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# Siblings' Rights to Visitation Post-Adoption

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## Siblings' Rights to Visitations Post-Adoption

### I. Introduction

The social and emotional significance of sibling relationships has grown in recognition as a result of social science research and is reflected in legislation on both the federal and state level. In addition, courts have acknowledged the lifelong adverse effects that legally severing these relationships could have on children particularly those in foster care situations. Despite their significance, children in out-of-home care are frequently separated while under State care and can be adopted by separate families post termination of parental rights. While both state and federal statutes exist aimed at nurturing and preserving sibling bonds during children's stay in foster care placement, none provide for continued contact post adoption. As a result, siblings entering foster care with preexisting relationships to one another face the additional trauma of not being able to remain in contact with one another post adoption.

Some advocates argue that siblings have a constitutionally based liberty interest to family privacy grounded in the Fourteenth Amendment Due Process Clause or the First Amendment freedom of association, and as such, are entitled to continued contact and visitations in the post adoption context. However, to date no court has recognized nor denied these interest and many seem to direct this issue to the legislative process. Additionally, even if such interests were recognized, they are not likely to be absolute or protect children in foster care from being ultimately separated before and post adoption.<sup>1</sup> Just as parental rights to family autonomy are subject to State interference when the health, safety and welfare of children are

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<sup>1</sup> Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (“[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.”).

at issue, so too are siblings' interests likely to be limited by those State interests, especially since they are particularly implicated in the foster care context.

This paper will consider the rights of children in the New Jersey foster care system to continued contact post adoption with their siblings who might also be in a foster care placement, "aged out"<sup>2</sup> or already reached the age of majority at the time of the State's intervention. The scope of this paper is limited to children with already existing sibling bonds at the time they enter State care as it is a rather broad topic generally warranting varying considerations. The paper will explore this issue by looking at both past and recent New Jersey case law, U.S. Supreme Court decisions as well as some of the constitutional arguments posited in support of sibling relationships in the post adoption context.

## II. Current Status in New Jersey

In New Jersey, a child in foster care placement has a statutorily protected right to continued visitation with his siblings unless the Division of Child Protection and Permanency (Division)<sup>3</sup> opposes such contact. In cases where the Division does oppose familial contact, it bears the burden of showing that the visitation would endanger the health, safety, and welfare of the child.<sup>4</sup> In a recent case, *D.C.*, the New Jersey Supreme Court held that a foster mother's unwillingness to facilitate visits between foster children and their siblings did not overcome the

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<sup>2</sup> Casey Family Programs, Child Welfare 101, Child Welfare Facts Sheet, <http://www.casey.org/Newsroom/MediaKit/pdf/CWFactSheet.pdf> (last visited 4/26/13) ("Aging out is when a youth in foster care becomes a legal adult.").

<sup>3</sup>N.J.S.A. 9:3A-10 (In July of 2012, Governor Christie signed legislation reorganizing the Department of Children and Families by, among other things, transferring certain services for youth from the Department of Human Services to the Department of Children and Families, which included the Division of Youth and Family Services (DYFS). In addition, DYFS underwent a name change and is now called the Division of Child Protection and Permanency).

<sup>4</sup> New Jersey Div. of Youth & Family Services v. J.Y., 2013 WL 362764 at 9-10 (citing *In re D.C.*, 203 N.J. 545 (2010)).

presumption of the Child Placement Bill of Rights Act<sup>5</sup> (Child Placement Act) that children in out-of-home placements should continue to have regularly scheduled visitations and contacts with their siblings.<sup>6</sup> The Child Placement Act enumerates, among other rights, a child's right to be placed in the same home with his siblings and have continued visits with them in the event they are placed in separate homes or programs.<sup>7</sup>

The *D.C.* court found that by not fractionalizing a child's placement period into pre and post termination, the Legislature recognized that there is nothing about the legal act of terminating parental rights, in itself, "that magically alters the child's day-to-day life or that would justify cutting off pre-existing sibling contact."<sup>8</sup> And as such, the Court noted that the Division continues to have an affirmative obligation to nurture sibling bonds, whether or not the process is initiated by a sibling, and whether or not their parents' parental rights have been terminated.<sup>9</sup>

According to the Court, the Child Placement Act's requirements are a reflection of constantly evolving legislation created in response to the changing understanding of social

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<sup>5</sup> In 2008, President Bush signed into law the Fostering Connections Act, a funding statute, which included a provision on sibling placement that declared "states must make reasonable efforts [...] to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings; and [...] in the case of siblings removed from their home who are not so jointly placed, to provide for frequent visitation or other ongoing interaction between the siblings, unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings." Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 67 (2011) (quoting Pub. L. No. 110-351, 122 Stat. 3949 (codified at 42 U.S.C.A. § 671 (West 2010)).

<sup>6</sup> In re *D.C.*, 203 N.J. 565-66.

<sup>7</sup> N.J.S.A. § 9:6B-4(d),(f) ("A child placed outside his home shall have the following rights, consistent with the health, safety and physical and psychological welfare of the child and as appropriate to the individual circumstances of the child's physical or mental development: (d). To the best efforts of the applicable department to place the child in the same setting with the child's sibling if the sibling is also being placed outside his home; (f). To visit with the child's sibling on a regular basis and to otherwise maintain contact with the child's sibling if the child was separated from his sibling upon placement outside his home, including the provision or arrangement of transportation as necessary.").

<sup>8</sup> In re *D.C.*, 203 N.J. 564-65.

<sup>9</sup> *Id.* at 564-65.

conditions.<sup>10</sup> The Act provides in relevant part that a child who is placed outside the home has “certain specific rights separate from and independent of the child’s parents or legal guardian by virtue of his placement in another residential setting” and therefore, “the State has an affirmative obligation to recognize and protect these rights.”<sup>11</sup> The Child Placement Act has been viewed as an express attempt by the Legislature to help micromanage the maintenance of sibling relationships because they are considered to be highly important to the health, safety and welfare of the children involved.<sup>12</sup> The Court found that the Act is intended to ensure that the Division continues to work on nurturing these bonds throughout the children’s entire placement period, so that they have that continued source of support “from the beginning to the end of their odyssey.”<sup>13</sup> “That responsibility inheres even after pre-adoptive placement, which may or may not come to fruition.”<sup>14</sup>

Post adoption however, preexisting sibling bonds lose their presumptive legal significance in the children’s lives and must instead be proved according to a legal standard. The Court clarified that its opinion in *D.C.* was not meant to be “an incursion on the deeply-embedded right of fit parents, biological or adoptive, to raise their children without outside interference. That right is well-established, and the *parens patriae*<sup>15</sup> exception that has been

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<sup>10</sup> *Id.* at 562-63.

