

REDISCOVERING THIRD PARTY VISITATION UNDER THE COMMON LAW IN NEW YORK: SOME UNCOMMON ANSWERS

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I. INTRODUCTION

One of the most important developments in family law over the past generation has involved the conditions under which non-parents (“third parties”) have (or have not) been permitted to secure court-ordered visitation with children with whom they have formed a significant relationship. This subject intersects constitutional, statutory and common law, parental rights, children’s rights, as well as the proper role of the judiciary in adapting rules to changing conditions in society. The topic has been important, in large part, because of the dramatic changes that have occurred in society over this period. A generation ago, most children were reared by two (married) parents in the United States. Today, both as a result of a high rate of divorce and a concomitantly high rate of unmarried couples, both same- and opposite-sex, living together as families, that is no longer true—and has not been for many years.

Before the 1960s, the common law was the only means by which courts in New York could award visitation to non-parents. In the mid-1960s, the New York State Legislature amended the Domestic Relations Law to provide a statutory basis for awarding visitation to grandparents, making it easier for them to succeed in their visitation requests. The legislature has expanded this legislation several times and also added siblings as statutorily authorized non-parents who may petition for court-ordered visitation. Today, the common law of visitation has been overtaken—*eclipsed* is the better term—by the statutory scheme.

This article will examine New York common law as way of background to a critical evaluation of relatively recent caselaw regarding

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non-parent visitation rights, particularly *Ronald FF. v. Cindy GG.*,¹ a major visitation decision issued by the New York Court of Appeals in 1987. In *Ronald FF.*, the New York Court of Appeals held that the common law did not permit anyone other than legally recognized parents to secure court-ordered visitation over the opposition of the child's fit parents. I hope to demonstrate that *Ronald FF.* was wrongly decided, in large part, because the court misapplied venerable common law principles. Its error, moreover, is part of a broader misperception shared by many courts regarding the common law authority to award visitation to a non-parent over the objection of a fit, non-abandoning parent.

Today, courts routinely erroneously assert that third parties were unable to secure visitation at common law because they lacked standing to bring such proceedings. A closely related error modern courts commit is asserting that the common law stood as a barrier to permitting courts any power to make orders regarding the custody or visitation of children so long as the parents were found by the court to be "fit." These twin errors have contributed to a modern myth that, because the common law prohibited non-parents from securing court-ordered visitation, the legislature came to the rescue by enacting several statutes giving standing to specific categories of non-parents, particularly grandparents.² As a result of this myth, current law has it that all persons not specifically designated by the legislature as proper petitioners are out of luck. Furthermore, the modern description suggests that because the legislature enacted these laws in derogation of the common law, courts must strictly construe them.³ For example, many cases interpreting the grandparent visitation statute have said that grandparents had no standing at common law to seek visitation with their grandchildren when the children's parents objected.⁴ As we shall

1. 511 N.E.2d 75 (N.Y. 1987).

2. See, e.g., *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 28 (N.Y. 1991) ("At common law, grandparents had no standing to assert rights of visitation against a custodial parent; a petition seeking such relief would necessarily have been dismissed. In 1966, the Legislature enacted section 72 of the Domestic Relations Law and for the first time granted grandparents standing to seek visitation rights.").

3. See, e.g., *People ex rel. Antonini v. Tracey L.*, 646 N.Y.S.2d 703, 704 (App. Div. 1996) ("Because the right of grandparents to petition to obtain visitation is entirely statutory and is in derogation of the common law, the legislative purposes and mandates of [the statute] must be strictly observed."); *Anthony L. v. Seymour S.*, 492 N.Y.S.2d 705, 706 (Fam. Ct. 1985) ("[Domestic Relations Law] section 72 which affords visitation to a grandparent is in derogation of the common law and was enacted for want of any similar provision under existing law. As such, it must be strictly construed." (citations omitted)). See also *David M. v. Lisa M.*, 615 N.Y.S.2d 783, 784 (App. Div. 1994).

4. See, e.g., *E.S. v. P.D.*, 863 N.E.2d 100, 103 (N.Y. 2007) ("Domestic Relations Law § 72 derogates from the common-law rule that 'grandparents [have] no standing to assert rights of visitation against a custodial parent.'" (quoting *Emanuel S.*, 577 N.E.2d at 28)); *Emanuel S.*, 577 N.E.2d at 28 ("At common law, grandparents had no standing to assert rights of visitation against a custodial parent: a petition seeking such relief would

see, much of this is not merely false; in crucial respects it gets things completely backwards.

Though the legislature has generously made it easier substantively for grandparents and siblings to secure court-ordered visitation, it has not attempted to enact visitation-related legislation that specifically addresses other categories of non-parents, such as former co-parents who do not have legally recognized parental status. The law today is quite clear that, as a result of *Ronald FF*, the common law is unavailable for this important category of significantly connected parent-like figures to seek visitation with children. As a consequence, current New York law requires that if such individuals are to secure “rights” to seek court-ordered visitation over parental objection, this relief will have to come from the legislature.

The premise of this article is that current New York law is deeply problematic as a matter of social policy and as a sensible understanding of family law principles, including constitutional principles. Simply stated, current law authorizes certain adults, such as grandparents, to seek court-ordered visitation with children even if they do not have a significant connection to those children. Simultaneously, the law denies adults who have served as important parent-like figures the chance to demonstrate that allowing a parent to sever arbitrarily all ties between the child and the former parent-like figure is harmful to the child.

This premise will remain in the background, in part because I have developed it extensively elsewhere.⁵ Proving that current New York law is irrational is the easy part. I aim here to make a more difficult claim. I hope to demonstrate that current New York law is wrong and that this is the direct result of the decision in *Ronald FF*. Specifically, *Ronald FF*’s error was conceiving the non-parent’s request to secure visitation as an attempt to *expand* the common law beyond what courts had previously permitted. The article will show that the common law always was available to consider whether entering an equitable order was necessary to protect the child’s essential interests. A related error committed by the *Ronald FF* court was treating the common law rules for custody and for visitation as substantively different. As we shall see, New York’s common law did no such thing until the *Ronald FF* decision. By the time the court of appeals decided *Ronald FF*, key aspects of the common law’s treatment of

necessarily have been dismissed.” (citations omitted)); *Frances E. v. Peter E.*, 479 N.Y.S.2d 319, 321 (Fam. Ct. 1984) (“Prior to the adoption of section 72 of the Domestic Relations Law, a grandparent had no right of visitation with his grandchild over the objection of the child’s parent.” (citations omitted)); *Geri v. Fanto*, 361 N.Y.S.2d 984, 987 (Fam. Ct. 1974) (“Prior to the enactment of section 72 of the Domestic Relations Law in 1966, grandparents had no standing to assert rights of visitation against the custodial parent. The statute was designed to confer upon them such standing and to establish the procedure for making their application.”).

5. See MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 97–104 (2005).

third-party visitation were misunderstood. Once the legislature began enacting legislation giving automatic "standing" to categories of petitioners, such as grandparents or siblings, courts looked upon the common law as being less liberal because, among other things, common law did not give special treatment to non-parent petitioners based on their relationship to a child.

Ultimately, I hope to demonstrate that the court of appeals should reconsider its decision in *Ronald FF.* in light of the history of the common law described in this article. I also hope to encourage litigants to press the claim, contrary to the holding in *Ronald FF.*, that there is common law authority to consider visitation applications by non-parents whose significant relationship with a child has been arbitrarily severed by a parent to the child's detriment.

II.

COMMON LAW POWER TO AWARD CUSTODY TO NON-PARENTS

At common law, custody and visitation proceedings were treated alike, both substantively and procedurally. For this reason, I begin my discussion of specific common law cases by looking at custody disputes involving non-parents. In part IV, *infra*, I will look separately at the common law visitation cases.

Common law courts possessed the power to issue orders awarding custody and visitation to non-parents. Moreover, common law courts possessed both the jurisdiction and the power to issue orders regarding the well-being of children even when the children were being raised by their fit parents. The rules were fairly straightforward. The circumstances under which non-parents could secure court-ordered custody of someone else's children over the parents' objection had two components. The first was jurisdiction ("standing" under the modern version of this concept). Under the common law, equity was *always* available to a petitioner seeking relief from the chancellor.

At common law, the crucial issue is not who brings the petition. The chancellor sits to hear petitions concerning children "at the instance of any one."⁶ This is because common law authority to enter an order that serves the child's interests is not derived from advancing the rights of the petitioner. It is fundamentally "for the protection of infants."⁷ The

6. *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925).

7. *Id.* It is interesting to trace the source of error in characterizing the common law in the cases discussed in note 4, *supra*. It turns out that the error is subtle (but important). The appellate division in 1990 stated the common law rule with a reasonable degree of precision. In *Emanuel S. v. Joseph E.*, the court wrote that "grandparents enjoy no common-law or constitutional right to visit with their grandchildren." 560 N.Y.S.2d 211,

common law operated within clear parameters. Anyone could bring to the court's attention a claim that a child's well-being demanded oversight by the chancellor.⁸ The chancellor would investigate and hear evidence on any matter; ultimately, "the welfare of the child is the chief object to be attained, and must be the guide for the judgment of the court."⁹

This principle is best articulated by Judge Cardozo in the oft-cited *Finlay v. Finlay*.¹⁰ In *Finlay*, a parent sought custody of his child and the

213 (App. Div. 1990) (citations omitted), *rev'd*, 577 N.E.2d 27 (N.Y. 1991). This is an accurate statement of the law when the emphasis is placed on the word "right." There was no grandparent *right* at common law to create or maintain a relationship with grandchildren. However, when this case reached the court of appeals, it changed the wording to: "At common law, grandparents had no standing to assert rights of visitation against a custodial parent: a petition seeking such relief would necessarily have been dismissed." *Emanuel S.*, 577 N.E.2d at 28 (citations omitted). But as we have seen, this is untrue. The question of standing was never a barrier at common law. Petitions regarding the well-being of children were always able to be filed. Thus, the first clause of the sentence is simply false. Nor is it true that all such petitions would necessarily be dismissed. They would be dismissed if the only claim being advanced was that the children's best interests warranted granting the relief. Common law courts required a showing of grievous need.

In *Frances E.*, the court accurately wrote only that "[p]rior to the adoption of section 72 of the [Domestic Relations Law], a grandparent had no right of visitation with his grandchild over the objection of the child's parent." 479 N.Y.S.2d. at 321 (citations omitted). Again, this is unassailable because it emphasizes *rights*. The common law did not conceive of chancery power as enforcing an adult's rights. The focus was on protecting children from harm. The source of the error is *Geri v. Fanto*, where Judge Glasser wrote that "[p]rior to the enactment of section 72 of the Domestic Relations Law in 1966, grandparents had no standing to assert rights of visitation against the custodial parent." 361 N.Y.S.2d at 987. If the sentence is correct, it is only because of the phrase "rights of visitation." Had Judge Glasser written, as Judge Capilli did in *Frances E.* in 1984, only that "a grandparent had no right of visitation," he would have accurately described the common law. See *Francis E.*, 479 N.Y.S.2d at 321. Regrettably, in *Emanuel S.*, Judge Simons copied Judge Glasser's prose. But to say a grandparent did not have standing to assert rights is to confuse two different concepts. Under the proper conditions, at common law grandparents not only could seek visitation but could prevail. But they could do neither because of any "rights" they possessed. To the extent the legislature extended "rights" to grandparents in enacting section 72, it is useful to clarify that they did not have common law rights. But it is false and misleading to say they could not seek visitation. They could and they did.

8. Though the analogy is imperfect, one might think of the common law as having characteristics associated with modern child welfare practice. Just as today, everyone in society is eligible to be a reporter and call in concerns to the child welfare hotline, which will trigger an investigation by child protection officials, under the common law, anyone could petition the chancellor to investigate the well-being of a child, even when the child's parent was raising the child. Because of this extraordinary breadth in terms of who may trigger the investigation, it would be no more coherent to regard the petitioner in the common law proceeding as having "rights" or "standing" than it would be to think of a neighbor or passer-by as having "rights" to call the hotline. Both are simply devices to permit further inquiry.

9. *People ex rel. Pruyn v. Walts*, 25 N.E. 266, 267 (N.Y. 1890). See also *People ex rel. Scalise v. Naccari*, 118 N.Y.S.2d 90, 91 (App. Div. 1953) (reserving authority to supervise a parent's childrearing choices if it appeared that "the custody is not administered in the best interests of the children").

10. 148 N.E. at 626.

custodial parent sought dismissal of the proceeding on the basis that the petitioner did not meet the statutory criteria for commencing a writ of habeas corpus. The court of appeals held that New York courts nonetheless possessed common law equitable power to hear his request for custody.¹¹ First, the court ruled that the legislative enactment of a statutory habeas proceeding did nothing to affect the jurisdiction, inherent in courts of equity. This is so, the court explained, because the common law authority is not a “remedy by suit. It is a remedy by petition. The distinction is implicit and fundamental alike in the genesis of the jurisdiction and in its subsequent development.”¹² Instead, the chancellor’s common law power always continues and has survived intact in New York. In setting forth the depth and breadth of that power, Judge Cardozo famously wrote that the chancellor

acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a “wise, affectionate, and careful parent,” and make provision for the child accordingly. He may act at the intervention or on the motion of a kinsman, if so the petition comes before him, but equally he may act at the instance of any one else. He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights “as between a parent and a child,” or as between one parent and another. He “interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*.”¹³

Little more need be said regarding what modern lawyers call “standing.”¹⁴ “Standing” simply was not a pertinent concept at common law.

This does not mean, of course, that the common law court exercised its power often. To the contrary, it was jealously guarded. So much so, perhaps, that our modern understanding of pre-statutory days has lost entirely the distinction between power and its exercise. No one can doubt

11. *Id.* (“If we were to assume with the plaintiff that the writ has been denied to him, there would remain his remedy by petition to the chancellor or to the court that has succeeded to the chancellor’s prerogative.”).

