact with the applicant; (4) 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; (5) if the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child; (6) the good faith of the applicant in filing the application; (7) any history of physical, emotional or sexual abuse or neglect by the applicant; and (8) any other factor relevant to the best interests of the child.[98]

If the sibling petitioning the court has previously been the child's full-time caretaker, such history is prima facie evidence that contact would be in the child's best interests.[99] Moreover, if a family member adopts the child, denial of the sibling's petition would satisfy the harm requirement.[100] The New Jersey Supreme Court believes that this "statute is important because it reflects a constantly evolving legislative response to changing understandings of social conditions and a

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[93] *Id*.
[94] *Id*. at 559-560.
[95] *In re D.C.*, 203 N.J. at 561.
[96] N.J. STAT. ANN. § 9:2-7.1(a) (West 2010).
[97] *In re D.C.*, 203 N.J. at 573.
[98] N.J. STAT. ANN. § 9:2-7.1(b)(1)-(8) (West 2010).
[99] N.J. STAT. ANN. § 9:2-7.1(c) (West 2010).
[100] *In re D.C.*, 203 N.J. at 573.

recognition that maintaining contacts with third parties, including grandparents and siblings, may, in certain circumstances, be necessary to the emotional health of children."[101]

B. Federal and New Jersey Case Law

1. *Troxel v. Granville*

New Jersey's Grandparent and Sibling Visitation Statute is similar to that of many states, in that it authorizes courts to order visitation over the objections of child's parents so long as visitation is in the child's best interests.[102] However, in 2000, the United States Supreme Court in *Troxel v. Granville* rejected the best interest standard in third party visitation disputes.[103] There, the Court was asked to determine the constitutionality of a Washington statute allowing "'any person' to petition a superior court for visitation rights 'at any time,' and authoriz[ing] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.'"[104] Brad Troxel and Tommie Granville, an unmarried couple, had two daughters together, Isabelle and Natalie.[105] The couple ended their relationship in 1991, and Brad, Isabelle, and Natalie spent their weekend visitation with the Troxels.[106] In May 1993, Brad committed suicide.[107] While Granville allowed her daughters to continue visiting with the Troxels after Brad's death, she informed them in October 1993 that she wanted to reduce their visitation with Isabelle and Natalie to one short visit each month.[108]

Two months later, the Troxels filed an action in a Washington Superior Court seeking to obtain visitation rights with their granddaughters.[109] After hearing from both parties, the trial court found that visitation with the Troxels was in the children's best interest and ordered visitation "one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents'

[101] *Id*. at 562.
[102] N.J. STAT. ANN. § 9:2-7.1 (West 2010).
[103] Troxel v. Granville, 530 U.S. 57, 63 (2000).
[104] *Id*. at 60.
[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] *Id*. at 60-61.
[109] *Troxel*, 530 U.S. at 61.

birthdays."[110] Granville appealed, and in the interim, her new husband adopted Isabelle and Natalie.[111] The Washington Court of Appeals reversed the trial court's visitation order, concluding that third parties lacked standing to petition for visitation unless there was a pending custody action.[112] The Washington Supreme Court affirmed, holding that third parties have no right to visitation absent harm to the child and that the statute was therefore invalid on its face because it allowed anyone to seek visitation without evidence of harm to the child.[113] Thus, the Washington Supreme Court rejected the best interest of the child standard and required third parties seeking visitation with a child to show that the child would be harmed if visitation was denied.[114]

In a 6-3 decision with six separate opinions,[115] the Supreme Court affirmed the judgment of the Washington Supreme Court, but on different grounds.[116] Justice O'Connor, writing for plurality, began by noting that "[t]he liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court," which implicated the Due Process Clause of the Fourteenth Amendment.[117] The Court then focused on three primary factors in holding that the Washington statute was unconstitutional.[118] First, the Court found that the statute was "breathtakingly broad" because it allowed "any person," not just a grandparent, to request visitation with a child "at any time."[119] Second, Granville never denied the Troxels access to her daughters; rather, she merely cut down the amount of visitation time to one short visit each month.[120] Finally, by failing to give Granville's determination of her daughters' best interest any special weight, the trial court violated the traditional presumption that a fit