<sup>11</sup> N.J.S.A. 9:6B-2(a), (b).

<sup>12</sup> *In re D.C.*, 203 N.J. at 563-64 (quoting William Wesley Patton, *The Status of Siblings’ Rights: A View into the New Millennium*, 51 DEPAUL L. REV. 1, 21 (2001)).

<sup>13</sup> *Id.* at 564-65.

<sup>14</sup> *Id.*

<sup>15</sup> *Matter of D.K.*, 204 N.J. Super. 205, 222 (Ch. Div. 1985) (citing *Matter of Grady*, 85 N.J. 235, 259 (1981) (“The *parens patriae* power of our courts derives from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate legal disability. While traditionally used to protect the economic and property interests of the legally disabled, it has also been invoked to protect personal rights. In divorce and child custody cases, for example, our courts exercise *parens patriae* jurisdiction to protect the best interests of children. The chancery courts also utilize their *parens patriae* powers when a juvenile has committed a criminal offense, or when a person has been committed to a psychiatric institution.”)).

recognized for half a century is narrowly tailored to avoid harm to the child.”<sup>16</sup> So, although the Court held that siblings may petition for visitations with their brothers or sisters in foster care placement post termination of their parents’ parental rights, consistent with its prior decisions on “open adoptions,”<sup>17</sup> it declined to outright extend the Child Placement Act’s presumption beyond the pre-adoption context. In essence, the court established the point at which a child’s day-to-day life is altered and cutting off pre-existing sibling contact will be justified, at least in the legal sense.

After a child has been adopted, the Court will not exercise its constitutional *parens patriae* jurisdiction over a parent’s fundamental right to raise their children as they see fit, absent a showing that it must do so to protect the child from harm.<sup>18</sup> Post adoption, newly formed families are legally afforded the same familial autonomy, privacy and limitations that biological families are entitled to.<sup>19</sup> Therefore, only “to the extent that visitation by a third party may be compelled over the objections of a biological family, the same rule applies to an adoptive family.”<sup>20</sup> In New Jersey, this means once a child in foster care placement has been adopted, neither she nor her biological siblings will have the benefit of the Child Placement Act’s presumption in favor of continued contact and visitations. Instead, the presumption that the adoptive parents will act in the adoptee’s best interest is given priority and unless they are

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<sup>16</sup> In re D.C., 203 N.J. 575-76 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)); see also *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (“So long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”).

<sup>17</sup> In re Adoption of a Child by D.M.H., 135 N.J. 473, 492-493 (N.J. 1994) (“An open adoption occurs when, prior to the adoption, it is agreed in writing that the child will have continuing contact with one or more members of his or her biological family after adoption is completed.”) .

<sup>18</sup> In re D.C., 203 N.J. 571-72.

<sup>19</sup> *Id.* at 570-71.

<sup>20</sup> *Id.* at 570-71.

deemed unfit or act against the child's best interests, the State should not intervene.<sup>21</sup> And so, the sibling bonds which were presumptively necessary to the health, safety and welfare of the children lose their order of legal importance and their significance must be validated via court proceedings. Siblings are then required to secure a visitation order under the Grandparent and Sibling Visitation Statute (Visitation Statute), where they will have the burden of demonstrating to the courts by a preponderance of the evidence that discontinuing the visitation would be harmful to their brother or sister.<sup>22</sup>

In an earlier case, *In re the Adoption by W.P. and M.P.*, the court found that the Visitation Statute would conflict with the New Jersey Adoption Act if it were applied post adoption since the Legislature specifically rejected the proposed open adoption provisions when the Adoption Act was amended in 1993.<sup>23</sup> The provisions rejected by the Legislature would have provided:

With the consent of the adopting parent the court may provide in the adoption order for visitation or other type of communication with the child after the adoption by any person who had a relationship with or was biologically related to the child. This provision may be modified by the court subsequent to the adoption on petition of the adoptive parent for good cause shown.<sup>24</sup>

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<sup>21</sup> *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

<sup>22</sup> N.J.S.A. § 9:2-7.1(a) as amended by L. 1993 c. 161, § 1 ("A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.").

<sup>23</sup> *In re Adoption by W.P. and M.P.*, 163 N.J. 158, 172-73 (2000) (In that case the child's grandparents petitioned the Court for continued visitations post adoption of their grandchild, the Court held that the statute did not apply in that context because it would conflict with the statutory intent of the Adoption Act.).

<sup>24</sup> *Id.* (quoting A. 1418 § 13(d), 205th Leg., 1st Sess. (N.J. 1992)).

It was the Court's view, however, that even if those provisions had been enacted by the Legislature it would not have provided continued visits or contact with the adoptees without the consent of the adoptive parents.<sup>25</sup>

The Court found that the legislative intent of the Adoption Act was to “creat[e] a new family unit without the fear of interference from the natural parents” and that by emphasizing the “complete termination of the biological parents’ rights [it] also logically had the effect of terminating the biological grandparents’ rights to visitation.”<sup>26</sup> Once adopted, the child becomes the child of the adoptive parents and part of their extended family.<sup>27</sup> As a result, the Court reasoned, the primary purpose of the termination is to protect the adoptive parents’ autonomy in raising their children and protecting them from future disturbances by the natural parents.<sup>28</sup>

Approximately 3-years later, the Visitation Statute underwent constitutional scrutiny in *Moriarty v. Bradt* in light of the guideposts set out by the U.S. Supreme Court’s plurality in *Troxel*.<sup>29</sup> In order to save the statute from constitutional infirmity, the Court added the threshold harm standard providing the “special weight” required by *Troxel* for a fit parent’s visitation determination over a nonparent’s challenge.<sup>30</sup> The *Moriarty* court concluded that the applicable standard, in cases where a third party seeks visitation over the objection of a fit parent, is the no

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<sup>25</sup> *Id.*

<sup>26</sup> *In re Adoption by W.P. and M.P.*, 163 N.J. 169-70.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 173-74.