12. *Id.*

13. *Id.* (citations omitted). Judge Cardozo extolled the virtues of the common law petition because, in contrast with lawsuits, “[t]he remedy by petition is summary and cheap and swift. It comes to us established and consecrated by tradition and practice immemorial.” *Id.*

14. We will later come to see the importance of the first feature of *Finlay*, that common law powers survived intact even after the legislature saw fit to enact statutory rules for filing petitions for habeas corpus. See *infra* note 211 and accompanying text. This rule, simply stated, is that the equitable “powers are not limited by the specific provisions of [statutory law] . . . nor should it matter whether the relief is sought by formal petition to the Chancery or by way of writ of habeas corpus.” *Sandfort v. Sandfort*, 105 N.Y.S.2d 343, 347 (App. Div. 1951) (Shientag, J., concurring).

that the common law weighted parental rights heavily. But this weighting was applied substantively when courts had to rule for one party or the other. The common law would not deny individuals the opportunity to persuade a court that it should intervene to protect a child or to enter an order superseding a parent's view on child-rearing.¹⁵ *Winning* was difficult for the non-parent, but getting to court was not.

One of the particularly interesting features of reading these common law decisions today is just how modern they sound in terms of their commitment to protect parental rights and, correlatively, to cabin the state's power to intervene casually into the private realm of family life. Long before the Supreme Court of the United States declared the private realm of family life to be protected by the Due Process Clause of the Fourteenth Amendment,¹⁶ New York common law courts wrote with a distinctive voice well attuned to these constitutional principles. But a sensitivity to the twin concerns of protecting parental rights and constraining judicial exercise of power is hardly the same thing as denying the power in the first place.

Although most of the custody cases brought at common law involved efforts by parents to seek the return of custody of their children who are in the care of someone else, the substantive question raised by those cases is the same whether or not the parents had custody when the case was filed: when are common law courts authorized to award custody to a non-parent over a parent's objection? A 1908 case decided by the appellate division and affirmed by the court of appeals helps frame the answer. In *People ex rel. Beaudoin v. Beaudoin*,¹⁷ the mother of an eight-year-old boy named Robert brought a common law writ of habeas corpus seeking Robert's custody. Robert was raised by his mother and father for the first four years of his life and, when his father died at four, he lived with his paternal

15. See, e.g., *Bachman v. Mejias*, 136 N.E.2d 866, 869 (N.Y. 1956) ("It is the duty of the New York Supreme Court to determine the custody of minor children in this State and such determination is to be based solely on the welfare of the minors."); *People ex rel. Kropp v. Shepsky*, 113 N.E.2d 801, 803 (N.Y. 1953) ("[A] child's welfare is the first concern of the court upon a habeas corpus proceeding, where the judge acts 'as parens patriae to do what is best for the interest of the child'" (quoting *Finlay*, 148 N.E. at 626)); *Finlay*, 148 N.E. at 626 (The chancellor "acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate and careful parent,' and make provision for the child accordingly." (citation omitted)). See also *Weichman v. Weichman*, 184 N.W.2d 882, 884 (Wis. 1971) ("The question is not one of the power of the court but of judgment or of judicial discretion. The underlying principle or guideline for the granting of visitation privileges, as it is for granting custody, is what is for the best interest and welfare of the child." (citation omitted)).

16. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (citation omitted)). See also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

17. 110 N.Y.S. 592 (App. Div. 1908), *aff'd*, 86 N.E. 1129 (N.Y. 1908).

grandmother (and two paternal aunts) for the next four years.¹⁸ According to the court, Robert's mother informally attempted to secure his custody after he lived with his grandmother for about one year. Having failed in her continued efforts, she finally filed the writ of habeas corpus.¹⁹ The appellate court ordered that Robert be returned to his mother, finding that there was insufficient evidence to justify a contrary result. In the court's words, "[t]he court should not compel this child to be brought up a comparative stranger to his nearest kin except for adequate reasons looking to his welfare, and we think no such reasons have here been shown."²⁰ Even though the outcome resulted in the parent prevailing, the court reminded the reader that "[t]here is no doubt that the Supreme Court under its equity powers may, in a proper case, having regard for the welfare of an infant, take its custody from the one legally entitled thereto and give it to another."²¹

Common law cases need to be examined in the aggregate to capture the full reach of common law powers. The clearest path for non-parents to prevail in a custody case was by proving that a parent was unfit or abandoned her child. This rule is commonly expressed as follows: "The mother or father has a right to the care and custody of a child, superior to that of all others, unless he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood."²² As a result, most cases under the common law resulted in parents winning when there were disputes over custody with non-parents. But such an outcome was not assured, and courts awarded custody to non-parents when the facts warranted.²³ This is because the common law rule did not end with an inquiry into fitness and abandonment. Even when the petitioner could prove neither, non-parents could still prevail over parents when they could show that the child's welfare demanded the result.

Thus, in 1917, the court of appeals reversed a trial court order that had awarded guardianship of a child to his father.²⁴ One year earlier, the trial

18. *Id.*

19. *Id.*

20. *Id.* at 593.

21. *Id.*

22. *People ex rel. Kropp v. Shepsky*, 113 N.E.2d 801, 803 (N.Y. 1953) (citations omitted). The court cited *People ex rel. Portnoy v. Strasser*, which stated: "No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person, since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court." 104 N.E.2d 895, 896 (1952) (citations omitted). *Portnoy* involved an attempt by a grandparent to secure custody from a fit white mother on grounds that she married a black man and was a member of the Communist Party. The mother was represented, among other counsel, by the American Civil Liberties Union.

23. *See, e.g., In re Benning*, 105 N.Y.S.2d 379 (App. Div. 1951) (awarding custody to child's grandparents and aunt over father's objection), *aff'd*, 303 N.Y. 775 (1952).

24. *In re Gustow*, 115 N.E. 995, 997 (N.Y. 1917).

court had awarded guardianship to the child's aunt. When the father petitioned for custody, the court reinstated him as the child's guardian and awarded him custody without conducting a hearing. The court of appeals ruled that the trial court committed reversible error by presuming without hearing any evidence that whenever parents seek custody of their children, they ought to prevail. The court explained:

[T]he controlling principle in all cases [is] the welfare of the child, which, in the case of an infant of tender years, involves proper care and nurture, suitable environment, healthful surroundings, and education, mentally and morally. A parent who is a drunkard, an incompetent, a notoriously immoral person, cruel or unkind towards his child would not be considered a suitable person to have the custody of a young child, when the welfare of the child is considered, simply because of the relation of parent and child. While the parent ordinarily is entitled to the custody of a child, the welfare of the child may be superior to the claim of the parent.²⁵

The common law case *In re Starr*, decided in 1935, could easily have taken place in more recent times.²⁶ After the parents of a four-year-old girl divorced, the maternal grandparents took custody of her. Six years later, the grandparents took their granddaughter to Europe for a summer vacation. On their return, the mother "refused to allow the child to continue with the maternal grandparents."²⁷ After the mother took custody of her child, the grandparents petitioned in equity for an order seeking her custody.

The trial court referred the case to a referee "to hear and determine" the matter.²⁸ The referee awarded custody of the child to the grandparents with the right of visitation to the mother. After that order, the mother filed a petition of habeas corpus seeking an order awarding custody of the child to her. The appellate court remanded the case to the trial court to determine whether any change in circumstances warranted awarding custody to the mother. But the court upheld the power of the referee to award custody to the grandparents.²⁹

A 1939 court of appeals decision exemplified the principle that a court in equity may refuse to award custody to fit parents based on the detrimental impact that the custody order would have on the child. In *In re Bock*,³⁰ the court awarded custody of three children to their uncle over the objection of their fit mother who was found not to have abandoned the

25. *Id.* (citations omitted).

26. 280 N.Y.S. 753 (App. Div. 1935).

27. *Id.* at 755.

28. *Id.* at 756 (internal quotation marks omitted).

29. *Id.* at 762-63.

30. 21 N.E.2d 186 (N.Y. 1939).

children. The children had resided with the uncle for four years and they preferred to remain in his care. Two of the children were older than fourteen, an age at which common law courts were supposed to give their views special weight. The court wrote:

While it is true that, *prima facie*, a surviving parent has a right to the guardianship of the children, particularly when they are of tender age, yet under all the circumstances the chief consideration must always be what will promote the best welfare of the children. While the circumstances of a particular case must be strong in order to overcome the so-called paramount right of the parent, yet where the circumstances of a particular case contain such evidence, the best interest of the infants must be the guiding principle. The surroundings and associations of the young have so great an effect upon their outlook and so form the basis of their future development that nothing should prevent the courts from considering the human aspects of the question presented. . . . To force these children into an environment to which they are so strongly opposed in any event would be unpleasant and might be attended by very serious results to their development [T]he Surrogate was not without power to appoint the paternal uncle . . . guardian of the person as well as of the property, even though no fault or moral turpitude was shown on the part of the mother.³¹

Exquisite attention to the needs of the children was also fully in play in a 1952 decision, *Benning v. Nigro*.³² In that case, the court of appeals affirmed an order dismissing a writ of habeas corpus brought by a fit father seeking the return of his child. The child's maternal grandparents had raised the child since shortly after his birth when his mother died. Despite the lack of evidence that the father was unfit or had abandoned the child, the lower court stressed that he had visited the child on only two occasions prior to filing a writ of habeas corpus and had telephoned on only several other occasions.³³ The trial court found that the child "is quite content and is receiving affectionate care from the grandparents" and was "of the opinion that the infant is of too tender an age to be uprooted from a contented and wholesome environment."³⁴ Neither the appellate division nor the court of appeals was able to discern anything wrong with the trial court's ruling.

Though many of the cases brought at common law have a familiar ring in today's world, fifty years ago unmarried couples did not often live and raise children together. Even less commonly did a former partner consider

31. *Id.* at 187-88.

32. 303 N.Y. 775 (1952), *aff'g* 105 N.Y.S.2d 379 (App. Div. 1951).

33. *Id.* at 775.

34. *Id.* at 775-76.

going to court to seek a continued relationship with the children after the adult relationship ended. Indeed, there are no known cases of this sort involving same-sex relationships filed in any court in New York before the 1980s. Though those relationships formed, they rarely included having children and even more rarely did they have children together premised on the understanding that the children would have two moms or dads. Nonetheless, there is nothing in common law doctrine to suggest that the common law would not have authorized issuing orders to ensure continued contact between children and significant adults who helped raise them, at least when a showing was made that the children would suffer harm if all contact with the adult were severed.

* * * *

Thus far, I have discussed custody cases in which the parties initially arranged a custody agreement wholly beyond the oversight (and even concern) of state law or rules. The private arrangement involved parents giving their children to some trusted person, commonly a friend or relative, without any formal, written understanding of what the future would hold. Eventually, one of the parties went to court to try to change the informal custody agreement.

There is, however, a second category of custody cases decided under common law. In this category, the underlying custody arrangement is regulated by an elaborate statutory scheme involving foster care or adoption. A common example is a custody fight between birth parents and putative adoptive parents following unsuccessful efforts to adopt a child. In these cases, one of the parties goes to court under the common law to try to change the custody arrangement that had originated through the adoption statute. Almost all of the celebrated common law custody disputes that were decided by the court of appeals from the early 1950s through the mid-1970s fall into this category. These highly regulated contexts contrast sharply with the private disputes that arise when parents informally ask friends or relatives to care for their children without any written understanding of what the future will bring.

In 1953, the court of appeals decided *People ex rel. Kropp v. Shepsky*,³⁵ where the key question was what to do after the birth mother validly revoked her consent to the planned adoption and sought the return of her child, who was in the care of putative adoptive parents. The court wrote that in this type of dispute the “burden rests . . . upon the nonparents to prove that the mother is unfit to have her child and that the

35. 113 N.E.2d 801 (N.Y. 1953).

latter's well-being requires its separation from its mother."³⁶ Moreover, the court held: "Except where a nonparent has obtained legal and permanent custody of a child by adoption, guardianship or otherwise, he who would take or withhold a child from mother or father must sustain the burden of establishing that the parent is unfit and that the child's welfare compels awarding its custody to the nonparent."³⁷ Then, in 1959, the court thwarted an effort by foster parents who had temporary custody of a four-year-old girl for virtually all of her life to interfere with the foster care agency's plan to remove the child from their home for the purpose of an eventual return to the birth mother.³⁸

The same rule was reaffirmed by the court of appeals in 1971 in the closely related context of a custodial dispute in the wake of a failed adoption. In *People ex rel. Scarpetta v. Spence-Chapin Adoption Service*,³⁹ a couple who hoped to adopt an infant they brought home from an adoption agency refused to return the child to her mother. Citing a long string of cases, the court reiterated the familiar rule that absent abandonment or unfitness, parents have a superior right to the custody of their children over all others.⁴⁰ And, a few months later, in *Spence-Chapin Adoption Service v. Polk*,⁴¹ the court ruled that once the surrender of parental rights, the precondition to planned adoption, is nullified, courts must return children to their birth parents over the objection of the temporary custodians "unless compelling reason stemming from dire circumstances or gross misconduct forbid it in the paramount interest of the child, or there is abandonment or surrender by the parent."⁴²

In these highly regulated cases, it is unsurprising that the court of appeals would stress that only a showing of unfitness or abandonment would justify a common law court's refusal to order the return of the child to her birth parents. The legislature intended that parents could forfeit their parental rights only in accordance with a carefully calibrated statutory scheme. When that scheme does not allow for parental forfeiture, the legislature intended that the parents have restored to them the bundle of rights they enjoyed before the adoption was planned or the child entered foster care.⁴³ However, as we have seen in the first category

36. *Id.* at 804 (citations omitted).

37. *Id.* *Cf. Ex parte* Livingston, 135 N.Y.S. 328, 332 (App. Div. 1912) (holding that failure to give notice of adoption proceeding to biological parents voided adoption).

38. *See In re* Jewish Child Care Ass'n, 156 N.E.2d 700 (N.Y. 1959).