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[110] *Id*.
[111] *Id*. at 61-62.
[112] *Id*. at 62.
[113] *Id*. at 62-63.
[114] *Id*. at 63.
[115] Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 877 (2003).
[116] *Troxel*, 530 U.S. at 63.
[117] *Id*. at 65.
[118] Maldonado, *supra* note 115, at 879.
[119] *Troxel*, 530 U.S. at 67.
[120] *Id*. at 71.

parent will take action in his or her child's best interests.[121] According to Justice O'Connor, "if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination."[122]

However, in reaching its decision, the Court did not apply strict scrutiny, even though the case involved a fundamental right.[123] Moreover, the Court did not consider whether the Due Process Clause of the Fourteenth Amendment mandates that all third party visitation statutes require evidence of actual or potential harm to the child before courts may grant visitation, the principal constitutional question at issue in the case.[124] Rather, the Court chose to "rest [its] decision on the sweeping breadth [of the statute] and the application of that broad, unlimited power"[125] and declined to define the scope of parents' Fourteenth Amendment Due Process Right when third party visitation is at issue.[126] Thus, as the Supreme Court left the case, no evidence of harm to the child is required; instead, courts must only ensure that parents' decisions of their child's best interests are given special weight.[127]

Justice Souter and Justice Thomas both entered concurrences to the judgment.[128] Justice Souter argued that the Court's decision should be affirmed because the Washington Supreme Court correctly invalidated the statute based on the broad nature of the statute's text, not because of how it was applied to any particular case.[129] Consequently, he believed that there was no reason to determine if harm was required or to contemplate the scope of parental rights.[130] In his concurring opinion, Justice Thomas agreed with the plurality in its recognition that parents have a fundamental right to make decisions regarding the welfare of their children but believed that the Court erred in failing to articulate the correct standard of review.[131] According to Justice Thomas, this

[121] *Id*. at 69-70.
[122] *Id*. at 70.
[123] *Troxel*, 530 U.S. at 73.
[124] *Id*.
[125] *Id*.
[126] *Id*.
[127] *Id*. at 69-70.
[128] *Troxel*, 530 U.S. at 75, 80.
[129] *Id*. at 75 (Souter, J., concurring).
[130] *Id*. at 77 (Souter, J., concurring).
[131] *Id*. at 80 (Thomas, J., concurring).

fundamental parental right should, in fact, be subject to strict scrutiny.[132]

Justice Stevens, Justice Scalia, and Justice Kennedy dissented from the plurality.[133] In his dissenting opinion, Justice Stevens rejected a requirement that evidence of actual or potential harm to a child must first be demonstrated before a court may grant a third party's visitation request, claiming that such a condition is not supported by the Court's prior decisions.[134] Instead, Justice Stevens supported a balancing approach, in which all of the parties' interests would be weighed against one another in a court's determination of whether the third party's petition for visitation with the child should be granted.[135] Justice Scalia, dissenting from the plurality, did not believe that federal judges were in the best position to vindicate parental rights.[136] Rather, Justice Scalia concluded that state legislatures should be the ones charged with the task of defending the rights of parents because "[they] have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people."[137] Finally, Justice Kennedy agreed that the Due Process Clause of the Fourteenth Amendment protects a parent's right to raise his or her child without undue intrusion by the state but argued that the Constitution does not prohibit the application of the best interests standard to prevent the risk of harm.[138]

2. *Moriarty v. Bradt*

Although the Supreme Court did not require evidence of harm to a child before a court could order visitation with a third party over the legal parents' objections,[139] some states require just that.[140] New Jersey, for example, is one of those states.[141] In *Moriarty v. Bradt*, the New