<sup>29</sup> *See generally* *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (In that case the paternal grandparents petitioned the courts under a Washington statute for continued visitations with their grandchild.

[O]ur world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, 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.

*Id.* at 70).

<sup>30</sup> *Moriarty v. Bradt*, 177 N.J. 84, 108-09 (2003) (quoting *Troxel v. Granville*, 530 U.S. 69.).

harm standard and not the best interest standard that had been applied by the lower court.<sup>31</sup> In the Court's view, because the Visitation Statute implicates parents' constitutional rights to raise their children as they see fit, application of the best interest standard did not afford adequate protection for fit parents' privacy rights because it did not always require proof of harm.<sup>32</sup> By contrast, the no harm or "exceptional circumstances"<sup>33</sup> standard does require that the petitioning party show by a preponderance of the evidence that denial of the visitation sought would cause serious physical or psychological harm or a substantial likelihood of such harm to the child.<sup>34</sup> Thus, by adding the no harm standard to the Statute, the Court provided the constitutionally required special deference and added protection for parents' familial privacy interests.

Even though the *D.C.* court reinforced the legislative and constitutional boundaries protecting parents' privacy interests, it did not abandon its former recognition that post adoption agreements, allowing continued contact between biological relatives and adoptive parents, particularly where a child is adopted by a relative or stepparent, are permissible.<sup>35</sup> The Court has advised that under those circumstances, the agreements should be entered into "with full counseling and advice, and must be completely voluntary and mutual, and in the best interests of the child."<sup>36</sup> Until *D.C.*, however, the Court had not gone as far as to judicially enforce these types of agreements or even express a willingness to do so, in the absence of a statutory

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<sup>31</sup> In re *D.C.*, 203 N.J. 574-75 (citing *Moriarty v. Bradt*, 177 N.J. 84 (The case involved a custody dispute between a fit biological father and the maternal grandparents of the child. The court reversed the lower court's decision awarding custody to the grandparents after it applied the best interest standard to the circumstances of the case. The Court held that applying the best interest standard in a case where the parent is fit constituted an incursion on the constitutional imperative of family autonomy.)).

<sup>32</sup> *Moriarty v. Bradt*, 177 N.J. 115 (citing *Watkins v. Nelson*, 163 N.J. 235, 248 (2000)).

<sup>33</sup> New Jersey Div. of Youth and Family Servs. v. N.J., 2011 WL 446082, 3-4 (App. Div. Feb. 10, 2011).

<sup>34</sup> In re *D.C.*, 203 N.J. 574-75 (citing *Moriarty v. Bradt*, 177 N.J. 84, 117 (2003)).

<sup>35</sup> In re Adoption of Children by F., 170 N.J. Super. 419, 426-27 (Ch. Div. 1979) (Granting the children an independent privilege to maintain contact with their natural father after they were adopted by their step-father.).

<sup>36</sup> In re Guardianship of K.H.O., 161 N.J. 337, 362-63(1999) (citing *Katterman v. DiPiazza*, 151 N.J. Super 209 (App. Div. 1990)).

provision granting such authority.<sup>37</sup> Nonetheless, the *D.C.* court seemed to suggest in its dicta that these types of arrangements or agreements should be particularly considered by the adoptive parents, whether a biological relative or not, of older children who may have strong bonds with their siblings, as those are “the only siblings with the potential to vault the harm threshold.”<sup>38</sup>

In its opinion, the *D.C.* court described circumstances under which sibling visits may be compelled against the wishes of a non-relative adoptive parent.

For example, a case in which pre-teen siblings, raised together in the same household, deeply entwined in each other's lives, are removed due to abuse or neglect. If one is adopted by a non-relative and the other taken in by his grandmother, it seems likely to us that denial of the sibling's application to visit his adopted brother would satisfy the harm threshold.<sup>39</sup>

The circumstances described by the Court are more likely than not to be a reality for a large proportion of children of all ages who are in foster care.<sup>40</sup> It is not uncommon for sibling groups to be separated while they are in out-of-home care because of the challenges in finding resource families able to accommodate them all together.<sup>41</sup> And because it is an even greater challenge

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<sup>37</sup> *In re Guardianship of KHO*, 161 N.J. 362-63 (1999) (citing *Adoption of a Child by D.M.H.*, 135 N.J. 473 (quoting *Senate Judiciary Committee, Statement to Senate*, No. 685 (1993))).

<sup>38</sup> *In re D.C.*, 203 N.J. 577.

<sup>39</sup> *Id.* at 574-75.

<sup>40</sup> Child Welfare Information Gateway, *Sibling Issues in Foster Care and Adoption: A Bulletin for Professionals* 1-15, 1 (December 2006), <http://www.camptobelong-ga.org/pdf/siblingissues.pdf> (last visited 4/5/13) (“A substantial proportion of the approximately 70 percent of children in foster care who have siblings in care are not placed with those siblings.”); see also National Resource Center for Permanency and Family Connections (NRCPPFC), *Sibling Placement: The Importance of the Sibling Relationship for Children in Foster Care* 1-10, 3 (2012), [http://www.hunter.cuny.edu/socwork/nrcfcp/downloads/information\\_packets/Sibling\\_Placement.pdf](http://www.hunter.cuny.edu/socwork/nrcfcp/downloads/information_packets/Sibling_Placement.pdf) (last visited on 4/16/13) [hereinafter *The Importance of Sibling Relationship for Children in Foster Care*] (citing R.L. Hedgar, *Sibling Placement in Foster Care and Adoption: An Overview of International Research*, CHILDREN AND YOUTH SERVICES IN REVIEW 27, 717-739 (2005) (“The National Adoption Information Clearinghouse estimates that 65-85% of U.S. foster children come from sibling groups, and studies of siblings in the child welfare system suggests that 60% to 73% of U.S. foster children have siblings who also enter foster care.”)).