39. 269 N.E.2d 787 (N.Y. 1971).

40. *Id.* at 791 (quoting *People ex rel. Kropp v. Shepsky*, 113 N.E.2d 801, 803 (N.Y. 1953)).

41. 274 N.E.2d 431 (N.Y. 1971).

42. *Id.* at 432-33.

43. *See, e.g., In re* Michael B., 604 N.E.2d 122 (N.Y. 1992) (finding that a statutory

of custody cases where parents chose and privately arranged to involve a third party in their child's life, common law courts felt it was their responsibility to consider the impact on the child when deciding a contested custody dispute between a parent and a non-parent and were willing to award custody to a non-parent over a fit parent's objection when the child's well-being demanded it.

III.

BENNETT V. JEFFREYS AND THE MODIFICATION (OR CLARIFICATION) OF THE COMMON LAW RULE

It is against this backdrop of common law cases that the court of appeals decided *Bennett v. Jeffreys* in 1976.⁴⁴ In *Bennett*, the court resolved a dispute between Bennett, the mother of eight-year-old Gina Marie, and Jeffreys, a family friend who had been raising Gina Marie (at Bennett's request) for most of the child's life. This case went to court because when Bennett was ready to regain Gina Marie's custody, Jeffreys refused to return her. The trial court found, and the appellate court agreed, that Bennett was a fit parent and had neither surrendered nor abandoned Gina Marie.⁴⁵

Given the prominent common law cases related to foster care and adoption schemes that the court of appeals had recently decided, *Bennett* provided an opportunity to refocus the common law when the dispute was unrelated to any regulated custody activity. *Bennett* was a "pure" common law case in the sense that the custodial arrangement, which eventually came to be the subject of the dispute, arose wholly outside of any statutory or regulatory arrangement and was simply the product of a private plan.⁴⁶

scheme intended to place children with family members did not encompass placement with a foster family and therefore child should be returned to father barring finding of unfitness).

44. 356 N.E.2d 277 (N.Y. 1976).

45. *Id.* at 280, 285.

46. *See id.* at 280–81. The court, both before and after *Bennett*, has insisted on protecting parental rights in a manner consistent with the legislative intent whenever there was room to interpret common law principles. Thus, when the dispute was over custody after a failed adoption and the putative adoptive parents refused to return the child to the birth parent whose "surrender" was deemed invalid, courts refused to give great weight to the impact on the child as a consequence of being removed from the only home she had ever experienced. *See, e.g., Spence-Chapin Adoption Service v. Polk*, 274 N.E.2d 431, 433 (N.Y. 1971). Although *In re Sarah K.* was decided on different grounds, it, too, did not seek to invoke *Bennett* principles. 487 N.E.2d 241, 251 (N.Y. 1985) (finding it unnecessary to consider lower court's best interest determination because adoption statute's limit on revocation of consent for adoption controlled outcome). Similarly, when disputes arose in the foster care context, the court, both before and after *Bennett*, insisted that it reconcile common law principles

The *Bennett* court ruled that common law courts possessed the authority to permit Jeffreys to keep Gina Marie. Originally, at the trial level, the family court denied Bennett's request for her child's return, ruling that Gina Marie's best interests required the court to permit her to remain with her long-term caregiver.⁴⁷ The appellate division reversed, ruling that because Bennett had not abandoned, surrendered, or neglected her child, the court was required to award her custody.⁴⁸

The court of appeals chided both of the lower courts. It ruled that the trial court erred because it decided the case simply based on Gina Marie's best interests, without giving any special weight to the law's preference that families of origin raise their children.⁴⁹ But it also ruled that the appellate division committed reversible error by woodenly awarding custody to Bennett based solely on its legal conclusions that she was fit and had neither abandoned her child nor surrendered her parental rights.⁵⁰ The court of appeals recognized that ordinarily "it is not within the power of a court . . . to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition"⁵¹ and that this common law rule fits quite well with the constitutional protection afforded parents against overreaching by state officials when it comes to child-rearing.⁵² But, the court also emphasized, the common law is sufficiently flexible to permit courts discretion, when necessary, to make custodial orders that are good for children.⁵³

Bennett held that a parent may not be denied custody of her child "absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances."⁵⁴ "If any of such extraordinary circumstances are present," explained the court, "the disposition of custody is influenced or controlled by what is in the best interest of the child."⁵⁵ The court ruled that the "extraordinary circumstances" present in the case were "the prolonged separation of mother and child for most of

with the regulated scheme that gave rise to the custody arrangement in the first place. See *In re Michael B.*, 604 N.E.2d 122 (N.Y. 1992).

47. See *Bennett v. Jeffreys*, 378 N.Y.S.2d 420, 421 (App. Div. 1976), *rev'd*, 356 N.E.2d 277 (N.Y. 1976).

48. *Id.*

49. *Bennett*, 356 N.E.2d at 284.

50. *Id.* at 284-85.

51. *Id.* at 281.

52. *Id.* ("[U]nder existing constitutional principles, [courts are] powerless to supplant parents except for grievous cause or necessity." (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972))).

53. *Id.* at 281-82.

54. *Id.* at 280 (emphasis added).

55. *Id.*

the child's life."⁵⁶ In light of this, it was necessary to make an "inquiry into the best interest of the child."⁵⁷

The phrase "extraordinary circumstances" has ever since dominated the field. This has had unfortunate consequences. Had *Bennett* simply applied well-worn common law principles, the court could have reached the same result, reminding everyone that common law courts have the power to award custody to non-parents over a fit parent's objection provided such an order was "essential to the child's welfare."⁵⁸

Indeed, it is perplexing why Chief Judge Breitel coined "extraordinary circumstances" in the first place. His opinion made clear that, at common law, "when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody."⁵⁹ Yet, he seemed to suggest that *Bennett* was breaking new ground by stressing that the case reflected "more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude."⁶⁰

It is perhaps understandable that in the mid-1970s, a progressive common law court would strive to shift its emphasis towards children's rights. The "psychological parent" theory had only recently become prominent in legal circles as a consequence of the remarkably influential 1973 publication of *Beyond the Best Interests of the Child* by Joseph Goldstein, Anna Freud, and Albert J. Solnit.⁶¹ This helped the *Bennett* court place a label on the need for common law courts to strive to protect children from the harm associated with the disruption of "psychological bonds" formed between a child and a long-term caregiver.⁶² "[E]ven though there has been no abandonment or persisting neglect by the parent," the court explained, "the psychological trauma of removal [may be] grave enough to threaten destruction of the child."⁶³ In the end, it was "the protracted separation of mother from child, combined with the mother's lack of an established household of her own, her unwed state,

56. *Id.*

57. *Id.*

58. *See, e.g.,* *People ex rel. Marks v. Grenier*, 293 N.Y.S. 364, 365–66 (App. Div. 1937), *aff'd*, 10 N.E.2d 577 (N.Y. 1937); *People ex rel. Barry v. Mercein*, 3 Hill 399, 412 (N.Y. Sup. Ct. 1842).

59. *Bennett*, 356 N.E.2d at 281.

60. *Id.* at 281 (citations omitted).

61. According to Joseph Goldstein, Anna Freud, and Albert J. Solnit, a psychological parent is "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (1973).

62. *Bennett*, 356 N.E.2d at 286 (Fuchsberg, J., concurring) (making specific reference to "the psychological parent").

63. *Id.* at 284.

and the attachment of the child to the custodian” that led the court to conclude that these combined circumstances authorized a common law court to decide the case based on the child’s needs, not the “rights” of the adults.⁶⁴

Although the psychological parent theory obviously influenced the court’s reasoning in *Bennett*, the common law recognized its underlying principles long before the 1970s. Indeed, Judge Breitel himself authored an opinion in 1962, when he was on the appellate division, rejecting an attempt by a parent to revoke her surrender of parental rights (thereby freeing her child for adoption), relying in part on the reasoning that “especially with the passage of time, the interests of the child would be seriously and increasingly jeopardized by return.”⁶⁵ In addition, as we have seen, this case fits well with the 1952 court of appeals case *Benning v. Nigro*, which upheld a common law court’s order denying a fit father’s request for custody of his three-year-old child who had been living with her grandparents because “the infant is of too tender an age to be uprooted from a contented and wholesome environment.”⁶⁶

As Chief Judge Breitel explained, when common law courts refused to award custody to parents, it was “not as a moral sanction for parental failure, but because ‘the child’s welfare compels awarding its custody to the nonparent.’”⁶⁷ Chief Judge Breitel also quoted from a 1961 court of appeals decision which said no common law court ever ruled “that the child’s welfare may ever be forgotten or disregarded.”⁶⁸

I do not mean to dwell on the issue that although *Bennett* used some new language, it added relatively little to the common law. Even if one concludes that *Bennett* broadly advanced the common law, one thing remains undeniable: after 1976, common law courts were expected to take an ever closer look at the impact of its custodial orders on children’s well-being. Parents do not have the “right” at common law to the automatic return of their children, regardless of the circumstances under which they originally gave up custody and the irreparable harm that their children may suffer. To this extent, to be clear, fit parents do not have unfettered freedom to make all decisions regarding their children’s upbringing.

64. *Id.*

65. *People ex rel. Anonymous v. N.Y. Foundling Hospital*, 232 N.Y.S.2d 479, 484 (App. Div. 1962), *aff’d*, 187 N.E.2d 791 (N.Y. 1962).

66. 303 N.Y. 775, 776 (1952), *aff’g*, 105 N.Y.S.2d 379 (App. Div. 1951).

67. *Id.* at 281–82 (citations omitted).

68. *Bennett*, 356 N.E.2d at 282 (quoting *People ex rel. Anonymous v. Anonymous*, 179 N.E.2d 200, 201 (N.Y. 1961)) (internal quotation marks omitted).

IV.

COMMON LAW POWER TO ORDER VISITATION TO A NON-PARENT OVER PARENTAL OBJECTION

What ought to be the connection between the rule for resolving custody disputes between parents and non-parents and the rule for resolving visitation disputes between parents and non-parents? One possible answer is that the same substantive rule would apply to both situations. Since court-ordered visitation over parental objection constitutes a significant intrusion into a parent's freedom to raise children, the non-parent should have to show as much to secure visitation as she would have to show to secure custody. A second possibility seems apparent (and perhaps even stronger): since visitation represents a lesser intrusion compared with the outright denial of custody, courts should be permitted to order visitation based on a less compelling basis than would be needed to award custody.

However, New York law rejected both of these rules. In its place, New York law applies a third rule: non-parents may *never* secure visitation of a fit parent's child *except to the extent the legislature allows it*. More precisely, New York law no longer recognizes a common law basis for a non-parent to seek visitation of someone else's child without proving either abandonment or unfitness. As remarkable as this is, how the court reached this result is even stranger. Before discussing the 1987 court of appeals decision that reached this result, it will be helpful to return to the common law and see what courts said about the power to order visitation to non-parents over the objection of fit parents prior to the 1987 case.

Before 1987, common law courts embraced the first option mentioned above—that the same substantive rule would apply to both custody and visitation disputes. One of the core common law principles (perhaps the one which has been least appreciated in recent years) was the symmetry with which the law treated efforts to secure custody and efforts to secure visitation. This is hardly surprising, given the common law's insistence that judicial power to intervene in a family be jealously guarded.⁶⁹ As a consequence, the common law reluctantly intervened and required as strong a showing when seeking visitation as when seeking custody.

69. See, e.g., *People ex rel. Kropp v. Shepsky*, 113 N.E.2d 801, 803 (N.Y. 1953) (citations omitted). The court cited *People ex rel. Portnoy v. Strasser*, which stated: "No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person, since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court." 104 N.E.2d 895, 896 (N.Y. 1952) (citations omitted).

The explanation for this rule is well developed in *Noll v. Noll*,⁷⁰ a case involving an attempt by grandparents to secure visitation of their grandchild. Because the common law treated visitation as “custody for a limited time,”⁷¹ the common law rule regarding when the court may order visitation over parental objection is as restricted as is the rule of when the court may award custody. As the *Noll* court explained, visitation “remains an interference with complete custody pro tanto.”⁷²

Noll involved a dispute between paternal grandparents who wished to maintain a relationship with their deceased son’s child and the child’s mother, who opposed such contact. The trial court awarded visitation to the grandparents. That order was reversed on appeal. *Noll* stressed that the same rights the parents had possessed jointly were now the mother’s and that she, as a fit parent, had “the sole authority and will” to decide whether visitation was appropriate or not.⁷³ The court reached this result based on two legal conclusions. First, “the mother is the proper, natural and legal custodian of her child, unwilling to have visitation by the petitioners.”⁷⁴ But that did not end the inquiry. In addition, the court added that it is improper to award visitation to the grandparents because “the welfare, contentment, peace of mind and happiness of the child *do not make it essential to have continued contact with the grandparents.*”⁷⁵

Just as common law courts were willing to entertain claims that the child’s well being made it essential to award custody to a non-parent, so, too, would they consider the impact on a child that would result from refusing to order visitation. That a non-parent had to show that granting visitation was “essential” to the child’s well-being is evidence of the common law’s commitment to err on the side of supporting parental

70. 98 N.Y.S.2d 938 (App. Div. 1950).

71. *Id.* at 940 (“Further, on the theory that visitation is custody for a limited time, it remains an interference with complete custody pro tanto and parents, whose fitness for custody is not questioned, as here, are given, by the uniform decision of courts of this state, regardless of the type of proceeding, (petition to the equity side of the court, as *parens patriae*, habeas corpus, adoption, guardianship proceedings in Surrogate’s Court)—custody paramount to the world.”). See *People ex rel. Hacker v. Strongson*, 141 N.Y.S.2d 859, 860 (Sup. Ct. 1955) (“Visitation is a form of custody, and custody is a legal right which properly belongs to the parents only.”); *Ex parte People ex rel. Cox*, 124 N.Y.S.2d 511, 515–16 (Sup. Ct. 1953) (“Here we have paternal grandparents who seek not custody as such, but visitation which in substance is custody pro tanto and to that extent to oust the mother of her natural right to custody and the custody awarded to her by the above decrees of this court. . . . For want of a better expression, and to avoid confusion, the courts have referred to such division of custody as the ‘right of visitation.’”).