[132] *Id*. (Thomas, J., concurring).
[133] *Troxel*, 530 U.S. at 80, 91, 93.
[134] *Id*. at 85-86 (Stevens, J., dissenting).
[135] *Id*. (Stevens, J., dissenting).
[136] *Id*. at 92-93 (Scalia, J., dissenting).
[137] *Id*. at 93 (Scalia, J., dissenting).
[138] *Id*. at 95, 99 (Kennedy, J., dissenting).
[139] *Troxel*, 530 U.S. at 73.
[140] California, Connecticut, and Kentucky all require evidence of harm to a child before the court will go to a best interests analysis. *In re* Harris, 112 Cal Rptr. 2d 127, 141 (Cal. Ct. App. 2001); Roth v. Weston, 789 A.2d 431, 447-48 (Conn. 2002); Scott v. Scott, 80 S.W.3d 447, 451 (Ky. Ct. App. 2002).
[141] *Moriarty*, 177 N.J. at 115.

Jersey Supreme Court examined what standard applies to a grandparent's petition to the court for visitation with a child in light of New Jersey's Grandparent and Sibling Visitation Statute and the Supreme Court's decision in *Troxel*.[142] In 1987, Patrick Moriarty ("Moriarty") and Julia Bradt ("Bradt") married, and by 1990, the couple had two children, Brian and Tara.[143] Moriarty and Bradt later separated, and in order to secure visitation with Brian and Tara in light of Bradt's drug abuse, Lynn and Patricia Bradt ("the Bradts"), grandparents to the children, intervened in the divorce action.[144] At a hearing on the Bradts' action, Moriarty was granted custody of Brian and Tara, and the Bradts were given visitation with the children every other weekend.[145] Once the divorce between Moriarty and Bradt was finalized, Moriarty was awarded sole custody of Brian and Tara, and Bradt was given supervised visitation in the presence of her parents.[146] However, in 1994, the court granted Bradt unsupervised visitation with her children, and the grandparents visited with Brian and Tara during most of their daughter's weekends with them.[147] During this time, significant hostility developed between Moriarty and the Bradts.[148] Bradt passed away in November 1999 from a drug overdose,[149] and soon after, Moriarty sought to cease Brian and Tara's visitation with their maternal grandparents.[150] Based on court-ordered diagnostic evaluations on Moriarty, the Bradts, and the children, Family Services recommended that the Bradts have unsupervised visitation with Brian and Tara.[151] This was largely because it believed "the grandparents 'could serve as a conduit with the children's deceased mother and [could] be a positive resource for the children in many ways.'"[152]

Moriarty filed a motion for summary judgment, arguing that in light of *Troxel*, the trial court was compelled to defer to his decision

[142] *Id*. at 88.
[143] *Id*.
[144] *Id*.
[145] *Id*. at 88-89.
[146] *Id*. at 89.
[147] *Moriarty*, 177 N.J. at 89.
[148] *Id*.
[149] *Id*. at 90.
[150] *Id*. at 90-91.
[151] *Id*. at 91-92.
[152] *Id*. at 91.

concerning grandparent visitation.[153] Moriarty's motion was ultimately denied by the trial court.[154] It instead ordered that the children were to have monthly visitation and one extended summer visitation with their grandparents.[155] The Appellate Division later reversed the trial court's decision, holding that Moriarty's substantive due process rights were violated by the order of grandparent visitation.[156]