<sup>41</sup> The Center for the Study of Social Policy (CSSP), *Progress of the New Jersey Department Children and Families, Period XII Monitoring Report for Charlie and Nadine H. v. Christie* 1-161, 84 (Dec. 12, 2012),

for child welfare agencies to secure adoptive homes for sibling groups consisting of four or more children, it is less likely that the children in those sibling groups will be adopted by the same family.<sup>42</sup>

Despite the commonality of sibling separation in foster care, many of them should theoretically be able to overcome the harm threshold provided they have an existing bond prior to entering placement, given the Child Placement Act's emphasis on preserving sibling bonds and the Division's affirmative obligation to nurture them. However, because the children's ability to remain connected and preserve their relationships is dependent on the Division's systemic soundness and ability to meet its obligations under the Child Placement Act and settlement agreement,<sup>43</sup> the possibility that they will be able to actually clear the requisite harm threshold is likely to become increasingly remote the longer they remain in out-of-home care.<sup>44</sup>

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<http://www.state.nj.us/dcf/welfare/federal/EMARGOEDFINALNJReportPeriodXIIDecember2012.pdf> (last visited 4/5/13) (“Between the months of January and June 2012, a monthly range of 46 to 52 percent of children had monthly visits with their sibling when they were not placed together. For example, in June 2012 there were 2,595 children in placement who had at least one sibling who did not reside in the same household as them. Of the 2,595 children, 1,343 (52%) children had a visit with their siblings during the month. Performance, while improving, is still substantially lower than the final target of 85 percent.”).

<sup>42</sup> NRCPFC, *Sibling Placement*, *supra* note 39, at 3 (citing K. Washington, *Research Review: Sibling Placement in Foster Care: A Review of the Evidence*, CHILD AND FAMILY SOCIAL WORK 12, 426-33, 431(2007) (“Studies show that larger sibling groups are more likely than smaller groups to be placed separately, not only because fewer foster homes are willing to accept large groups of children, but also because large sibling groups are less likely to enter foster care at the same time.”); *see also* Child Welfare Information Gateway, *Sibling Issues in Foster Care and Adoption: A Bulletin for Professionals* 1 -15, 8 ( December 2006),

<http://www.camptobelong-ga.org/pdf/siblingissues.pdf> (last visited 4/5/13) (“In some cases of separated siblings, foster parents may want to adopt only the sibling placed with them. Workers are put in the unenviable position of choosing the lesser of two evils—allowing the child to be adopted without his or her siblings, or keeping the child in foster care until a family can be found who will adopt all of the siblings.”).

<sup>43</sup> Children's Rights, New Jersey (Charlie and Nadine H. v. Christie) <http://www.childrensrights.org/reform-campaigns/legal-case/new-jersey/> (last visited on 4/19/13) (“Children's Rights filed [a] class action lawsuit in 1999 on behalf of more than 11,000 children in New Jersey's child welfare system. In 2003 — following the much publicized death of Faheem Williams and the discovery of his two starving siblings, children known to the state's Division of Youth and Family Services (DYFS) — a landmark settlement agreement mandating sweeping reforms was reached, but initially yielded few results.”); *see also* New Jersey Department of Children and Families (DCF), *Child Welfare Reform, Modified Settlement Agreement*, <http://www.state.nj.us/dcf/about/welfare/modified/> (last visited on 4/19/13) (Identifying the State's critical services in need of improvements under the imposed reform of

Like many other child welfare agencies throughout the United States, the Division struggles with fulfilling its responsibility to provide children under their care with the continued visitations and familial contact mandated by statutes and necessary, in most cases, to the children's well-being and the family units' preservation.<sup>45</sup> As a result, sibling relationships are often neglected for varying reasons and the children become less involved in each other's lives potentially diluting their bonds and ability to overcome the harm threshold the longer they are under state care and in separate placements. Unfortunately, irrespective of the cause of their separation and their inability to remediate the circumstances, siblings ultimately bear the burden of overcoming the no harm standard, which the Court made clear, is a "stringent one that cannot

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the Modified Settlement Agreement (MSA) are improvements in the delivery of services that "help keep families together, reunite families that are separated, address the well-being of children in out of home care...").

<sup>44</sup> HARRY J. APONTE, *BREAD & SPIRIT: THERAPY WITH THE NEW POOR: DIVERSITY OF RACE, CULTURE AND VALUES* 74-75 (1994) ("Family boundaries become porous to the institutional environment in the form of agencies that assume responsibility for and care of these families. These social welfare agencies, mental health clinic, and other community institutions become part of their daily lives. Unfortunately, the service provider network usually does not coordinate its efforts with the families and often becomes another disorganizing force in their lives. In its eagerness to help, the network of agencies more often than not also drains away the control families and communities have over their lives. The Institutional network inadvertently substitutes its policies for a family's and its community's values, and its bureaucracy for their social structure.").

<sup>45</sup> New Jersey Department of Children and Families, Child Welfare Reform Modified Settlement Agreement, *supra* note 41; *see also* Children's Rights, News Events Blog: *New Data, Same Tragic Story: Oklahoma's Deep Dysfunction Threatens its Vulnerable Children*, <http://www.childrensrights.org/news-events/cr-blog/new-data-same-tragic-story-oklahomas-deep-dysfunction-threatens-its-vulnerable-children/> (last visited 4/16/13) ("Family visits, which are so crucial to kids in foster care, were not completed more than 85 percent of the time, and 22 percent of kids with siblings didn't see their brothers or sisters for an entire YEAR."); Tennessee (Brian A. v. Bredesen), *New Report: Tennessee Maintains Vital Improvements for Kids in Foster Care, but Significant Challenges Remain* <http://www.childrensrights.org/news-events/press/new-report-tennessee-maintains-vital-improvements-for-kids-in-foster-care-but-significant-challenges-remain/> (last visited 4/16/13) (Tennessee's Department of Children's Services (DCS) must make significant improvements such as "ensuring more participation from families in planning for children's safe and permanent exit from state custody, and greatly increasing opportunities for children in foster care to visit with their birth parents and their brothers and sisters."); *see* APONTE, *supra* note 43 at 73-74 ("[It ] is axiomatic that children are the individual mirrors for both the contentment and the distress of their families. The harmony or disharmony in the family as a whole will also affect every relationship within the family, facilitating or impeding connections among family members. Moreover, the social conditions of a community will support or undermine families and their individual members.").