72. *Noll*, 98 N.Y.S.2d at 940.

73. *Id.*

74. *Id.* at 941.

75. *Id.* at 941 (emphasis added). Remarkably, the standard “essential to the child’s well-being” presaged an important disagreement fifty years later over what the Constitution requires. See *infra* part VI.

choice, but it is also evidence of the chancellor's ultimate power to reject that choice.⁷⁶

Moreover, the common law rule that courts were always available to entertain requests to ensure a child's well-being also applied equally to custody and visitation matters. In *Ex parte People ex rel. Cox*,⁷⁷ paternal grandparents brought a writ of habeas corpus seeking court-ordered visitation of their 20-month-old granddaughter who was being raised by her mother. The court rejected the claim that there was no statutory authority for grandparents to sue for visitation and that the legislature only provided a remedy for parents, holding that the "statute is not exclusive or the only authority for the exercise of the power of this court over the custody and possession of minor children."⁷⁸ Rather, the court possesses the common law authority "in the protection that is due to the incompetent or helpless. The court having jurisdiction of the subject matter may inquire into the custody, control and cause of detention of any child found within its territory."⁷⁹ The court stressed that it "has the widest powers of interference in behalf of infants who stand in need of its protection"⁸⁰ and, moreover, that "*any person on behalf of an infant may make this application.*"⁸¹ This, of course, simply follows the common law rule regarding who may initiate a proceeding seeking custody of a child.⁸²

V.

RONALD FF. V. CINDY GG.

Ironically, eleven years after the court of appeals, in *Bennett*, reminded common law courts of their inherent power to protect children's interests when deciding custody disputes between parents and non-parents, the same court refused to apply this important principle to visitation disputes. Astonishingly, in 1987, in *Ronald FF. v. Cindy GG.*,⁸³ the court

76. See *People ex rel. Marks v. Grenier*, 293 N.Y.S. 364, 366 (App. Div. 1937) (denying grandparent visitation because it was not "essential to the child's welfare to direct such continued contact"), *aff'd*, 10 N.E.2d 577 (N.Y. 1937); *Ex parte People ex rel. Cox*, 124 N.Y.S.2d at 516 (denying grandparent visitation since parties did not attempt to demonstrate that child's welfare was not being promoted by the present custody). See also *Consaul v. Consaul*, 63 N.Y.S.2d 688 (Sup. Ct. 1946).

77. 124 N.Y.S.2d 511 (Sup. Ct. 1953).

78. *Id.* at 514 (citations omitted).

79. *Id.* (citations omitted).

80. *Id.* (citing *People ex rel. Sisson v. Sisson*, 275 N.Y.S. 299 (Sup. Ct. 1934), *aff'd*, 2 N.E.2d 660 (N.Y. 1936)).

81. *Id.* at 515 (emphasis added). See also *Sandfort v. Sandfort*, 105 N.Y.S.2d 343, 346 (App. Div. 1951) (explaining that state Supreme Court has broad equitable powers to issue orders necessary to protect children within the state).

82. See *supra* notes 6–16 and accompanying text.

83. 511 N.E.2d 75 (N.Y. 1987).

of appeals expressly limited the "extraordinary circumstances" rule established in *Bennett* to custody proceedings in an important, but far too short, decision. Through this decision, the court of appeals severely constrained the power of courts deciding visitation cases by prohibiting courts from awarding visitation under the common law to a non-parent over the objection of a fit parent regardless of the impact on the child.

In *Ronald FF.*, Ronald and Cindy had an intimate relationship prior to Cindy's becoming pregnant. After Cindy learned she was pregnant, she told Ronald that she was expecting what was very likely his child.⁸⁴ They moved in together for the five months before the child's birth. Ronald assisted Cindy during her pregnancy, was present at the delivery, and was listed as the father on the child's birth certificate.⁸⁵ Over the next year or so, the family lived together before the couple decided to separate. Even after the separation, Ronald visited the child regularly and Cindy even sued him for child support. When Ronald learned that Cindy was planning to move to Texas, he filed a proceeding in family court seeking visitation rights and a temporary restraining order to prevent her from moving.⁸⁶ In response, the court ordered blood testing to ascertain his legal status as the child's father. That was when the parties learned that Ronald was not the child's biological father.⁸⁷

As a result, Ronald went from having the legal status of parent to having a very different status. As a "third party" with no legally recognized rights to the child, Ronald's case did not readily fit under the statutory provision authorizing parents to seek visitation of their children. Accordingly, the courts treated Ronald's case as though he brought it pursuant to the common law.⁸⁸

The family court found that the child's best interests were furthered by ordering twice monthly visits with Ronald.⁸⁹ After initially issuing a

84. *Id.* at 76.

85. *Id.*

86. *Id.*

87. *Id.*

88. Ronald filed his petition in family court, a statutory court without common law jurisdiction. Because of this, family court should have dismissed Ronald's case unless he was found to fall within the category of "parent" under Domestic Relations Law section 70, the statute under which parents can seek visitation. Several years later, the court of appeals ruled that persons such as Ronald are not "parents" within the meaning of this law. See *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991). On that basis, the family court should have dismissed Ronald's case. But the New York Supreme Court is a constitutional court with all of the common law powers and Ronald could have filed a new case in the supreme court since the dismissal of his family court case would not have been a ruling on the merits. The court of appeals, however, never made this distinction and treated the case as if the family court had common law jurisdiction. See *In re Starr*, 280 N.Y.S. 753, 758 (App. Div. 1935), for an explanation of how common law continues to apply in New York courts.

89. See *Ronald FF.*, 511 N.E.2d at 76.

restraining order prohibiting Cindy from moving to Texas with her child, the family court's final order lifted the restraining order and substituted it with an order directing the mother to provide thirty days notice to Ronald so that he could seek judicial relief if he chose to.⁹⁰ The appellate division affirmed the award of visitation, concluding that the facts constituted "extraordinary circumstances" justifying the court reaching the question of whether visits with Ronald would be in the child's best interests.⁹¹

The court of appeals reversed. The reversal was based on the law, not on the facts or on any disagreement with the lower courts that the facts constituted "extraordinary circumstances." "The central issue," the court wrote, "is whether the *Bennett* standard, first enunciated and to date applied only to custody disputes between parents and third parties, is available to allow visitation rights to a nonparent against the wishes of the custodial parent."⁹² The opening sentence of the opinion announced the holding: "Visitation rights may not be granted on the authority of the *Matter of Bennett v. Jeffreys* extraordinary circumstances rule, to a biological stranger where the child, born out of wedlock, is properly in the custody of his mother."⁹³ Because the lower courts found that the mother was a fit parent, and because Ronald was seeking only visitation to which the mother was opposed, "the *Bennett* rule is inapplicable and unavailable."⁹⁴

Stressing that a fit parent ordinarily has "the right to determine who may or may not associate with her child,"⁹⁵ the court wrote:

In *Matter of Bennett v. Jeffreys*, we articulated the narrow exception in which a court may consider whether the best interest of a child permits termination of parental custody. "[I]ntervention by the State in the right and responsibility of a natural parent to custody of her or his child is warranted if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstances which would drastically affect the welfare of the child. It is only on such a premise that the courts may then proceed to inquire into the best interest of the child and *to order a custodial disposition on that ground.*"⁹⁶

90. *Id.*

91. *Ronald FF. v. Cindy GG.*, 502 N.Y.S.2d 823, 825 (App. Div. 1986), *rev'd*, 511 N.E.2d 75 (N.Y. 1987).

92. *Ronald FF.*, 511 N.E.2d at 77.

93. *Id.* at 76 (citations omitted).

94. *Id.*

95. *Id.*

96. *Id.* at 77 (citations omitted).

Explaining that because “[i]n this case, no one questions the mother’s fitness to raise her child and no one seeks to change custody,” the court announced that *Bennett* “has no application to the situation before us.”⁹⁷ Thus, the court denied Ronald’s visitation request.

This is nothing short of fantastic. The opinion is a striking departure from the well-established common law rule that courts have the authority to grant visitation to a non-parent over a fit parent’s objection when such visitation is essential to the child’s well-being.⁹⁸ Even if the specific *Bennett* “extraordinary circumstances” test did not apply to visitation cases, the proper inquiry would have been to ascertain whether such visits would be “essential” to the child’s well-being.⁹⁹ If reversal was the correct ruling in the court of appeals because the lower courts used the incorrect tests, the court erred by dismissing the case. Instead, it should have remanded the matter to the trial court to conduct a more focused inquiry into the strength of the relationship between Ronald and the child and, more particularly, whether the child regarded Ronald as a psychological parent with whom it would be essential to maintain an on-going relationship.

Moreover, the common law, as we have seen, treated custody and visitation cases symmetrically. Whatever the rules for visitation and custody were, they would be the same for both. Thus, *Ronald FF.* breaks with common law by failing to apply an important common law rule announced in the custody context to the visitation context. Furthermore, the court provides no explanation as to why it is suddenly treating visitation differently from custody. This, in its entirety, was the court’s analysis: “the differences in degree” between custody and visitation “is [sic] so great and so fundamental that rules like the *Bennett* rule, which have been carefully crafted and made available only to custody disputes, should not be casually extended to the visitation field. Thus, we expressly decline to do so.”¹⁰⁰ This analysis ignores and contradicts the long line of common law cases that categorize visitation as custody for a limited time and apply identical rules to custody and visitation cases.

I am not advancing the claim that simply because the common law authorizes courts to deprive fit parents of custody when circumstances warrant such a dramatic result, there must be a parallel rule with regards to visitation. My more modest point is that a rule that *denies* courts the power to award visitation over a fit parent’s objection even when there are compelling justifications to do so is extremely difficult to reconcile with *Bennett*, given the principle that the same rules would apply to visitation

97. *Id.*

98. See *supra* notes 70–76 and accompanying text.

99. See *Noll v. Noll*, 98 N.Y.S.2d 938, 941 (App. Div. 1950).

100. *Ronald FF.*, 511 N.E.2d at 77.

and custody cases. Therefore, the court that reaches such a result must do so with analysis and reasoning. Regrettably, *Ronald FF.* lacks both.

Even if the court were going to depart from the common law principle of treating visitation and custody identically, we would expect a court that has the power to grant full custody to a non-parent also to have the power to exercise the lesser interference of granting visitation to a non-parent. Recall that *Bennett* ruled that courts have the power to take children away from a fit parent for the entire length of childhood when there are extraordinary circumstances. Given this rule, surely one would expect, at the least, courts would also possess the power to interfere with a fit parent's custody to the considerably lesser extent involved in ordering visits with one's child over parental objection upon a proper showing of compelling circumstances.¹⁰¹ Any conclusion to the contrary deserves, at minimum, analysis and justification. But none is provided by the court of appeals.

Thus, the claim that the custody rule "should not casually be extended to the visitation field"¹⁰² has it backwards. Though *Ronald FF.* speaks as if it were deciding whether to *extend* the custody rule to the visitation context, in fact the case created a jurisprudence that *limits* custody rules to the custody context. It would be one thing to say, in those jurisdictions that have liberalized the grounds upon which courts may order visitation with a child over parental objection, that this liberal rule ought not casually be extended to the custody context. Even here, we should expect courts to provide reasoning and analysis. But it is far from obvious why the common law rule allowing courts to take children away from fit parents when circumstances warrant is inapplicable to the lesser interference that visitation exacts. This is not to suggest that visitation orders over parental objection are trivial. They *do* constitute a major interference with parental rights.¹⁰³ But undeniably the interference is less great than an order denying custody outright to a parent.

Why should a common law court have the power to deny a fit parent custody of her child when compelling circumstances seem to justify such a result but be completely powerless to order visitation when such a result is compelling? This has *never* been answered by a New York court. Because courts owe a duty to do more than announce judgments, litigants should continue to press the claim that *Bennett* should apply to the visitation context until the court of appeals provides an explanation for a contrary rule.

101. Indeed, as we shall see, the court of appeals in *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981), upheld a statute authorizing courts to order visitation over parental objection to the biological grandparents of adopted children precisely on the reasoning that courts were interfering with parental rights to a considerably lesser degree when compared with changing custody. See *infra* notes 148–154 and accompanying text.

102. *Ronald FF.*, 511 N.E.2d at 77.

103. See GUGGENHEIM, *supra* note 5, at 97–132.

Although *Bennett* highlighted the long established common law principle that courts should consider the impact on children when deciding disputes between parents and non-parents, *Ronald FF.* entirely abandoned this principle. If Ronald had sought custody of the child instead of visitation, the court would have had to entertain the merits of the case and consider awarding custody to him, even though there was no claim of parental unfitness. If Ronald had been able to persuade the court that the extraordinary circumstances of having served as the child's de facto parent meant that the child's well being was threatened by completely severing all ties with him, the court would have been empowered to consider awarding him custody.¹⁰⁴ But because the petition did not seek to wrest permanent custody from the mother, the court was powerless even to entertain the claim for visitation because the mother was a fit parent.¹⁰⁵

This inability to consider the child's interests simply because the parent is fit is, however, precisely what *Bennett* rejected in the context of custody disputes. The claims in support of recognizing and giving legal effect to fully bonded parent-child relationships are by now too well rehearsed to repeat in any detail. What is important for the purposes of this article, however, is to remind the reader just how seriously New York courts were beginning to take these claims in the mid-1970s, shortly after the publication of Goldstein, Freud, and Solnit's work began to influence deeply the thinking of common law judges. Indeed, the whole point of *Bennett* is that the court of appeals got the message and found a way to advance common law principles in light of an emerging understanding of children's needs. *Bennett* rejected as too rigid a rule that courts are without power to recognize parent-like relationships that have formed outside of the state's focus when refusing to recognize the relationship may have severe consequences for the child's well-being. When a court finds that a fit parent's child-rearing choice will have dire consequences for the child, *Bennett* made clear that common law courts stand at the ready to intervene.