The New Jersey Supreme Court reversed the decision of the Appellate Division and reinstated the trial court's order.[157] While the United States Supreme Court declined in *Troxel* to designate the appropriate level of scrutiny for third party visitation cases, the New Jersey Supreme Court held that grandparent petitions for contact under the Grandparent and Sibling Visitation Statute are subject to strict scrutiny because a fundamental right (e.g., a parent's right to autonomy in raising his or her child(ren)) is at issue.[158] Furthermore, the court found *Troxel's* special weight standard inadequate because "avoiding harm to the child is polestar and the constitutional imperative that is necessary to overcome the presumption in favor of the parent's decision and to justify intrusion into family life."[159] Under the avoidance of harm standard adopted by the court, the State may not infringe on a parent's fundamental right to raise his or child when there is no harm threatening the child's welfare.[160] However, when harm is shown by a preponderance of the evidence and the presumption favoring a fit parent's decision-making capacity is overcome, the trial court is to create a visitation schedule for the grandparents and the child in line with the child's best interests.[161] The court determined that Brian and Tara would be harmed if visitation with their grandparents were limited because the children's relationship with the Bradts allowed them to connect with their deceased mother.[162] Therefore, while *Troxel* declined to address whether harm to the child must be shown under the

[153] *Moriarty*, 177 N.J. at 92-93.
[154] *Id*. at 93.
[155] *Id*.
[156] *Id*. at 94.
[157] *Moriarty*, 177 N.J. at 95, 122.
[158] *Id*. at 114.
[159] *Id*. at 113.
[160] *Id*. at 115.
[161] *Id*. at 117.
[162] *Id*. at 119.

Constitution for the court to grant third party visitation,[163] *Moriarty* adopted the avoidance of harm standard as necessary to protect the right to parental autonomy.[164]

3. *In re D.C.*

Troxel and Moriarty both involved petitions for visitation with a grandchild.[165] Additionally, in each case, the children at issue were living with a natural parent.[166] In *In re D.C.*, the New Jersey Supreme Court addressed, for the first time, the applicable standards for sibling visitation petitions when the sibling is in foster care and after the sibling is adopted.[167] In 2005, twins Dana and Donna and brother Hugo were removed from their mother's care by the Division.[168] The twins were placed in a foster home and Hugo was placed in a group home.[169] The children also had an adult sister, Nellie.[170] In early 2006, Nellie requested the Department of Social Services ("Department") in Richmond, Virginia, her home location, to evaluate her as a placement candidate for her three younger siblings.[171] The Department first recommended that Hugo be placed in Nellie's care, and then in August 2007, suggested that Nellie take the twins as well.[172] However, in December 2007, the Department withdrew its approval to place Dana and Donna with Nellie, referencing Hugo's declining grades and Nellie's financial difficulties in its reasoning.[173] During the same month, the court terminated the mother's parental rights to all three children.[174] Shortly thereafter, the Division informed Nellie that visitation with the twins was to be terminated.[175]

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[163] *Troxel*, 530 U.S. at 73.
[164] *Moriarty*, 177 N.J. at 114-15.
[165] *Troxel*, 530 U.S. at 60; *Moriarty*, 177 N.J. at 90.
[166] In *Troxel*, the children at issue were living with their natural mother, Tommie Granville. *Troxel*, 530 U.S. at 60-61. The children at issue in *Moriarty* were living with their natural father, Patrick Moriarty. *Moriarty*, 177 N.J. at 89.
[167] *In re D.C.*, 203 N.J. at 550-51.
[168] *Id*. at 552.
[169] *Id*.
[170] *Id*.
[171] *Id*. at 552-53.
[172] *Id*. at 553.
[173] *In re D.C.*, 203 N.J. at 553.
[174] *Id*. at 554.
[175] *Id*.

Nellie filed an action seeking placement of the twins, Dana and Donna, in her care, or, alternatively, for visitation.[176] The trial judge held that the twins' foster mother was to retain custody but permitted Nellie to visit her sisters.[177] However, a visitation schedule was not set out by the court, and just one month later, the twins' foster mother refused to allow Nellie maintain contact with her sisters.[178] Nellie filed a motion to enforce the trial judge's order.[179] The court refused to enforce the order and concluded that "the best interests of the children 'trumped' any rights that Nellie had as a sibling . . . [and] she was not in a position to re-litigate the plan of the Division, which remained foster home adoption."[180] The Appellate Division affirmed, holding that the Division did not thwart Nellie's attempts to visit with her sisters, no sibling relationship existed between Nellie and her sisters, and the best interests of the twins would not be served by continued contact with Nellie.[181] On appeal, Nellie challenged the material facts regarding the twins' best interests and contended that there was an abuse of discretion by the trial judge in her decision not to conduct an evidentiary hearing concerning her visitation request.[182]