likely be satisfied by siblings who have had no connection to each other or by those whose bonds are flaccid, or worse, toxic.”<sup>46</sup>

The importance of preserving preexisting relationship bonds for children in foster care, including those who are adopted, has been recognized by the Court for some time. In *New Jersey Div. of Youth & Family Services v. S.S.*, the Court urged the Legislature to “weigh the importance of maintaining sibling relationships in the post adoption context against the need for protecting parental autonomy of the new family unit, and ensuring the success of the adoption system,” in light of the goals of the Child Placement Act, the Visitation Statute and the Adoption Act.<sup>47</sup>

There, the Court acknowledged the uniqueness and value sibling relationships have generally and for children in foster care placement specifically, describing them as “strong [bonds] that are, in most cases, irreplaceable.”<sup>48</sup> In agreeing with past courts and social science scholars, it acknowledged that “[a] sibling relationship can be an independent 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.”<sup>49</sup> According to the Court and the mental health scholarship it relied on, sibling bonds do not have a natural expiration and their

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<sup>46</sup> In re D.C., 203 N.J. 575-76.

<sup>47</sup> *New Jersey Div. of Youth & Family Services v. S.S.*, 187 N.J. 556, 564-65 (2006).

<sup>48</sup> *Id.* at 560-61 (quoting *L. v. G.*, N.J.Super. 385, 395 (Ch.Div. 1985)).

<sup>49</sup> *Id.*

disruption and abrupt ending could have a negative impact that lasts a lifetime where the benefit of lifelong companionship and emotional security could have otherwise existed.<sup>50</sup>

Similarly, in *D.C.*, the Court emphasized that “[m]aintaining sibling relationships can provide a sense of stability in the lives of abused children placed outside of their natural homes.”<sup>51</sup> It reasoned that if sibling bonds are “important in healthy families, they are critical to children who experience chaotic circumstances. Indeed, children who have been abused or neglected, or whose families have been ripped apart, face heightened levels of emotional stress and, in such circumstances, they learn very early to depend on and cooperate with each other to cope with their common problems.”<sup>52</sup> The amplified importance of those ties for children in foster care can be attributable to the multiple losses of significant relationships they so often experience leaving their relationship to each other as potentially the only source for a continuing significant relationship.<sup>53</sup> Separating them under those circumstances, whether they are “temporarily or permanently removed from their parents can severely intensify grief and trauma. In some cases sibling separations can be even more traumatic than separation from parents.”<sup>54</sup>

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<sup>50</sup> *Id.* at 560-61 (quoting 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, 987 (1999)).

<sup>51</sup> *In re D.C.*, 203 N.J. 561-62 (citing *New Jersey Div. of Youth & Family Services v. S.S.*, 187 N.J. 560-61).

<sup>52</sup> *Id.*

<sup>53</sup> Child Welfare Information Gateway, *Siblings Issues in Foster Care and Adoption: Sibling Relationships in Abusive or Neglectful Families* (2006), <http://www.childwelfare.gov/pub/siblingissues/index.cfm> (last visited 4/5/13) (“While sibling relationships in particular families experiencing adverse situations do not always compensate for other deficits, research has validated that for many children, sibling relationships do promote resilience—for example, a young child’s secure attachment to an older sibling can diminish the impact of adverse circumstances such as parental mental illness or loss.”).

<sup>54</sup> National Resource for Permanency and Family Connections, Information Packet: *Siblings in Out-of-Home Care* 1-24, 3 (December 2005), [http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information\\_packets/siblings.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information_packets/siblings.pdf) (last visited 4/6/13); *see also* Office of Child Advocate Report, *Adolescents in New Jersey’s Foster Care System: An Assessment of Case Practice and Recommendations for Reform* 1-38 (January 6, 2006), [http://www.nj.gov/childadvocate/publications/PDFs/1ATP\\_Report\\_Final\\_010606.pdf](http://www.nj.gov/childadvocate/publications/PDFs/1ATP_Report_Final_010606.pdf) (last visited 4/16/13) (The Office of the Child Advocate (OCA) conducted a case file review of approximately 68 adolescent youth who were in out-of-home placements and found that among other things, many of the youth who were surveyed experienced trauma both before and after placement but little was done to address it).

There are many who go even further and argue that siblings have a constitutional right to their relationships with one another and that perhaps the recognition of such a right would potentially protect them against the added trauma of being separated. For example, in *S.S.*, the question before the Court was whether the courts or the Division had an affirmative duty in the post adoption context to ensure that sibling contacts were maintained.<sup>55</sup> In that case, amicus curiae New Jersey Child Advocate in support of the law guardian's position, argued that siblings, “even when adopted by separate families, possess a right of visitation—a right to associate with one another guaranteed by Article I, Paragraph 1 of the New Jersey Constitution.”<sup>56</sup> The case involved a 4-year old, the youngest of a sibling group of five, who since birth had been living with a foster family that was willing to adopt her. Prior to the termination of her mother’s rights, she was having visitations with her four older siblings, all of whom were already adopted by another family.<sup>57</sup> The Court declined to reach the issue of whether the children had a constitutional right to visitation post adoption, since it was not genuinely in controversy at that time.<sup>58</sup> The Court found that the child’s visits with her siblings were not in jeopardy because the

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Children in out-of-home placement across the country are, in many instances, dually traumatized. The first type of trauma often comes by the acts or omissions of a parent, relative or guardian whom the child knows as his or her caregiver; the second type comes by the act of removal and separation from the familiar. Failure to adequately recognize and address these experiences in a systematic and ongoing fashion with all youth upon removal to substitute care sets the stage for future instability. Unless addressed through early assessment and, where appropriate, counseling, youth who have been victimized and/or removed from the home are left ever more vulnerable to ponder, sometimes without resolution, life-altering questions about how they first came to be in foster care and why. Once in foster care, the probability of continued and new trauma is high. With every change in placement or reassignment of case managers, feelings of loss and separation may occur.

*Id.* at. 18).

<sup>55</sup> New Jersey Div. of Youth & Family Services v. S.S., 187 N.J. 558-59.

