

Black v. Simms: A Lost Opportunity to Benefit Children by Preserving Sibling Relationships When Same-Sex Families Dissolve

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I. Introduction

The changing composition of the American family has altered the reality of children living in the United States, but some states have failed to adapt to that reality. As Justice O'Connor opined in *Troxel v. Granville*, "[t]he demographic changes of the past century make it difficult to speak of an average American family."¹ These changes include a rising number of households headed by same-sex couples who are raising children. In 2010, more than 2.5 million children in the United States lived with an unmarried parent and that parent's partner.²

Over the last decade, custody and visitation law also has undergone significant change. Recent reforms have strengthened parental autonomy, while concurrently expanding the category of who may be considered a parent.³ For example, courts may bestow parental rights on *de facto* parents: individuals who, while not legal parents, lived with a child for a significant period of time and functioned as a child's parent.⁴ In some states,

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1. *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality).

2. *America's Families and Living Arrangements: 2010*, U.S. CENSUS BUREAU, tbl. C3 (2010), <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>.

3. Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 5 (2002).

4. A. L. I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1)(c) (2002). For cases

gay and lesbian *de facto* parents have obtained increased access to children with whom they have important, psychological relationships.⁵ In others, the strength of legal parents' rights to the care, custody, and control of their children has created a near absolute bar to the claims of gay and lesbian *de facto* parents.⁶ This disparity directly impacts children, and in some cases, may determine whether they are able to maintain relationships with their siblings. The law's failure to recognize parental rights for gay and lesbian *de facto* parents endangers these relationships, ones that ultimately affect the well-being of children.

The Louisiana case of *Black v. Simms*⁷ serves as a prism through which to examine how courts may better protect children of same-sex unions. In *Black*, the Louisiana Court of Appeal held that Kimberlee Corianne Black could not be considered a functional, or *de facto*, parent to Braelyn, the child born to her same-sex partner, Kimberly Renae Simms. Black and Simms used the same sperm donor and each bore a child. For six years, Black, Simms, and half-siblings, Braelyn and Eli, lived together as a cohesive family unit. When the couple's relationship ended, Simms cut off all contact between Braelyn and Black, as well as between Braelyn and her half-brother, Eli. Braelyn's relationship with Eli was permanently severed when the Louisiana Court of Appeal denied Black access to Braelyn and failed to make provisions for the siblings to maintain contact.

Part II of this article discusses the facts and procedural history of the *Black* case. Part III reviews *Troxel v. Granville*,⁸ the Supreme Court's most recent decision regarding third-party visitation. Part IV describes the social science evidence, case law, and legal scholarship that demonstrate that children benefit when they are able to maintain legal and psychological ties with their siblings. Part V discusses the Louisiana Court of Appeal's reasoning in *Black*. Part VI critiques the *Black* decision because the Louisiana Court of Appeal failed to act in the best interests of Braelyn and Eli. The article concludes that the recognition of gay and lesbian *de facto* parents' rights benefits children by protecting sibling relationships,

discussing the common law *de facto* parenthood standard, see *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992).

5. See, e.g., *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010); *Kulstad*, 220 P.3d 595; *In re Parentage of L.B.*, 122 P.3d 161; *V.C. v. M.J.B.*, 748 A.2d 539; *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419.

6. See, e.g., *Black v. Simms*, 12 So. 3d 1140 (La. Ct. App. 2009); *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008); *Wakeman v. Dixon*, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999).

7. *Black*, 12 So. 3d at 1141–45.

8. *Troxel*, 530 U.S. 57 (plurality) (2000).

which are crucial to children's emotional, intellectual, social, and psychological development. *Black* serves as an important example of the harm that may come to children of same-sex couples when the law fails to adapt to the changing composition of the American family.

II. *Black v. Simms*: Factual Background and Procedural History

Kimberlee Corianne Black and Kimberly Renae Simms lived together with their two children as a family unit in Shreveport, Louisiana, for at least six years until they permanently ended their relationship in February 2006.⁹ Their eldest child, Braelyn, was born to Simms in 2000. The couple planned and prepared for the birth together: Black helped Simms pay for her assisted reproduction procedures, attended the appointments with Simms, and was present at Braelyn's birth. Using the same sperm donor, Black gave birth to Braelyn's half-brother, Eli, two years later.¹⁰

Simms and Black began to have problems in 2004, so Simms moved out of their home for a short period of time. Simms ultimately moved back in with Black, who was also living with her parents, Sheri and Robert Black. Black's parents later testified at trial about the "love, devotion, and time" the family had spent raising Braelyn while she lived with them.¹¹ In February 2006, the couple's relationship ended when Simms became involved with another woman. From February until May 2006, Simms allowed Black to have visitation with Braelyn, during which Black would "take Braelyn for the weekend."¹² During those visits, Braelyn also interacted and lived with her half-brother, Eli. These visits ceased after a confrontation in May 2006 when Simms came to pick Braelyn up. After that point, Simms cut off all contact between Braelyn and Black, as well as between Braelyn and Eli.

On June 1, 2007, Black filed a petition for sole custody, or in the alternative, joint custody with reasonable visitation, of Braelyn. During a hearing on June 19, 2007, Simms was ordered to allow Braelyn to call Black once a week. A mental health evaluation was also ordered to assess whether it was in Braelyn's best interest for her to have access to Black and Eli. Based on the court's order, Cindy Nassar, a licensed professional counselor, evaluated Braelyn. Nassar testified that Braelyn had an "emotional connection" to the Black family and that Braelyn's "view of

9. *Black*, 12 So. 3d at 1141, 1144.