In a unanimous decision, the New Jersey Supreme Court reversed.[183] The court first determined that the Child Placement Bill of Rights Acts governs sibling visitation once a child is removed from his or her home.[184] In dissecting the legislative history and specific language of the statute, the court concluded that the Act applies to children throughout the entire pre-adoption placement frame and that the Division has an "affirmative obligation" to facilitate sibling contact during this time.[185] Here, the court found that the Division failed to fulfill its responsibilities to the siblings under the Act because it did little to facilitate contact between Dana, Donna, Nellie, and Hugo.[186]

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[176] *In re D.C.*, 203 N.J. at 554.
[177] *Id*. at 555-56.
[178] *Id*. at 556.
[179] *Id*.
[180] *Id*.
[181] *Id*.
[182] *In re D.C.*, 203 N.J. at 557.
[183] *Id*. at 577.
[184] *Id*. at 562.
[185] *Id*. at 563-64.
[186] *Id*. at 566.

In deciding whether Nellie and Hugo[187] have the right to petition the court for visitation with their twin sisters after their imminent adoption, the court began by observing, as in *Moriarty*, that while adoptive families, like natural families, have a right to family integrity, that right is not absolute.[188] Under the *parens patriae* doctrine, the State must intercede when "necessary to prevent harm to a child."[189] However, the State could not interfere with parents' (adoptive or biological) constitutional right to direct their children's upbringing simply because it would be in the children's best interests.[190] The Court determined that

> [A]pplication of the best interests standard to a third party's petition for visitation is an affront to the family's right to privacy and autonomy and . . . interference with a biological or adoptive family's decision-making can only be justified on the basis of the exercise of our *parens patriae* jurisdiction to avoid harm to the child.[191]

Thus, under the avoidance of harm standard (the same standard applied in Moriarty in the context of grandparent visitation), a court may award a sibling visitation with his or her brother(s) and sister(s) only if the sibling establishes, by a preponderance of the evidence, that such visitation is necessary to prevent the child from experiencing harm.[192] The court noted that under this "stringent" standard, siblings having no connection to one another or those with a toxic relationship would be denied visitation.[193] The Court remanded the case for an expedited evidentiary hearing so that Nellie could provide evidence, subject to the avoidance of harm standard, that Dana and Donna would be harmed if denied contact with her and Hugo.[194]

III. PROTECTING CHILDREN'S INTEREST: THE PRESUMPTION OF HARM STANDARD

As discussed previously, a sibling may be granted visitation with his or her brother(s) and sister(s) adopted by a non-relative under New

[187] Hugo is now over the age of eighteen but still lives with Nellie. While he was in a group home, Hugo visited regularly with his twin sisters. *Id*. at 552, 575.

[188] *In re D.C.*, 203 N.J. at 568 (citing Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944)).

[189] *Id*. at 569 (quoting Fawzy v. Fawzy, 199 N.J. 456, 474-75 (2009)).

[190] *Id*. at 573.

[191] *Id*.

[192] *Id*.

[193] *Id*. at 575.

[194] *In re D.C.*, 203 N.J. at 574-75

Jersey's avoidance of harm standard only if the sibling establishes, through a preponderance of the evidence, that such visitation is essential to prevent the child from experiencing harm.[195] "The signal value of the harm requirement is that it establishes a qualitative legal standard—not a procedural or evidentiary barrier—that is distinct from the 'best interests' test."[196] Accordingly, "a finding that visitation would be in the child's best interests — i.e., that the child would be better off if visitation were allowed compared to if visitation were denied — does not suffice to justify the interference with the parents' rights."[197] This standard differs drastically from the Supreme Court's holding in *Troxel*, where the Court determined that it must give deference to the parents' determination of the child's best interest.[198] New Jersey's heightened standard is not appropriate because it fails to give deference to the voluminous research on the sibling bond and could have a potential chilling effect on post-adoption sibling visitation requests. Instead, the New Jersey Supreme Court should adopt a presumption that denying sibling visitation after adoption will cause the child harm. This presumption is efficient and supported by social science and psychological studies.