<sup>56</sup> New Jersey Div. of Youth & Family Services v. S.S., 187 N.J. 558-59.

<sup>57</sup> *Id.* at 558-59.

<sup>58</sup> *Id.* at 558-59.

respective adoptive families, acting in the children's best interests, had been cooperating by allowing visits to take place without any court intervention.<sup>59</sup>

Although *D.C.* also involved siblings' rights to visitation, it was not argued that they had a constitutional right to visitation post adoption. Instead, the adult siblings of 5 year-old twins petitioned the Court for continued visits under the Visitation Statute post termination of the mother's parental rights, while adoption was still pending.<sup>60</sup> In that case, after the twin's sister, Nellie, was denied approval as a kinship placement for them, the Division discontinued visitations.<sup>61</sup> Nellie appealed her rejection as a viable placement option for the twins, and petitioned the lower court for visits in the meantime.<sup>62</sup> Initially, the visits were approved since the foster mother was in agreement at the time but the lower court did not hold the Division responsible for arranging nor supervising the visits as required by the Child Placement Act.<sup>63</sup> A month later however, the Division informed Nellie that the foster mother was no longer willing to facilitate visits with the twins.<sup>64</sup> When Nellie attempted to enforce the prior visitation agreement via the courts, she was informed that she was not in a position to re-litigate the Division's plan of foster home adoption for the twins, and that visitation could not be ordered and would remain at the discretion of the foster mother.<sup>65</sup>

The New Jersey Supreme Court reversed the lower courts' decision and remanded for an expedited evidentiary hearing. It held that post termination of parental rights, siblings in foster care continued to have a right to the benefit of the Child Placement Act's presumption of

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<sup>59</sup> *Id.* at 563-64.

<sup>60</sup> *In re D.C.*, 203 N.J. 550.

<sup>61</sup> *Id.* at 554-55.

<sup>62</sup> *Id.*

<sup>63</sup> *In re D.C.*, 203 N.J. 556-57.

<sup>64</sup> *Id.* at 556-57.

<sup>65</sup> *In re D.C.*, 203 N.J. 545, 556-57 (2010).

continued sibling contact and visitations.<sup>66</sup> In addition, it held that post adoption Nellie was entitled to an opportunity under the Visitation Statute, to demonstrate by expert and factual evidence that the twins would suffer harm if the visits were denied.<sup>67</sup> Among the factors the court below was charged with considering was whether or not Nellie was ever a full-time caregiver for the twins,<sup>68</sup> the relationship, if any, existing among the siblings and the effect denial of the visitation would have on the petitioning siblings.<sup>69</sup> In the Court's view, if harm is demonstrated, then the "diminution of parental autonomy would be a proper exchange for the protection of the child[ren] under [it's] constitutional *parens patriae* jurisdiction."<sup>70</sup>

Prior to *D.C.*, the court had not recognize a sibling's standing to petition the court for post adoption visitation nor had it addressed visitation post termination of parental rights. In establishing that the Child Placement Act continues to protect sibling relationships post termination of parental rights, the Court effectively postponed the emotional consequences associated with legally severing a child's preexisting relationships with her siblings.<sup>71</sup> However, the Court acknowledged that avoiding the additional loss beyond adoption would be an "uphill battle" for those who try to maintain ties with their siblings over an adoptive parent's objection. A feat likely to be most challenging for children in foster care as they are often times powerless to do anything about sustaining familial contacts even prior to the termination of parental rights.<sup>72</sup>

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<sup>66</sup> *Id.* at 565-66.

<sup>67</sup> *Id.* at 574-75.

<sup>68</sup> N.J.S.A. § 9:7-1(b)(8)(c) ("[I]t shall be prima facie evidence that visitation is in the child's best interest if the applicant had, in the past, been a full-time caretaker for the child.").

<sup>69</sup> *In re D.C.*, 203 N.J. 575-76.

<sup>70</sup> *Id.* at 577.

<sup>71</sup> *In re the Adoption by W.P. and M.P.*, 163 N.J. 173-74.

<sup>72</sup> New Jersey Task Force on Child Abuse and Neglect Staffing and Oversight Review Subcommittee (NJTFCAN), Sixth Annual Report to Governor Chris Christie and the New Jersey Legislature, Proceeding and Findings for the

Additionally, by injecting the no harm standard into the Visitation Statute, the Court grounded its authority to enforce and impose post adoption visitation agreements in its constitutional *parens patriae* jurisdiction in the absence of legislative authority. At the same time, the Court appealed to the putative adoptive parents' altruism by asking that they embrace the children's unique circumstances as they are and not pretend that "a deep bond between siblings who have been adopted does not exist."<sup>73</sup> Its appeal and expressed willingness to judicially impose visitations, although under very narrowly defined circumstances to prevent additional harm to a child, is perhaps as far as the Court is able to go to protect sibling bonds post adoption without compromising the constitutionally and legislatively protected rights of the adoptive parents.

### III. Siblings Constitutional Rights to Visitation

In *SS*, the Court did not reach the constitutional question of whether siblings have a constitutional right to visitation or association with one another, and *D.C.* was decided under the State's Visitation Statute and the Court's constitutional *parens patriae* jurisdiction to protect children from harm. It has been argued however, that siblings have a separate liberty interest to family privacy founded on either the Federal Constitution's First Amendment right to

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[http://www.nj.gov/news/reportsnewsletters/taskforce/SORSreport\\_Jun12.pdf](http://www.nj.gov/news/reportsnewsletters/taskforce/SORSreport_Jun12.pdf) (last visited on 4/4/13) (“[E]ngaging families in a way that enables them to successfully reunite continues to be a challenge. One of the most important aspects of family reunification is quality, consistent visitation between parents and children and siblings while children are in out-of-home placement. The monitor’s data, however, show that New Jersey’s visitation practices are not meeting this goal. As a result, SORS will delve deeper into this issue in the coming year to look more closely at ways DCF can improve both the quantity and quality of visitation among family members in the child welfare system.”).