In light of *Bennett's* concern with the consequences for children of severing relationships with parent-like adults, *Ronald FF.* is irrational. Under *Ronald FF.*, regardless of the impact on the child, the court is powerless even to consider awarding visitation between the child and a parent-like figure. To demonstrate this irrationality, let's apply the rule of *Ronald FF.* to *Jeffreys v. Bennett*, a hypothetical case based very closely on

104. Since Cindy, as the child's legally recognized mother, would be allowed to secure court-ordered visitation, awarding custody of the child to Ronald would not have resulted in the child losing all ties with either of his psychological parents.

105. This is reinforced in *Alison D. v. Virginia M.*, when the Court is able simply to write: "Petitioner concedes that respondent is a fit parent. Therefore she has no right to petition the court to displace the choice made by this fit parent in deciding what is in the child's best interests." 572 N.E.2d 27, 29 (N.Y. 1991).

Bennett v. Jeffreys. In this hypothetical *Jeffreys v. Bennett*, all of the facts of *Bennett v. Jeffreys* are the same, except that when Bennett, the mother, asked Jeffreys, the family friend, to return Gina Marie to her, Jeffreys initially agreed to do so. Unfortunately for all concerned, the transition did not go well and, after a few weeks, Gina Marie was experiencing considerable stress. Jeffreys worried about Gina Marie's emotional well being and consulted a lawyer to consider her legal options. After trying to work things out outside of the law, Jeffreys' lawyer recommended to her that she commence a writ of habeas corpus seeking Gina Marie's custody. Jeffreys decided that this was a sensible option. She had agreed to return Gina Marie thinking it was the right thing to do and the best thing for the child, but now it was evident that Gina Marie missed her psychological mother so deeply that it would be wisest to regain her custody.

There is no question that this proceeding would be proper at common law. *Bennett* is not limited to parents who stand before the court as petitioners seeking the return of children they are not currently caring for. It matters not to the common law who is the petitioner. Parent and "legal stranger" both may bring the proceeding, invoking the chancellor's authority to serve the child's best interests. Nor could there be much question that the court would be well within its powers to award custody of Gina Marie to Jeffreys. For these purposes, *Bennett v. Jeffreys* and *Jeffreys v. Bennett* are indistinguishable. The right outcome in the one would be the right outcome in the other.

But once this is recognized, *Ronald FF* becomes unacceptable. Here is the result *Ronald FF* creates when the court is poised to decide *Jeffreys v. Bennett*. The chancellor is authorized to order Gina Marie to be removed from her mother's custody and sent to live with Jeffreys but lacks any power to permit Gina Marie to remain with her mother on condition that the mother allow Jeffreys regular visitation with Gina Marie.¹⁰⁶ Although the court may vitiate the mother's custodial rights, it may not interfere with them in a less extreme manner. Moreover, it may not do so on the apparent understanding that this less extreme interference with the mother's custodial rights is beyond the chancellor's power.¹⁰⁷ Even if one

106. See, e.g., *B.G. v. K.B.*, 812 N.Y.S.2d 316 (Fam. Ct. 2006). In *B.G.*, a great-grandmother petitioned for custody of her great-granddaughter over the objection of the mother. The court found there were extraordinary circumstances because the child had been in her care for more than one year. Because of the absence of a statute authorizing a cause of action, the great-grandmother had to rely on common law principles. Having prevailed on this basis, she was entitled to a hearing on the merits. *Id.* at 318. However, had she merely sought to maintain contact with the child through visits, she would have had her case dismissed without even a hearing. See *David M. v. Lisa M.*, 615 N.Y.S.2d 783, 784 (App. Div. 1994) (holding that great-grandparent is not entitled to petition for visitation pursuant to section 72 of the Domestic Relations Law, the grandparent visitation statute).

107. Consider the implications if you were an attorney to whom Ms. Jeffreys came for legal advice. She reports to you that she thinks she should continue to maintain a

believes that *Ronald FF.* is fully rational, there is no question that the case blatantly broke with past common law cases and principles, and did so without any explanation.

VI.

CONSTITUTIONALITY OF AWARDING VISITATION OVER A FIT PARENT'S OBJECTIONS

At one point in *Ronald FF.*, Judge Bellacosa somewhat disingenuously implies that the Constitution constrained the result reached by the court. Citing a constitutional case decided by the United States Supreme Court, the opinion states: "The State may not interfere with that fundamental right unless it shows some compelling State purpose which furthers the child's best interests."¹⁰⁸

But it is extremely difficult to comprehend the import of this point. The question being asked is whether, *when there are compelling reasons*, common law courts possess the authority to order visitation to non-parents over parental objection. Shed to the bone, *Bennett* is about identifying a compelling state interest. Indeed, if the court had not found a compelling interest in *Bennett*, it could not have interfered with the mother's custody. "Extraordinary circumstances," as *Bennett* used the term, was meant to include those cases in which "the psychological trauma of removal [from a non-parent] is grave enough to threaten destruction of the child."¹⁰⁹ But

significant presence in Gina Marie's life because the transfer of custody from her to the mother was too abrupt. You inform Ms. Jeffreys that she may commence a legal proceeding to regain custody of Gina Marie. She responds by indicating that she is unsure it would be the right thing to keep custody of Gina Marie. She tells you that she was thinking instead that she would prefer to have regular, weekly visitation with the child so that Gina Marie would come to regard Ms. Jeffreys as a significant member of the child's extended family. You reply that Ms. Jeffreys may seek custody, but not visitation. Ms. Jeffreys cannot understand why that would be so. You read the caselaw carefully and you are left with nothing more by way of an explanation than to tell her that, in New York, judges do not possess the legal power to require that parents permit their children to visit with a non-parent (other than when the legislature expressly authorizes it). She asks, in turn, "Do you mean that New York judges have the power to take Gina Marie away from her mother, but they lack the power to require that she permit me to visit with Gina Marie? All I am able to secure in New York is all or nothing?" You are forced to reply that Ms. Jeffreys is a quick learner and has correctly described the state of New York law.

108. *Ronald FF. v. Cindy GG.*, 511 N.E.2d 75, 77 (N.Y. 1987) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). Judge Bellacosa's choice to mention the Constitution as an additional ground favoring the result reached in *Ronald FF.* contrasts dramatically with his stinging criticism of Chief Judge Kaye's opinion for the Court in *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995). In his dissent in *Jacob*, Judge Bellacosa "emphasize[d] that it is the dubiety cast over very significant constitutional propositions in this fashion that is at least as disquieting as an unequivocal constitutional declaration." *Id.* at 413 (Bellacosa, J., dissenting).

109. *Bennett v. Jeffreys*, 356 N.E.2d 277, 284 (N.Y. 1976). See, e.g., *Tolbert v. Scott*, 840 N.Y.S.2d 112, 113 (App. Div. 2007) (applying *Bennett* and finding that the

Ronald FF's holding is that *even when there are compelling reasons to require continued access between a child and a non-parent*, New York common law courts are powerless to do anything about it. *Ronald FF* fails to explain why the Constitution would possibly allow a court to award full *custody* to a non-parent over a fit parent's objection but would not allow a court to award mere *visitation* to a non-parent under the same extraordinary circumstances. The remarkable current state of New York law is that it is easier for courts to award custody of a child to a non-parent over the parents' objection than it is to award visitation of a child to a non-parent over the parents' objection. What this bizarre result has to do with the Constitution is difficult to fathom.

Furthermore, constitutional challenges to the New York statute that provides a means for grandparents to visit a child over a fit parent's objection have failed.¹¹⁰ A constitutional challenge to the court's ability to award Ronald FF visitation is considerably weaker given that the mother encouraged Ronald to form a significant de facto parent relationship with her child. Even if one believes that courts generally ought not to be able to order that children visit with a non-parent over the parent's objection, it is a very different matter once a parent has allowed another adult to form a significant parent-child relationship with her children. Once parents voluntarily allow someone to form a parent-like relationship with their child, it is more difficult to argue that the law is powerless to insist that the parent permit the parent-like relationship to continue after the adult relationship has soured.

In all events, as a result of the Supreme Court's 2000 decision in *Troxel v. Granville*,¹¹¹ no one can harbor doubts any longer that New York's common law rule that courts may award visitation to non-parents over their fit parents' objection in order to prevent children from suffering harm is constitutional. In fact, New York's common law rule is more protective of the constitutional rights of parents than the federal Constitution requires.¹¹² No one can fault the court of appeals in 1987 for not knowing how the Supreme Court would rule on this issue in 2000, but it is highly instructive to observe that, except in *Ronald FF*, the court of appeals had consistently failed to display any keen concern about overreaching the boundaries of constitutional power in any of its third-party visitation decisions before *Troxel* was decided.

In *Troxel*, the Supreme Court declared unconstitutional as applied a Washington statute that authorized courts to award visitation to non-

grandmother failed to show that "the attachment of the subject child to her was so strong that a separation threatened the destruction of the child") (citations omitted).

110. See *E.S. v. P.D.*, 863 N.E.2d 100, 106 (N.Y. 2007).

111. 530 U.S. 57 (2000).

112. See *Noll v. Noll*, 98 N.Y.S.2d 938, 941 (App. Div. 1950). See also *supra* notes 70–75 and accompanying text.

parents whenever they believed such orders would further a child's best interests. The Supreme Court of Washington had held the statute unconstitutional because it failed to require a showing of harm to the child before permitting a judge to order visitation over a fit parent's objection.¹¹³ But the Supreme Court affirmed on the lesser ground that, as applied in the case, the judge did not give proper weight to the parent's objections before reaching the question whether the visits would serve the children's interests.¹¹⁴

Within the Court, there was a disagreement among some of the justices over whether the Constitution requires a showing of harm before courts may award visitation when a fit parent objects.¹¹⁵ Two Justices, Stevens¹¹⁶ and Kennedy,¹¹⁷ made plain in separate dissents that they do not believe such a rule is constitutionally required. This frames the debate at its outer edges. The justices most supportive of the power of courts to award third-party visitation would permit such awards without having to find that the visits are necessary to prevent harm to the child. The other justices left this question open. But no one on the Court doubted that the Constitution *permits* such orders when the court has found a showing of harm.¹¹⁸

Within this debate, there is plenty of room to fashion a constitutional test for court-authorized visitation orders when fit parents are opposed to them.¹¹⁹ Moreover, it is a simple thing to fit this test solidly within the core principles of *Bennett v. Jeffreys*. One such test is built upon the Model Third-Party Contact Statute promulgated by the American Academy of Matrimonial Lawyers.¹²⁰ First, to survive constitutional challenge, persons

113. *In re Smith*, 969 P.2d 21, 28–30 (Wash. 1998). The language in *Noll* is perfectly pitched to make this precise point: “[T]he court cannot interfere simply to better the moral and temporal welfare of the child as against an unoffending parent.” *Noll*, 98 N.Y.S.2d at 941. See also *In re Boses*, 105 N.Y.S.2d 569, 570 (App. Div. 1951) (reversing order of visitation to maternal grandparents because “[t]he burden of showing that the welfare of the children is not being promoted by present custody is not carried by showing only that it might be desirable to have the children visit their grandparents”).

114. *Troxel*, 530 U.S. at 69–70 (plurality opinion).

115. Justice O’Connor’s plurality opinion expressly did not reach the issue. *Id.* at 73 (plurality opinion).

116. *Id.* at 84–85 (Stevens, J., dissenting).

117. *Id.* at 94 (Kennedy, J., dissenting).

118. New York’s common law rule that courts may award visitation to a third party upon a showing that such visitation is “essential to the child’s well-being” may be understood as coming quite close to a harm standard and would plainly meet all constitutional challenges.

119. See *Zeman v. Stanford*, 789 So. 2d 798, 804 (Miss. 2001); *Rideout v. Riendeau*, 761 A.2d 291, 302–03 (Me. 2000).

120. AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, MODEL THIRD-PARTY (NON-PARENTAL) CONTACT STATUTE (2002), available at http://www.aaml.org/files/public/Model_Third_Party_Contact_Act.htm [hereinafter AAML MODEL STATUTE]. I served as the Reporter for this effort. See Martin Guggenheim, *The Making of the Model*

filing for access should have to show that their relationship with the children has been interrupted or that they are entitled to have a relationship even though one does not already exist because they are a significant relative as defined by our culture.¹²¹

The AAML Model Statute limits the universe of non-parents who may petition a court for visitation with a child. Grandparents need only show they have a “significant relationship,”¹²² and all others must show they have a “parent-like relationship.”¹²³ To show a “parent-like relationship,” the parent must have consented to its being formed and it must have lasted for “a substantial period of time.”¹²⁴ They must also show that the parent has substantially interfered with the relationship,¹²⁵ that they made efforts to ameliorate the problem before going to court,¹²⁶ and that they petitioned the court within a reasonable time after the relationship was disrupted.¹²⁷ All of this broadly conforms with the American Law Institute’s Principles of the Law of Family Dissolution: Analysis and Recommendations, enacted in 2000.¹²⁸ It also closely conforms to a well-known Wisconsin Supreme Court decision in 1995 which applied equitable power to allow a former partner in a lesbian relationship to seek visitation of the biological mother’s child even though the former partner was neither biologically nor legally related to the child.¹²⁹ The court ruled that individuals who can show the existence of a parent-like relationship will be permitted to seek visitation over the legal parent’s objection when they lived with the child long enough to create “a bonded, dependent relationship parental in nature” by taking significant responsibility for the child’s care and when the legal parent fostered the formation of the parent-like relationship.¹³⁰

Third-Party (Non-Parental) Contact Statute: The Reporter’s Perspective, 18 J. AM. ACAD. MATRIMONIAL L. 15 (2002).

121. See, e.g., LA. CIV. CODE ANN. art. 136(B) (2007); OR. REV. STAT. § 109.119(1) (2005).

122. AAML MODEL STATUTE, *supra* note 120, § (1)(a)(i).

123. *Id.*, § (1)(a)(ii). See, e.g., *Hickenbottom v. Hickenbottom*, 477 N.W.2d 8, 16–17 (Neb. 1991); *In re H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995).