A. D.C. Gives Minimal Deference to Expansive Research on the Sibling Bond

As discussed before, social science and psychological studies on the sibling bond find that the relationship between brother(s) and/or sister(s) often becomes more important for children whose parents abused and/or neglected them.[199] For these children, the relationship they maintain with their siblings frequently provides them with the comfort and stability necessary to deal with their chaotic set of circumstances.[200] However, the application of the avoidance of harm standard to siblings

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[195] *Id*. at 573-74.

[196] Brief for Petitioner at 6, Fausey v. Hiller, 549 U.S. 1304 (2006) (No. 06-863). In *Hiller v. Fausey*, the Pennsylvania Supreme Court affirmed the Superior Court's order of visitation between a child and his maternal grandmother, finding that Pennsylvania's statute providing for "partial custody or visitation to grandparents upon the death of their child who is also the grandchild's parent" survived strict scrutiny analysis. 588 Pa. 342, 344 (2006).

[197] Eugene Volokh, *Sibling Visitation*, THE VOLOKH CONSPIRACY (Oct. 24, 2010), http://volokh.com/2010/09/30/sibling-visitation/.

[198] *Troxel*, 530 U.S. at 69-70.

[199] Herrick & Piccus, *supra* note 28, at 5.

[200] *Id*. at 6.

in *D.C.* gives little deference to the importance of this research. Instead, the court's holding provides that "visitation may only be ordered when there's a finding that denying visitation would cause 'a substantial likelihood' of 'serious physical or psychological harm' to the child."[201]

Unfortunately, it is unlikely that much of the research on the sibling bond rises to the level of the avoidance of harm standard. For example, the importance of the sibling relationship throughout childhood and the duration of one's life, which largely stems from the individual's development and the benefits associated with companionship, would likely not be sufficient for a court to grant contact between siblings post-adoption under the harm standard because no grave physical or psychological harm would necessarily result.[202] Likewise, the fact that the sibling relationship is the longest relationship that most have in a lifetime would also probably fail to meet the harm requirement.[203] Nevertheless, these research findings are extremely important to how one evolves over the course of his or her life, and it must be realized that "[a]n order of adoption does not erase the emotional bonds children may have with their birth family, especially when siblings from abusive homes are split apart by the adoption."[204] Therefore, by adopting a presumption that denying sibling contact after adoption will cause the child harm, the New Jersey Supreme Court would rightly recognize the significance of this body of research and the fact that an entry of adoption does not simply take away the importance of the sibling relationship.

B. D.C. Could Potentially Chill Sibling Petitions for Visitation in New Jersey

The application of the avoidance of harm standard to siblings, as set forth in *D.C.*, could also chill sibling petitions for visitation with a brother or sister adopted by non-relatives. First, as discussed previously, the burden is on the sibling to demonstrate, by a preponderance of the evidence, that the child at issue would suffer harm if visitation it not granted.[205] The court itself understands that this

[201] Volokh, *supra* note 197.
[202] CHILD WELFARE INFO. GATEWAY, *supra* note 26.
[203] NAT'L ADOPTION INFO. CLEARINGHOUSE, *supra* note 11.
[204] *In re* Cocose, No. V-4205-04, slip op. at 1, 6 (Fam. Ct. N.Y. July 22, 2005)
[205] *In re D.C.*, 203 N.J. at 573-74.

standard is "stringent."[206] Under such a strict guideline, some siblings may believe that whatever evidence they provide will not come close to satisfying a showing that the child would suffer harm and, therefore, will be deterred from petitioning the court for visitation. An additional concern is that many siblings do not have the necessary resources that would allow them to demonstrate that a minor sibling will suffer harm if contact is denied, even if the child would, in fact, suffer harm. This lack of resources may result in many siblings not even trying to seek visitation post-adoption or being able to meet the avoidance of harm standard, despite the likely harm present.