<sup>73</sup> *In re D.C.*, 203 N.J. 545, 576-77 (2010).

association or the Fourteenth Amendment Due Process Clause right to privacy but, thus far, no court has held that a liberty interest exists on either ground.<sup>74</sup>

The United States Supreme Court had an opportunity to address the issue but denied certiorari in *Hugo P. v. George P.*,<sup>75</sup> where it was asked to determine whether or not siblings had a constitutional right to family integrity similar to the one it recognized between a parent and child in cases such as *Stanley v. Illinois*<sup>76</sup> and *Santosky v. Kramer*.<sup>77</sup> In the underlying case *Adoption of Hugo*, after weighing many factors, the trial court found that the benefit of keeping Hugo with his foster mother, who had already adopted his sister, and “avoiding the trauma of the loss of these supportive people,” was outweighed by the long-term benefit of moving him “into a family of relatives who [were] better able to help him meet his potential.”<sup>78</sup> There, the lower court did not give any special weight to Hugo’s relationship with his sister but did include it as one of the factors it considered in determining what was in his best interests.

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<sup>74</sup> Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 8 (2011).

<sup>75</sup> *Adoption of Hugo*, 700 N.E.2d 516 (1998), cert denied *Hugo P. v. George P.*, 526 U.S. 1034 (1999).

<sup>76</sup> *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) (Holding that under the Due Process Clause of the Fourteenth Amendment, an unwed father was entitled to hearing on his fitness as a parent before his children could be taken from him in dependency proceeding.); see also *Caban v. Mohamed*, 441 U.S. 380(1979) (Where the Court held there was no demonstrable legitimate state interest in the gender-based distinction which did not permit unwed fathers to adopt their children without the mother’s consent. There the putative father demonstrated substantial interest in his children as he had been providing both emotional and financial support.); but see *Quillion v. Walcot*, 434 U.S. 246 (1977), reh’ denied 435 U.S. 918 (1978); (A unanimous court held that a putative father, who had no contact with his biological child, had no constitutional right to oppose the adoption of that child.).

<sup>77</sup> *Santosky v. Kramer*, 455 U.S. 745, 745-46 (1982) (“White, held that under the Due Process Clause of the Fourteenth Amendment, unwed father was entitled to hearing on his fitness as parent before his children could be taken from him in dependency proceeding instituted by the State of Illinois after the death of the children's natural mother. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental rights termination proceeding interferes with that fundamental liberty interest. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”); but see *Lehr v. Robertson*, 463 U.S. 248, 249 (1983) (Holding the Fourteenth Amendment Due Process and Equal Protection Clauses did not require that a putative father, who had not established a relationship with his biological child nor registered with the putative father register, receive notice and a hearing before the child can be adopted. “[H]is interest in personal contact with his child acquires substantial protection under the Due Process Clause. But the mere existence of a biological link does not merit equivalent protection.”).

<sup>78</sup> *Adoption of Hugo*, 700 N.E.2d 516, 522 (1998).

By contrast, the *Troxel* court determined that a parent's fundamental right in their relationship to their children did required special weight when their decisions are challenged by a nonparent third party. The plurality in that case, established that granting visitations to a third party against the wishes of a fit parent without giving any special weight to the parent's decision was an unconstitutional infringement on her fundamental right to make decisions concerning the care, custody, and control of her children.<sup>79</sup> The Court however, did not reach the question of whether the Due Process Clause requires that all third party visitation statutes impose a showing of harm or potential harm as a condition precedent for granting the sought after visitations. Instead, its decision rested on the challenged statute's unconstitutional overbreadth and application.<sup>80</sup> Additionally, the Court opted not to establish any bright line rule regarding third party visitations as "much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter."<sup>81</sup>

In his dissent, Justice Stevens raised the issue that although the Court had not "yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seem[ed] extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation."<sup>82</sup> Similarly in other contexts, the Justices have recognized children's liberty interests apart from those of their parents.<sup>83</sup> For example in *Yoder*, Justice Douglas argued in his dissent that apart from the

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<sup>79</sup> *Troxel v. Granville*, 530 U.S. 71 (2000).

<sup>80</sup> *Id.* at 58.

<sup>81</sup> *Id.* at 73-74.

<sup>82</sup> *Id.* at 88-89 (Stevens, J., dissenting).

<sup>83</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 243-44 (1972) (Douglas, J., dissenting in part):

parents' right to inculcate their children in their religion of choice and the State's interest in the education of its citizenry, the children's right to free exercise was also implicated in that case.<sup>84</sup>

He argued that if a child's desires conflicted with his parent's and he was mature enough to express them, it would be an invasion of the child's rights to permit imposition of the parents' desires without "canvassing his views."<sup>85</sup> "[If] an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections."<sup>86</sup>

Generally the Court has recognized that, although unspecified, the individual liberty protected by the Bill of Rights necessarily includes the ability to form and preserve certain kinds of "highly personal relationships" without unjustified State interference.<sup>87</sup> "Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently

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Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests. These children are 'persons' within the meaning of the Bill of Rights. We have so held over and over again. In *Haley v. Ohio*, 332 U.S. 596 (1948) we extended the protection of the Fourteenth Amendment in a state trial of a 15-year-old boy. In *re Gault*, 387 U.S. 1, 13 (1967), we held that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.' In *In re Winship*, 397 U.S. 358 (1970), we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment.

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), we dealt with 13-year-old, 15-year-old, and 16-year-old students who wore armbands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged. 'Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.'

*Id.* at 511.

<sup>84</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (In that case, the Court held that the First and Fourteenth Amendments prevented a state from compelling that Amish parents send their children to high school after graduating from the eighth grade.).

<sup>85</sup> *Id.* at 242 (Douglas, J., dissenting in part).

<sup>86</sup> *Id.*

<sup>87</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984).

to define one's identity that is central to any concept of liberty.”<sup>88</sup> “[F]reedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”<sup>89</sup>

In the foster care context the Court did not find a constitutional liberty interest in statutorily created foster family relationships.<sup>90</sup> The Court reasoned that “the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in ‘this Nation's history and tradition.’”<sup>91</sup> While it did not deny that in some cases liberty interests may arise from positive-law source, it indicated that in those instances it would be appropriate to determine the parties’ expectations and entitlements from the state law.<sup>92</sup> However, it did indicate that in a situation where a child has been living with a foster family for several years and it is the only family she has ever known, “it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.”<sup>93</sup>

In *Roberts v. U.S. Jaycees*, the Court addressed the constitutional protection warranted by certain personal affiliations such as those attending to the “creation and sustenance of a family—marriage, e.g., *Zablocki v. Redhail*; childbirth, e.g., *Carey v. Population Services International*; the raising and education of children, e.g., *Smith v. Organization of Foster Families*; and cohabitation with one's relatives e.g., *Moore v. East Cleveland*.”<sup>94</sup> In determining which other types of relationships may have claim to constitutional protection

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<sup>88</sup> *Id.* at 619-20.