124. AAML MODEL STATUTE, *supra* note 120, § (1)(a)(ii).

125. AAML MODEL STATUTE, *supra* note 120, § (1)(b). See, e.g., MISS. CODE ANN. § 93-16-3(2)(a) (2007) (requiring a “viable relationship” between grandparent and grandchild and that parent must have unreasonably denied visitation). See also *H.S.H.-K.*, 533 N.W.2d at 436 (stating that parent-like figure petitioning for visitation must prove that the child’s parent “has interfered substantially with the petitioner’s parent-like relationship with the child”).

126. AAML MODEL STATUTE, *supra* note 120, § (1)(b).

127. AAML MODEL STATUTE, *supra* note 120, § (1)(c).

128. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, ch. 2, §§ 2.03-2.12 (2002).

129. See *In re H.S.H.-K.*, 533 N.W.2d 419, 437 (Wis. 1995).

130. *Id.* at 421. See also *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004) (recognizing former unmarried partner of parent as a “de facto parent” entitled to legal

The AAML statute places the burden on the applicant to establish standing¹³¹ and then to produce evidence that the child would suffer a serious loss if the court did not award visitation.¹³² Once the applicant meets these burdens, the burden shifts, for the first time, to the parent to come forward with evidence showing why the decision to refuse contact is reasonable and in the child's best interests.¹³³ The ultimate burden remains with the petitioner to show by clear and convincing evidence that the child would suffer a serious loss if the court did not award visitation and that the parent's denial of contact was unreasonable and not in the child's best interests.¹³⁴

This test fits quite well with the spirit of *Bennett v. Jeffreys* but with a far more focused methodology that instructs courts with considerably greater clarity what to look for and how to proceed. *Bennett* itself provides a wonderful opportunity simultaneously to carve out a proper basis for supervening parental choice and to hue carefully to constitutional protections of fundamental rights. This may be done through traditional analysis of a compelling state interest. The case would have been that much more effective if, instead of using the ambiguous phrase "extraordinary circumstances," the court had more carefully focused on what really was driving it: protecting children from harm or entering orders "essential to the child's welfare."¹³⁵ Here, then, is where the common law meets *Bennett* and Chief Judge Breitel's claim that *Bennett* actually is better regarded as following common law than taking it in a new direction is accurate. Unfortunately, by choosing to create a new test, *Bennett* made it possible for *Ronald FF.* to miss the focus of the common law: protecting children and ensuring that parents do not make decisions that would harm them.

The issue with respect to constitutional restraint when awarding visitation to a non-parent is not, as *Ronald FF.* implied, whether it is ever permissible to grant visitation. The issue is about *when* it is permissible.

protection); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891–93 (Mass. 1999) (finding that de facto parent had right to visitation where it was in child's best interest); *V.C. v. M.J.B.*, 748 A.2d 539, 541–42, 554 (N.J. 2000) (finding that former same-sex partner had standing as a psychological parent to seek visitation of children born to former partner); *Developments in the Law: IV. Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2054–64 (2003) (explaining that de facto parents are increasingly being recognized as parents with legal rights).

131. AAML MODEL STATUTE, *supra* note 120, § (2)(a)(i).

132. AAML MODEL STATUTE, *supra* note 120, § (2)(a)(ii).

133. *Id.*

134. AAML MODEL STATUTE, *supra* note 120, § (2)(b).

135. *See, e.g.*, *People ex rel. Marks v. Grenier*, 293 N.Y.S. 364, 366 (App. Div. 1937), *aff'd*, 10 N.E.2d 577 (N.Y. 1937); *People ex rel. Barry v. Mercein*, 3 Hill 399, 412 (N.Y. Sup. Ct. 1842).

Thus, to suggest that there are constitutional limits on what a court may do is only to acknowledge the obvious. But it is equally clear that there is considerable room to award such visits within these limits.

VII.

THIRD-PARTY VISITATION UNDER NEW YORK STATUTE

After *Ronald FF.*, the most straightforward way for legally unrecognized parents like Ronald—unofficial fathers or mothers who have formed significant psychological parent relationships with children—to seek court-ordered visitation over the objection of legally recognized parents, was to sue pursuant to statutory enactments authorizing certain persons to file visitation petitions. In New York, there are three categories of such persons: grandparents,¹³⁶ siblings,¹³⁷ and parents.¹³⁸ People like Ronald had to rest their hope on getting New York courts to broadly construe the statutory term “parent” to include de facto parents. In 1991, however, in *In re Alison D.*, the New York Court of Appeals refused to read the statute with sufficient breadth to include such parents.¹³⁹

Many commentators have criticized *Alison D.*, broadly endorsing then-Judge Judith Kaye’s dissenting opinion. In that opinion, Judge Kaye made a very strong case that the statute should be interpreted to include psychological parents such as Ronald.¹⁴⁰ She reasoned that the legislative purpose in enacting the visitation statute was to advance children’s best interests and those interests are furthered by broadly allowing adults who have formed significant relationships with children to be able to show that they should be permitted to maintain those relationships despite the parent’s objection.¹⁴¹ The focus of this article is elsewhere. Rather than demonstrate that *Alison D.* was wrongly decided, I want to use that decision to demonstrate something amiss about the reasoning of New York’s highest court. For it is plain that the combination of *Ronald FF.* and *Alison D.* reflects the court’s unwillingness to permit non-legally recognized parents to go to court to seek court-ordered visitation with children after the adult relationship has ended. That unwillingness, given

136. N.Y. DOM. REL. LAW § 72 (McKinney 2007).

137. N.Y. DOM. REL. LAW § 71 (McKinney 2007).

138. N.Y. DOM. REL. LAW § 70 (McKinney 2007).

139. 572 N.E.2d 27, 29–30 (N.Y. 1991).

140. *Id.* at 30 (Kaye, J., dissenting).

141. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 944–51 (1984); Alessia Bell, *Public and Private Child: Troxel v. Granville and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 275–77 (2001); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 410–11 (1994).

the extremely weak decision in *Ronald FF*, is perhaps more accurately characterized as hostility. This judicial hostility is worth examining in greater detail because it contrasts so remarkably with a series of other visitation cases decided by the same court over a fairly long period of time. This other line of cases involves grandparents.

The history of statutory expansion for grandparent visitation is itself instructive. It is a history of starting very small and, once grandparents' advocates (or lobbyists) got their foot in the door, nudging the door ever wider until it finally reached the current rule that *any* grandparent may sue for *any* reason to seek visitation of a grandchild.¹⁴² But it did not begin that way.

To the contrary, the first grandparent visitation statute, enacted in 1966,¹⁴³ authorized applications for grandparent visitation only where the grandparents' own offspring was deceased. In 1975, the statute was amended to allow a grandparent to seek visitation whenever one of the child's parents died, whether or not it was the grandparent's own offspring.¹⁴⁴ In addition, the 1975 amendment included a broad expansion, providing that courts could award visitation to grandparents if it is in the child's best interests whenever "circumstances show that conditions exist which equity would see fit to intervene."¹⁴⁵ But even this liberalization still placed the emphasis on allowing visitation when the family had suffered or was suffering extra stress. Thus, memoranda accompanying the amendment to Domestic Relations Law section 72 emphasized that "[i]n the context of today's society with a high divorce rate, many disinterested parents do not concern themselves with the welfare of a child who is in the custody of the other parent"¹⁴⁶ and that it "is important to children to continue contact with their family especially where the parents have separated or been divorced."¹⁴⁷

Over the years, the court of appeals has decided a number of cases concerning grandparent visitation based on legislation authorizing courts to award visitation to grandparents over the objection of fit parents when the court finds it is in the child's best interests to do so.¹⁴⁸ One early case

142. It is true that New York law has always made clear that being allowed to petition and to prevail are distinct inquiries—much like the common law. See *Lo Presti v. Lo Presti*, 355 N.E.2d 372, 375 (N.Y. 1976).

143. N.Y. DOM. REL. LAW § 72 (L.1966, ch. 631).

144. N.Y. DOM. REL. LAW § 72 (L.1966, ch. 631, as amended by L.1975, ch. 431).

145. *Id.*

146. Letter from the sponsor, State Senator Giuffreda, to Counsel for the Governor (June 19, 1975).

147. Memorandum of State Board of Social Welfare (June 23, 1975), Bill Jacket, L.1975, ch. 431.

148. See, e.g., *E.S. v. P.D.*, 863 N.E.2d 100, 104 (N.Y. 2007); *Wilson v. McGlinchey*, 811 N.E.2d 526, 529 (N.Y. 2004); *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 28 (N.Y.1991); *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049, 1053 (N.Y. 1981); *Lo Presti v. Lo Presti*, 355 N.E.2d 372, 375 (N.Y. 1976).

involved a challenge to the constitutionality of a statute that authorized courts to award visitation to a child's biological grandparents after the child was adopted.¹⁴⁹ Adoptive parents brought the challenge, arguing that they possessed the constitutional right to raise their child as they chose so long as they were themselves fit parents. Although recognizing that parents have constitutional rights to raise their children free from inappropriate state regulation, the court observed, "Constitutional protection notwithstanding, parents are not totally free to act as they please. . . . In determining whether a State's interference with the family relationship is proper, the action will not be reviewed under exacting scrutiny, but according to a less rigorous standard of whether there is a 'reasonable relation to any end within the competency of the State.'"¹⁵⁰

Plainly, the court of appeals perceived the challenged law as serving children, not grandparents. The court comfortably upheld that statute as a valid exercise of the state's *parens patriae* authority to enact laws to further children's well-being,¹⁵¹ reasoning that allowing grandparents of adopted children to maintain access with them may prevent children from "suffer[ing] great emotional stress."¹⁵² According to the court, ordering visitation may prevent a child from suffering "the added burden of being severed from his or her grandparents, who may also provide the natural warmth, interest and support that will alleviate the child's misery."¹⁵³ Concluding that the law was "reasonably related to the goal of protecting the best interest of the child,"¹⁵⁴ it unanimously upheld the statute.

Not only did the court stress the legitimacy of the state's interest in ensuring children's best interests are served, it also emphasized the limited nature of the interference of imposing an order of visitation on parents over their objection. On this point, the Court noted:

[T]he power to interfere is severely limited in other respects as well. It does not include any power to decide for the adoptive parents, for example, how and where the child shall be educated, what religious training shall be imposed, what hours the child may keep, or with what friends the child may associate. Nor may the court break up the family unit merely because the court disapproves of the way the adoptive parents have elected to raise the child. These aspects of family integrity remain inviolate. The court may do nothing more than execute the Legislature's determination that, under appropriate circumstances, an adoptive

149. *People ex rel. Sibley*, 429 N.E.2d at 1049.

150. *Id.* at 1052 (citations omitted).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 1053.

child's best interest will be served by continued visits with its natural grandparents.¹⁵⁵

After the legislature amended the statute to permit courts to award grandparents visitation if it is in the child's best interests whenever "circumstances show that conditions exist which equity would see fit to intervene,"¹⁵⁶ a couple united in their opposition to grandparents having a relationship with their son challenged the reach of the statute as applied to them. The couple argued both that the statute was not intended to apply to them and, if it were so applied, it would violate the Constitution. In *Emanuel S. v. Joseph E.*,¹⁵⁷ the appellate division narrowly interpreted the statute as being unavailable to grandparents when the only thing they alleged in support of their petition was that they "love their grandchild and are being emotionally deprived by not being allowed to visit with their grandson" and that "they believe their relationship with their grandson would be beneficial to the child."¹⁵⁸ The court concluded that the legislature did not intend to go so far as to grant standing to "any grandparent."¹⁵⁹ Thus, it interpreted the statutory phrase "or where circumstances show that conditions exist which equity would see fit to intervene" to require that grandparents must first "demonstrate the existence of some circumstance or condition, such as untoward disruption of an established grandparent-grandchild relationship because of, e.g., a change in the status of the nuclear family, or interference with a 'derivative' right, or some abdication of parental responsibility, before judicial examination of the best interests of the child with its attendant trauma, increased animosity, and financial drain is to be undertaken."¹⁶⁰ Finding "no binding authority for the proposition that the State may interfere in family life to the extent sought" where there is an intact family composed of two fit parents in joint opposition to grandparent visitation, the appellate division dismissed the grandparents' case without affording them any relief.¹⁶¹ This was because grandparents' love and affection "are an insufficient premise for the judicial scrutiny sought and undertaken here."¹⁶²

One would anticipate that the same court that decided *Ronald FF.* and *Alison D.* would comfortably affirm this ruling. But that is not what happened. Only two months after it decided *Alison D.*, the court of

155. *Id.* (citations omitted).

156. N.Y. DOM. REL. LAW § 72 (McKinney 2007).

157. 560 N.Y.S.2d 211 (App. Div. 1990), *rev'd*, 577 N.E.2d 27 (N.Y. 1991).

158. *Id.* at 212 (internal quotation marks omitted).

159. *Id.* at 214 (internal quotation marks omitted).