Questions further emerge as to what "harm" the sibling would need to show in order for visitation to be granted. For example, the court notes that the harm threshold would be satisfied in the case of visitation between a sibling who has been adopted by a non-relative and the other who has been taken by a grandparent.[207] However, siblings who are separated at birth and brought up in different households with no communication would fail under the harm standard.[208] These two examples provided by the court are on opposite ends of the spectrum, thereby opening up a grey area concerning petitions. Although it would be fairly easy to discern the results of the examples provided, individual cases do not necessarily fall into these black and white categories. Accordingly, siblings may be dissuaded from asking the court for visitation because of such uncertainty.

However, a presumption that denying sibling contact after adoption will cause the child harm would assuage these concerns. First, this presumption would lessen the burden on petitioning siblings, making it easier for them to gather evidence and have their day in court. It would recognize that there are, in fact, situations in which harm to a child is present but the sibling may not have the necessary resources to rise to the strict level of the avoidance of harm standard. Second, grey areas, such as the ones described above, would be largely eliminated. Although the counter-argument could be made that adopting this presumption would open the floodgates to litigation and strain judicial resources, public policy would be violated by allowing harm to ultimately befall a child simply because a sibling does not have the necessary resources to surpass a stringent avoidance of harm inquiry.

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[206] *Id*. at 575.
[207] *In re D.C.*, 203 N.J. at 573.
[208] *Id*. at 573-74.

IV. CONCLUSION

Adoption is a formation of the state,[209] and consequently, states may require certain things of individuals who wish to adopt.[210] While mandating post-adoption sibling contact would likely be seen as an unconstitutional interference on an adoptive parent's right to bring up the child as he or she desired,[211] the importance of the sibling relationship cannot be denied.[212] Therefore, siblings should be permitted to petition a court for visitation with a brother or sister who is adopted by non-relatives subject to a presumption that disallowing sibling contact would harm the child.

Although critics argue that post-adoption sibling contact obligations deter the goal of having "a system that encourages prospective adoptive parents to adopt or at least one that does not discourage families from adopting because of fear or additional obligations,"[213] New Jersey's current avoidance of harm standard for sibling visitation, promulgated by the state supreme court in *D.C.*, places an unfair burden on a sibling by forcing him or her to establish, by a preponderance of the evidence, that post-adoption contact is necessary to avoid harm to the brother or sister.[214] Given the special bond shared between siblings and the potential chilling effect this stringent standard could have, the Court should instead adopt a presumption that denying sibling contact after adoption will cause the child harm. Ultimately, in doing so, the Court will not only recognize the importance of the prevailing social science and psychological research, but will also acknowledge that situations do exist where harm to a child is present but the sibling may not have the necessary resources to rise to the strict level of the avoidance of harm.

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[209] *In re* Adoption of Robert Paul P., 471 N.E.2d 424, 426 (N.Y. 1984) (stating that adoption is "'solely the creature of, and regulated by, statute law'") (citation omitted).

[210] Maldonado, *supra* note 61, at 358.

[211] *In re* Adoption of Vito, 728 N.E.2d 292, 302 (Mass. 2000).

[212] NAT'L ADOPTION INFO. CLEARINGHOUSE, supra note 11.

[213] Mary Coogan, *Post-Adoption Sibling Contact: Some Issues to Consider*, ACNJ SPECIAL REPORT (Sep. 18, 2010), http://www.acnj.org/admin.asp?uri=2081&action=15&di=863&ext=pdf&view=yes.

[214] *In re D.C.*, 203 N.J. at 573.