<sup>89</sup> *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974).

<sup>90</sup> *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977).

<sup>91</sup> *Id.* at 845-46 (quoting *Moore v. City of East Cleveland*, 431 U.S., at 503 (1932)).

<sup>92</sup> *Id.*

<sup>93</sup> *Smith v. Org. of Foster Families*, 431 U.S. 844-45.

<sup>94</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 619-20.

limiting the States authority to interfere with an individual's freedom to enter into those associations, the court advised a careful assessment of their objective characteristics.<sup>95</sup> Similar to familial relationships, the attributes these associations are likely to have are their “relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.”<sup>96</sup>

Considering some of the Court’s decisions and dicta, the arguments made for the constitutional protection of sibling relationships, particularly those existing prior to out-of-home placement, under the Fourteenth Amendment Due Process right to familial privacy and the First Amendment freedom of association certainly seem to be justified. If a foster family situation could plausibly ripen into holding a similar place to that of a natural family in the life of a foster child, and certain nonfamilial associations that are likened to a family may enjoy a constitutionally protected level of freedom from State interference, it seems only logical that siblings relationships, which are the fruit of the natural family, should have similar constitutional protections.

Unfortunately, even if there were a constitutionally protected right to association with siblings or family privacy for children, it is not likely to be absolute, nor immune from State interference. Just as parents’ right to family integrity may be subject to limited interference by the State, where its interests in the health, safety and welfare of its citizenry is concerned, so too will sibling rights be subject to limitations, particularly since the need for foster care

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<sup>95</sup> Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

<sup>96</sup> *Id.*

placement is essentially the State's exercise of its constitutional powers in protecting its citizens. The Court has always recognized an inherent right to family autonomy when it comes to parent-child relationships, yet once a child is placed in foster care that autonomy becomes significantly limited and the State's intrusion in the realm of family privacy becomes most prevalent. So much so, that there is no guarantee parents will be able to even visit with their children with any real frequency despite the constitutional and legislative provisions in place to protect their bonds and interests and the threat of termination of parental rights looming over them.<sup>97</sup> By comparison, sibling relationships, which do not enjoy the special weight afforded to parent-child relationships when challenged, are not likely to be any less vulnerable to State intrusion even if it were afforded the same level of constitutional protections once the children enter foster care.

#### IV. Conclusion

Despite the currently recognized importance of sibling relationships by the social scientists, state and federal legislatures, and courts all over the United States, and the lasting negative effects associated with their loss, children in foster care are often separated while in placement and permanently after they have been adopted. Even with the enactment of statutes on both the state and federal levels requiring that reasonable efforts are made to place siblings together during their stay in out-of-placements, less than 50 percent of children who also have siblings living in foster care are placed with their siblings.<sup>98</sup> This phenomenon is not specific to the Division in New Jersey alone, as it is the same for many child welfare agencies in other parts of

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<sup>97</sup> See generally New Jersey DCF, Modified Settle Agreement, *supra* note 41; see also Children's Rights News Blog: New Data, Same Tragic Story, *supra* note 45; see Tennessee Maintains Vital Improvement for Kids in Foster Care, *supra* note 45.

<sup>98</sup> Randi Mandelbaum, Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption, 41 N.M. L. REV. 1, 2 (2011).

the country. It is argued that a possible solution would be the recognition of a constitutional right to sibling association under the First Amendment or a right to family privacy for children under the Fourteenth Amendment Due Process Clause. However, just as parental rights to family integrity are subject to State interference when the State's interests in the health, safety, and welfare of its citizens are concerned, so too will children's rights be subject to similar limitation, and even more in the foster care context where those State interests are particularly implicated.

The New Jersey Supreme Court has advocated in its past decisions that the Legislature should weigh the importance of sibling relationships post adoption with the need to protect the familial autonomy of the newly created adoptive families. And, in its most recent case, *D.C.*, the Court appealed to the putative adoptive parents of older children to consider the continuation of preexisting sibling bonds as they are not empty slates and [l]ike all of us, ... is the agglomeration of all the relationships and happenstances, good and bad, of his or her lifetime.<sup>99</sup> The Court's opinions indicate that in its view, preservation of sibling bonds would be best addressed through State legislation and the parties involved.

Review of the U.S. Supreme Court decisions seems to also support this view. In *Troxel*, the Court left open how State's should handle third party petitions for visitation over a parent's objection imposing only the required special weight to parental decisions absent a showing of unfitness.<sup>100</sup> While in *Smith v. Org. of Foster Families*, it distinguished between the inherent family rights that come from a natural family and those created by statute and contracts in a foster family situation. But, it also pointed out in that case that a positive-law source may give

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<sup>99</sup> In re *D.C.*, 203 N.J. 576-77.

<sup>100</sup> *Troxel v. Granville*, 530 U.S. 71.

rise to a liberty interest, where the expectations and entitlement of the parties may be delineated in the state law itself.<sup>101</sup>

Perhaps somewhere between *Troxel* and *Smith* is a possible solution for preserving sibling relationships. Adoption law is created by state statutes and the rights of the adoptive parents arise from that positive-law source. If we were to look to that law source for the expectations and entitlements of the parties who are adopting the uniquely situated children like the ones described by the Court in *D.C.*, that have preexisting sibling relationships then foster adoptive parents can assess early on whether they will be able to accommodate those particular children. By addressing this issue sooner than later it will avoid the incursion on the parental autonomy post adoption and exposing adoptees to the additional trauma of losing another significant relationship or having to choose between their sibling and adoptive family. This can only be accomplished via careful research and legislative provisions.

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<sup>101</sup> *Smith v. Org. of Foster Families*, 431 U.S. 845-46.