160. *Id.*

161. *Id.*

162. *Id.*

appeals unanimously reversed the appellate division,¹⁶³ expressing extreme sympathy with the legislative goal of protecting children's interests over the strong objection of parents who claimed for themselves the proper authority to decide with whom their children should interact, reminding readers that "visits with a grandparent are often a precious part of a child's experience."¹⁶⁴ The grandparents had visited with the infant for the first three months after his birth. The relationship between the grandparents and parents then deteriorated, and the parents terminated all contact between the grandparents and the child.¹⁶⁵ The grandparents instituted the proceeding when the child was one year old. This was more than enough for the court of appeals, which broadly interpreted the statute (more broadly and plainly with considerably greater sympathy than the appellate division had done).¹⁶⁶ The court held that it was proper for the trial court to decide to afford the grandparents standing, despite the joint opposition of the parents. Since the parents thwarted the grandparents' efforts to develop a deep attachment with the child before seeking judicial relief, the trial court was instructed to reach the question of whether visitation is in the child's best interests once the court concludes that the grandparents "deserv[e] the court's intervention."¹⁶⁷ It is, to say the least, difficult to square this enthusiasm for grandparent visitation with the combined results in *Ronald FF.* and *Alison D.*¹⁶⁸

Indeed, until the Supreme Court decided *Troxel v. Granville*,¹⁶⁹ the court of appeals never took particularly seriously any challenge to the constitutionality of New York's grandparent visitation statute.¹⁷⁰ In 2004, in *Wilson v. McGlinchey*,¹⁷¹ the court of appeals quoted *Troxel* to remind everyone that the choice regarding whether grandparents are permitted to enjoy access to someone's children "is for the parent to make in the first

163. *Emanuel S. v. Joseph E.*, 577 N.E.2d 27 (N.Y. 1991).

164. *Id.* at 298 (internal quotation marks omitted) (citations omitted).

165. *Id.* at 28.

166. Recognizing that permitting third party visitation cases to proceed to trial too easily adds tension, increases animosity, and exacts considerable financial costs, the appellate division ruled that a petitioner must first demonstrate the existence of some special circumstance or condition before courts may reach the question whether visitation would be in best interests of the child. *Emanuel S. v. Joseph E.*, 560 N.Y.S.2d 211, 214 (App. Div. 1990), *rev'd*, 577 N.E.2d 27 (N.Y. 1991).

167. *Emanuel S.*, 577 N.E.2d at 28.

168. See Kimberly Carr, *Alison D. v. Virginia M.: Neglecting the Best Interests of the Child in a Nontraditional Family*, 58 BROOK. L. REV. 1021, 1041-43 (1992) (discussing the dichotomous rationales of *Alison D.* and *Emanuel S.*).

169. 530 U.S. 57 (2000).

170. This is in contrast to a number of state appellate courts which declared their statutes unconstitutional long before they had the benefit of the Supreme Court's view on the subject. See, e.g., *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993).

171. 811 N.E.2d 526 (N.Y. 2004).

instance.”¹⁷² This principle, of course, harkens back to the common law rule long established in New York. Non-parents at common law could not lightly prevail in their efforts to secure court-ordered visitation over parental objection because common law courts required that judges give due weight to a fit parent’s views. They could prevail, however, upon showing that there were important countervailing considerations to the parents’ preferences such as demonstrating that it was essential to the child’s well-being to continue contact with the petitioner.

Most recently, in 2007, the court of appeals decided *E.S. v. P.D.*,¹⁷³ which involved an appeal from an order granting visitation to the maternal grandmother of a ten-year-old boy over the father’s objection. The child’s mother had died several years earlier, and the grandmother spent considerable time living with and helping to raise the child during the late stages of the mother’s life when she was terminally ill and after her death. However, the grandmother’s relationship with the father then became so acrimonious that he ordered her to leave his home and to stay away from his son.¹⁷⁴ Her only available remedy was to seek court-ordered visitation.

In almost every respect, this was an easy case for the grandmother. In the first place, she possessed automatic statutory standing because the child’s mother was deceased. On the merits, the grandmother played a very significant role in the child’s life, developed a close parent-like relationship with him, represented the link for the child with his mother, and always took good care of him. She lost her opportunity to remain a presence in the child’s life because the father refused to permit continued contact.

Two questions were raised in the case: first, “whether the grandparent in this case was properly granted visitation with her grandson [pursuant to statute]. . . and, if so, whether this provision is constitutional in view of the United States Supreme Court’s decision in *Troxel v. Granville*.”¹⁷⁵ The court answered both questions in the affirmative, rejecting the constitutional challenge to the statute both on its face and as applied.

The conclusion that the grandmother was properly granted visitation actually has two components. First, the court had to find that it was reasonable for the court below to conclude that awarding visitation was in the child’s best interests. The facts in the case virtually compelled the court to come to that conclusion. As the court of appeals explained: after the mother became ill with breast cancer, the grandmother was asked to move into the marital home where, in addition to caring for the mother and the child, she “cleaned the house, shopped, cooked household meals

172. *Id.* at 529 (quoting *Troxel*, 530 U.S. at 70) (internal quotation marks omitted).

173. 863 N.E.2d 100 (N.Y. 2007).

174. *Id.* at 102.

175. *Id.* at 101.

and looked after the child when [the mother's] illness prevented her from doing so."¹⁷⁶ After the mother died in 1998, the father invited her to remain in the home and continue to care for the child. That arrangement lasted more than three years. During this time, in the court's words:

[The] grandmother comforted, supported and cared for the motherless child. She got him ready for school, put him to bed, read with him, helped him with his homework, cooked his meals, laundered his clothes and drove him to school and to doctor's appointments and various activities, including gym class, karate class, bowling, soccer, Little League baseball and swimming class. She arranged and transported him to away-from-home or supervised at-home play dates; she took him to the public library and introduced him to the game of chess. From 1998 through 2001, the child and father spent entire summers at grandmother's home in East Hampton, where the child's maternal first cousins and other family members were frequently present as well.¹⁷⁷

The falling out between the grandmother and the father concerned their differences in child-rearing. They "differed over such matters as how to handle the child's sometime unwillingness to eat the food prepared for him at mealtime, and how strictly to enforce his bedtime, his tooth brushing regimen, homework routines and the like."¹⁷⁸ After the father concluded that the grandmother was "sabotaging his parental authority and competing with him for control over the household,"¹⁷⁹ he ordered her out of the house and permitted only very limited contact between the two of them thereafter. After the grandmother had to wait four hours for a scheduled visit with the child, she decided to file a petition seeking court-ordered visitation.¹⁸⁰

After a lengthy trial, the trial court awarded visitation to the grandmother, concluding that the father "failed to present any credible evidence warranting either the termination of the relationship between [the grandmother] and [the child] or the imposition of restrictions on the right of visitation. Instead, the evidence in the record establishes the existence of a very close, loving relationship between [the grandmother] and [the child], and that [the child]'s best interest is served by granting [the grandmother] regular, unfettered visitation."¹⁸¹

The appellate division affirmed the trial court's order, although it modified some of the details of the visitation schedule. In doing so, it

176. *Id.* at 102.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 103 (internal quotation marks omitted).

rejected the father's claim, based on *Troxel*, that the controlling statute was facially invalid because it authorized courts to award visitation over parental objection based on the child's best interests without requiring that courts first give special weight to the parents' views.¹⁸² The appellate division rejected this argument, simply concluding that because the statute placed the burden of persuasion on the grandparent to show why visitation is in the child's best interests, the statute "necessarily gives the parent's decision presumptive weight."¹⁸³

The court of appeals affirmed in all respects. But this time, *for the first time when deciding a grandparent visitation case*, the court began its analysis clarifying that "courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one."¹⁸⁴ It is difficult to avoid the conclusion that the court of appeals was reminded of this basic principle by *Troxel's* holding that when a court entertains a visitation petition by a non-parent, the Constitution requires that "the court must accord at least some special weight to the parent's own determination."¹⁸⁵

The court of appeals went further and agreed with the appellate division that the trial court took seriously the father's objections to continued visitation and found them insufficient.¹⁸⁶ Here it is important to appreciate the close nexus between a court's view of what is best for the child and the proper weight to give to a parent's views. *Troxel* plainly permits courts to order visits over parental objection; it simply requires that courts not enter such orders lightly and give due weight to what the parent thinks.

In a case such as *E.S.*, where the merits of a visitation order were so powerful, it is understandable that the court would conclude both that the order was supported by a sound basis in the record and was permissible despite the father's objection. In the court's words: "The father in this case is a competent parent, and [the trial court] was therefore properly 'mindful' in the first instance of his right to rear the child as he saw fit."¹⁸⁷

182. *Id.*

183. *Id.* (internal quotation marks omitted).

184. *Id.* at 104. To the extent that New York's grandparent visitation statute could be said to be in derogation of the common law, see *supra* note 3, it was because the legislature authorized courts to award visitation merely upon a showing that it was in the child's best interests to do so. Ironically, as a result of *Troxel's* influence on case law interpreting the statute, the statutory basis upon which courts may award visitation is now closer to what it was originally at common law: courts may do so only after overcoming the strong presumption that the parent's decision is not in the child's best interests. Though this is a more liberal standard than it was at common law, it is undeniably closer to the common law standard than before the Court decided *Troxel*.

185. *Troxel v. Granville*, 530 U.S. 57, 70 (2000).

186. *E.S.*, 863 N.E.2d at 106.

187. *Id.* at 104.

The trial court found, however, that the grandmother “established an extraordinarily close relationship [with the child] during the nearly five-year period that she lived with him and [the father]”¹⁸⁸ and that she “clearly appreciate[d] and respect[ed] the separate roles that she and [the father] play[ed] in [the child’s] life.”¹⁸⁹ Added to this, the trial court found that “the relationship with [the grandmother was] central to [the child’s] well[-]being”¹⁹⁰ and “that the child . . . had articulated a deep love for and attachment to [her].”¹⁹¹

All of these facts do more than support the legal conclusion that continued visits further the child’s best interests. They also serve as the basis for rejecting the constitutional claims raised by the father. His first claim was that the statute is invalid because by its terms it does not require that courts give special weight to the parent’s views.¹⁹² The court of appeals quickly disposed of this claim by ruling that the statute is constitutional despite the failure to indicate in its language that courts must give special weight to the parent’s views so long as courts actually give such weight to them.¹⁹³ In effect, courts in New York, post-*Troxel* have read into the statute what few careful students of the law understood to have been there before: a requirement that courts not award visitation simply because, as the statute seems to permit, such an award would further a child’s best interests, but only after giving due weight to the parent’s reasons for opposing such an order.¹⁹⁴

This directly leads to the last part of the analysis: the conclusion that the statute was properly applied without offending the Constitution. The principal distinguishing characteristic the court of appeals seized upon is that, according to the court, the illegal act in *Troxel* was that the trial court “presuppose[d] that grandparent visitation was warranted” and placed the burden to disprove that on the parent.¹⁹⁵ In contrast, according to the court, the trial court in *E.S.* “emphasiz[ed] that it was ‘mindful’ of [the] father’s parental prerogatives, [and] employed the strong presumption that the parent’s wishes represent the child’s best interests, as our statute

188. *Id.* (internal quotation marks omitted).

189. *Id.* (internal quotation marks omitted).

190. *Id.* at 104 (internal quotation marks omitted).

191. *Id.* (internal quotation marks omitted).

192. *Id.* at 104–05.

193. *Id.* at 105–06.

194. *See, e.g.,* *Hertz v. Hertz*, 738 N.Y.S.2d 62, 65 (App. Div. 2002) (“Domestic Relations Law § 72 can be, and has been, interpreted to accord deference to a parent’s decision, although the statute itself does not specifically require such deference.” (citations omitted)); *Morgan v. Grzesik*, 732 N.Y.S.2d 773, 778 (App. Div. 2001) (“[T]he court, after fully considering the nature and basis of respondents’ objections, crafted a visitation order addressing those concerns.”).

195. *E.S.*, 863 N.E.2d at 106.

requires.”¹⁹⁶ Calling this a “high hurdle,” the court readily concluded that it had been leaped.¹⁹⁷ Ultimately, it is difficult to believe that no member of the *Ronald FF* court could conceive of a way to permit court-ordered visits to non-parents over parental objection. The court’s record in rejecting every challenge to New York’s grandparent visitation statute simply belies this possibility. The court’s lack of sympathy toward constitutional constraints on the statutory visitation issue stands in dramatic contrast with the sentiment expressed in *Ronald FF*.

VIII.

CAN WE RECONCILE *RONALD FF* WITH THE COURT’S TREATMENT OF THIRD-PARTY VISITATION CASES IN OTHER CONTEXTS?

Why the same court that broadly embraced awarding visitation to grandparents upon little more than a showing that such visitation, in the considered view of a judge, would be in the child’s best interest, would refuse to rely upon the common law to permit judges to order visits to prevent children from suffering harm remains to be considered. How is it possible that *Ronald FF* veered so far off the path of insisting upon considering these cases from the perspective of the child? I ask not as a proponent of excessive child-centeredness as the basis for making law,¹⁹⁸ but as a careful reader of scores of court of appeals decisions over many years. It is not an overstatement to characterize the very essence of the court’s jurisprudence throughout the field of family law to be its core concern for the child’s best interests. This is true whether one is talking about the resolution of custody disputes between competing parents,¹⁹⁹ relocation disputes when a non-custodial parent objects to the custodial parent’s wishes to move out of town,²⁰⁰ grandparent visitation cases,²⁰¹ or, of course, custody disputes between parents and non-parents.²⁰²

196. *Id.* (citations omitted).

197. *Id.*

198. See GUGGENHEIM, *supra* note 5, at 125–31, 150–58 (2005).

199. See *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1262 (N.Y. 1982) (“Any court in considering questions of child custody must make every effort to determine ‘what is for the best interest of the child, and what will best promote its welfare and happiness.’” (citations omitted)); *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 767 (N.Y. 1982) (noting that the best interest of the child is “paramount” in child custody decisions).

200. See, e.g., *Tropea v. Tropea*, 665 N.E.2d 145, 150 (N.Y. 1996) (holding that, in relocation cases, courts should place the “predominant emphasis” on “what outcome is most likely to serve the best interests of the child.”).

201. See, e.g., *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 29 (N.Y. 1991) (stating that, pursuant to grandparent visitation statute, court must determine if visitation is in the best interests of the grandchild).

202. See *Bennett v. Jeffreys*, 356 N.E.2d 277, 281 (N.Y. 1976) (“[I]n the extraordinary circumstance, when there is a conflict, the best interest of the child has always been

Even when the issue involves an attempt by a legally recognized parent to secure court-ordered visitation, the court of appeals has moved away from characterizing the proceeding as essentially enforcing a parental right. In 1981, in *Weiss v. Weiss*,²⁰³ for example, the court of appeals emphasized that conceiving of visitation as a parent's "natural parent right" is an "appellation [which] is too narrow. It ignores the primacy of the child's welfare. Where the . . . emotional well-being of a child is involved, it is, at best, anomalous that its protection should be dependent on the vindication of the rights of the parents. Visitation is a joint right of the noncustodial parent and of the child."²⁰⁴ In 1996, in a famous relocation case involving a legally recognized parent's efforts to prevent the custodial parent from moving too far away, the court of appeals characterized the child's interests as "paramount,"²⁰⁵ upon which the "predominant emphasis" should be placed.²⁰⁶ As the court explained, "[I]t is the rights and needs of the children that must be accorded the greatest weight, since they are innocent victims of their parents' decision to divorce and are the least equipped to handle the stresses of the changing family situation."²⁰⁷

Ronald FF., alone among all of these cases involving children, chose to discuss only parental rights and insisted that it would not intervene without a showing of parental unfitness.²⁰⁸ The sum of current New York law after *Ronald FF.* is that New York courts are prohibited from considering a child's interests when deciding visitation disputes (even though they may consider the child's interests when considering custody disputes) unless the petitioner can show either (a) that the parent is unfit or (b) that the legislature has expressly authorized the proceeding.²⁰⁹ There appears to be no justification for such a result.²¹⁰ Certainly, the court of appeals has never provided one.

regarded as superior to the right of parental custody.").

203. 418 N.E.2d 377 (N.Y. 1981).

204. *Id.* at 379–80 (internal quotation marks omitted) (citations omitted).

205. *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996).

206. *Id.* at 150.

207. *Id.*

208. *Ronald FF. v. Cindy GG.*, 511 N.E.2d 75, 77 (N.Y. 1987).

209. *See Anonymous v. Anonymous*, 797 N.Y.S.2d 754, 754 (App. Div. 2005) ("Neither the Legislature nor the Court of Appeals has seen fit to include in the term 'parent' a biological or legal stranger who has developed a longstanding, loving and nurturing relationship with the child . . ."). *See also Behrens v. Rimland*, 822 N.Y.S.2d 285, 286 (App. Div. 2006) (holding that co-parent, who was neither an adoptive nor a biological parent of the child, lacked standing to seek visitation); *Janis C. v. Christine T.*, 742 N.Y.S.2d 381, 383 (App. Div. 2002).

210. One could imagine a court concluding that because visitation orders can cause ongoing disruption to a family and may require more judicial oversight than awards of custody, the simplest rule is that whoever has the greater right of custody should have the lesser right to make decisions about visitation. But such a rule does not fit well with New York's well established child-centered jurisprudence. *See supra* notes 199–202.

Moreover, it simply makes no sense for New York courts to refuse to apply venerable common law principles that require paying attention to children's interests.²¹¹ So what is left to explain *Ronald FF.*'s refusal to apply traditional common law powers to award visitation to people with significant relationships to children absent statutory authority? It cannot be that the court believes the legislature intended to preempt common law powers.²¹² Nor can the court have concluded that intrusions created by the

211. Judge Cardozo famously clarified the availability of New York courts to hear proceedings involving children whenever a child's interests are at risk. When New York enacted a statutory habeas corpus provision in 1896 (N.Y. Domestic Relations Law § 70) authorizing parents to file a writ when seeking custody of their children, the law gave the same remedy to parties that they already had at common law. See *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925). Similarly, when the legislature enacted Domestic Relations law section 72 in 1966 authorizing certain grandparents to seek custody, it was authorizing a cause of action that was available already at common law. This does not mean that the grandparent statute added nothing to the common law or was not needed for grandparents to secure court-ordered visitation over parental objection. The statute was needed because it added something precious to grandparents: a reasonable chance of prevailing. The grandparent statute substantially modified the *substantive* rule of the common law. But it did not impact the question of jurisdiction or judicial power to award visitation to grandparents. At common law, grandparents could prevail only by showing that the parent was unfit or that the "the welfare, contentment, peace of mind and happiness of the child . . . make it essential to have continued contact with the grandparents." *Noll v. Noll*, 98 N.Y.S.2d 938, 941 (App. Div. 1950). The statute, far more generously, authorized grandparents to prevail upon a showing that visitation was in the child's best interests.

Judge Dye, in his dissenting opinion in *In re Jewish Child Care Ass'n*, suggested that the legislature is without power to divest the Supreme Court of New York of its common law authority to protect the well-being of children because this power "belongs solely to the Supreme Court as successor to the Chancellor, which may not be limited or diminished by the Legislature." 156 N.E.2d 700, 704-05 (N.Y. 1959) (Dye, J., dissenting) (citations omitted). See also *In re McDevitt*, 168 N.Y.S. 433, 434 (Sup. Ct. 1917) (dismissing a writ of habeas corpus petition seeking visitation but noting that "an application for the relief here sought might be addressed to the equity side of the court"), *aff'd*, 172 N.Y.S. 905 (App. Div. 1918).

Other courts reason that the legislature did not intend for the statute to supplant or preempt "the courts' long standing equitable power to protect the best interest of a child by ordering visitation in circumstances not included in the statute"; although statutory visitation applies under limited circumstances and to certain persons, the legislature has also "clearly and repeatedly expressed the policy that courts are to act in the best interest of children." See *In re H.S.H.-K.*, 533 N.W.2d 419, 430-31 (Wis. 1995). Thus, such courts have held that it is reasonable to infer that the legislature "did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in circumstances not included within the statutes but in conformity with the policy directions set forth in the statutes." *Id.* at 431. See *In re D.M.M.*, 404 N.W.2d 530, 537 (Wis. 1987) ("The legislature did not intend to supplant the common law that allowed other persons to petition for visitation, but intended that grandparents and greatgrandparents [sic] be provided with a uniform right to petition in all the courts of the state. The legislature intended that the best interest of the child should control the decision to grant visitation in all these situations, which is the polestar of the statute.").

212. The entire history of legislative expansion of third-party visitation leads to quite the opposite conclusion. The legislature has evidenced only an interest in expanding the bases for courts to award visitation when courts find such a result would further a child's best interests. Not a sentence can be found from the legislature suggesting a concern that

legislature are more palatable than intrusions created by the common law. State intrusion into families is equally constrained whether it results from court decision or statute. If statutory authorization for third-party visitation is constitutional because it furthers a legitimate state interest, the same is true for common law powers invoked to accomplish the same thing. Likewise, when a court goes too far in permitting visitation, the Constitution prohibits it whether the legislature or the common law is the underlying source of the exercise of judicial power.

Nor can we be satisfied that *Ronald FF.* reflects the court of appeals' discomfort with perceiving itself as being primarily responsible for inviting too much meddling into the private lives of families. The court is, in the end, the agent primarily responsible for the expansive rulings it has issued over the years supporting grandparent visits and interpreting the statute broadly to allow grandparents to secure visits over parental objection. Though it is plausible that the Court simply is more comfortable expansively interpreting the legislature's agenda than the common law, this is an unacceptable jurisprudence because it has resulted in a repudiation of too many long established common law principles.

To appreciate fully what is unacceptable about this, it is useful to clarify precisely how the statutory enactments modified the common law. What the legislature changed from the common law was not, as so many courts have misunderstood, providing automatic standing to designated parties. Since anyone under the common law could file a visitation proceeding, providing standing to particular categories of people really changed nothing. The statutory enactments, though, made it easier to prevail on the merits. Under the statutes, the petitioner need only show that ordering visitation is in the child's best interests. At common law, prevailing parties needed to show that the result was essential to the child's well-being.

For many years, New York courts—led by the court of appeals—comfortably tolerated trial courts awarding visitation to statutory petitioners (particularly grandparents and siblings), based merely on a showing that such visits were in the child's best interests. Since the Supreme Court decision in *Troxel*, however, New York courts have been nudged a bit closer to the common law rule in the grandparent statutory visitation context. As a result, there is a greater symmetry between statutory and common law visitation cases today than ever before, with one glaring modification: ever since *Ronald FF.*, the modern common law no longer resembles its earlier version. Perhaps the greatest irony of all, then, is that modern statutory law is better aligned with the common law than is modern common law doctrine.

courts not tread too deeply in this field. The judicial response in New York to all of this is that whatever the legislature sees fit to do is acceptable, but the courts have chosen not to go any further.

Another possibility is that the court is unsympathetic to claims that are likely to advance the interests of same-sex partners,²¹³ even though *Ronald FF*'s reach goes well beyond such relationships. The court might mean to discourage non-marital partners from rearing children without adopting them.²¹⁴ But I am loath to believe that the court of appeals would permit these factors to be given any weight in *Ronald FF*.²¹⁵

Moreover, as we have just seen, such reasoning places the emphasis on the wrong party, if one takes the court at its word. Since the "right" to petition for visitation is supposed to exist in order to advance the interests of the child, denying an adult access to seek visitation because of an adult-centered reason is inconsistent with furthering this purpose.²¹⁶

Since the court of appeals approached grandparent visitation in *E.S.* as furthering the legitimate state interests of allowing significant relationships with children to continue after the adult relationships have foundered, it is worth re-evaluating the rule announced in *Ronald FF* through this focus. An effective way to do that is to explore an important case decided a few years ago, comparing it with the facts in *E.S.*, in order to ascertain the continued validity of the rule announced in *Ronald FF*.

In 1993, Janis and Christine committed themselves to be partners for life in a formal commitment ceremony conducted by an ordained minister and attended by about fifty friends and relatives.²¹⁷ Because they lived in New York, the couple could not legally marry. After they moved-in together, the women decided to raise children together and agreed that Christine, who was younger, would be artificially inseminated and stay home with the children, while Janis would support the family.²¹⁸ Before the children were born, Christine executed a will and other documents which appointed Janis as the "co-parent" and "adoptive parent" of the

213. See *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006) (holding that law limiting marriage to opposite-sex couples is constitutional).

214. See *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995).

215. Another possibility is that the court is reluctant to add litigation for single parent families without legislative authority. This basis is not illegitimate, but it would require the court to acknowledge that it is declining to do something it has the power to do, instead of simply stating the result. Once the court of appeals accepts, as it must, that it has the common law power to permit non-parents to seek access to other people's children, it still retains the common law authority to decline to exercise that power and to await legislative action. But this new basis is both more truthful and requires the court to say more about its reasons.

216. If this article has done nothing else, I hope it has made clear that common law courts are not powerless to grant visitation to non-parents and that the current rule is a modern choice by common law courts not to exercise power they once willingly exercised. Similarly, it cannot be that common law courts are prohibited by the Constitution from ordering visitation when circumstances warrant.

217. *Janis C. v. Christine T.*, 742 N.Y.S.2d 381, 382 (App. Div. 2002), *rev'g J.C. v. C.T.*, 711 N.Y.S.2d 295 (Fam. Ct. 2000).

218. *Id.*

children in the event of her incapacity or death.²¹⁹ In 1996, Christine gave birth to a boy and in 1998, she gave birth to a girl. Christine and Janis jointly chose the children's names, godparents, pediatrician, and school. They lived in the same household and shared holidays, birthdays, and vacations together. While the family was together, the children regarded both Janis and Christine to be their parents, as did everyone around them.²²⁰ In 1999, however, the couple had a falling out and separated. Initially, after the separation, Christine permitted Janis to visit with the children.²²¹ After a short while, Christine decided not to permit any further visitation between Janis and the children.²²²

Janis decided to bring a proceeding in court that would allow her to continue her relationship with the children over Christine's objection. But because Janis was not Christine's spouse and she had not adopted the children, she was barred by the combined doctrine of *Ronald FF.* and *Alison D.* from having the opportunity even to demonstrate that Christine's refusal to permit any continued contact between Janis and the children was arbitrary and harmful to the children.²²³

Most supporters of the dramatic statutory expansion of third-party visitation in New York over the past generation base their support in the name of advancing children's rights because they provide a basis upon which courts may overrule a parent's arbitrary desire to sever an important relationship between her child and another adult. It is difficult to believe that there are many people who, on the one hand, have actively supported this statutory trend and, on the other, are pleased to know that New York courts are without any power even to hear the merits of Janis's case. But proponents of change in current law have believed that the only place to achieve change is in the legislature. This article suggests a second possibility: relitigate *Ronald FF.* and persuade the court of appeals that it needs to overrule it.

IX. CONCLUSION

This article has shown that statutory and common law principles concerning visitation proceedings brought by non-parents currently are more closely aligned than ever before except that *Ronald FF.* has intervened to eliminate the common law rule that once allowed courts to

219. *Id.*

220. *Id.*

221. *J.C. v. C.T.*, 711 N.Y.S.2d 295, 296 (Fam. Ct. 2000), *rev'd*, 742 N.Y.S.2d 381 (App. Div. 2002).

222. *Janis C.*, 742 N.Y.S.2d at 382; *J.C.*, 711 N.Y.S.2d at 296.

223. *See Janis C.*, 742 N.Y.S.2d at 383.

supervene a fit parent's child-rearing choice by ordering visitation to a non-parent over parental objection. As a result, New York common law courts today possess less authority to enter orders justified by compelling reasons to overrule fit parent's childrearing choices than they did thirty years ago. This is true despite a clear consensus shared by legislators, judges, and commentators to treat visitation cases as being about children's interests and to encourage courts to use their equitable powers to their constitutional limits to advance children's interests.

This leaves only one clear conclusion. The courts were wrong to rule that there is no common law power to grant visitation to non-parents over parental objection. New York courts should permit non-parents to file such proceedings and should continue developing common law answers to the question when they should prevail. When deciding that question, the *Bennett* rule will certainly be the obvious candidate for consideration. But if courts regard "extraordinary circumstances" as too vague a standard, then they should apply its functional substitute. Since the essence of the standard was meant to capture those cases in which the failure to intervene would "drastically affect the welfare of the child," courts should use this explicit standard in visitation cases.

If, as this article has attempted to show, *Ronald FF.* is indefensible, it is time to overrule it.