10. *Id.* at 1141. It is not clear whether joint or second parent adoption is permitted in Louisiana. See Louisiana Adoption Law, <http://www.hrc.org/issues/parenting/adoptions/978.htm> (last visited Apr. 23, 2011). Louisiana has not adopted a statutory or judicial *de facto* parenthood standard. *Black*, 12 So. 3d 1140.

11. *Black*, 12 So. 3d at 1141, 1144.

12. *Id.* at 1141.

dependability and predictability would be threatened if she did not reestablish her relationship with her psychological family,”¹³ including Eli. A social worker, Robbie Dowden, who was working with Simms, also included Braelyn in a few sessions. Braelyn told Dowden that she missed the Blacks. Although she does not appear to have independently evaluated Braelyn or to have spoken to the Blacks or Eli, Dowden concluded that it would be in Braelyn’s best interest if she were denied all access to the Black family.¹⁴

After a hearing regarding Black’s custody petition, the trial court granted an involuntary dismissal of her claims in June 2008. A panel of three judges on Louisiana’s Court of Appeal for the Third Circuit reviewed Black’s appeal to determine whether a third party who has acted as a child’s *de facto* parent may obtain sole or joint custody without showing that an award of sole custody to the legal parent would cause substantial harm to the child.¹⁵

III. *Troxel v. Granville*: Leaving the Door Open for Untraditional Families

Troxel v. Granville limited the rights of third parties seeking visitation over the objections of a legal parent, but left the door open for *de facto* parental rights. Paternal grandparents, Jenifer and Gary Troxel, petitioned for visitation with their grandchildren after their son committed suicide and the children’s mother attempted to limit their visitation to once per month.¹⁶ Although the trial court found that visitation with their grandparents was in the children’s best interests, the Washington Supreme Court ultimately upheld the reversal of the trial court’s grant of visitation to the Troxels and held that Washington’s visitation statute was unconstitutional for two reasons. First, the Constitution permits a state to interfere with a parent’s right to rear his or her children only to prevent harm or potential harm to a child. Second, Washington’s visitation statute was simply too broad.¹⁷ The United States Supreme Court granted *certiorari*.

The plurality opinion authored by Justice O’Conner invalidated the Washington statute as applied, but declined to answer the “primary constitutional question”: whether a showing of harm or potential harm must

13. *Id.* at 1144, 1145.

14. *Id.*

15. *Id.* at 1140.

16. *Troxel v. Granville*, 530 U.S. 57, 60–61 (2000) (plurality). The Troxels sought visitation under a Washington statute that allowed any person to petition a state court for visitation rights at any time and authorized the court to order visitation if it was in the best interests of the child. *Id.* at 61.

17. *Id.* at 63.

be demonstrated in a dispute between a legal parent and a third party.¹⁸ Additionally, the plurality did not apply a strict scrutiny analysis. Rather, the plurality agreed that Washington's visitation statute was "breathhtakingly broad," and upheld the long-held "presumption that fit parents act in the best interests of their children."¹⁹ The decision of the children's legal parent, Tammie Granville, was entitled to "special weight," particularly since Granville had not cut off all contact. The plurality also seemed to indicate that once the appropriate deference was paid to a legal parent's decision, a third party could potentially rebut the presumption that the parent's decision was made in the child's best interest.²⁰

The *Troxel* opinion left many unanswered questions and revealed the deep fractures within the Court regarding the nature of parental rights. First, the Court did not define *who* may be a parent. Second, the Court did not describe how much deference must be paid to a legal parent's decision making, or define the "special weight" that must be applied to such decisions. Although the plurality recognized the changing demographics of the American family, including the assumption of parental duties by "persons outside the nuclear family," it also stated that the extension of statutory rights to "persons other than a child's parents" places a "substantial burden on the traditional parent-child relationship."²¹

Justice Kennedy, in dissent, expressed concern that the best interest's standard should not be forsaken or minimalized, even when a legal parent's liberty interests are at stake.²² In particular, Justice Kennedy stated that a fit parent's rights, versus a complete stranger's, is an entirely different situation than a fit parent's rights versus another legal, biological, or *de facto* parent. In instances where a third party has acted as a *de facto* parent, the best interests standard might need to be employed to avoid harming a child by separating him or her from a third party, with whom, the child has a substantial relationship.²³ Additionally, Justice Kennedy opined that the broad standard set forth by the plurality was based on faulty assumptions about the composition of American families and did not properly anticipate the claims that might arise based on the reality

18. *Troxel*, 530 U.S. at 62–63 (plurality). The Troxels did not claim they acted as *de facto* parents, but petitioned in their capacity as the children's paternal grandparents, which the Washington Supreme Court found was permitted by the plain language of Washington's visitation statute.

19. *Id.* at 67, 68, 73; *see also id.* at 86 (Stevens, J., dissenting) ("the presumption that parental decisions generally serve the best interests of their children is sound").

20. *Id.* at 70.

21. *Id.* at 63–64.

22. *Id.* at 94, 99–101 (Kennedy, J., dissenting).

23. *Id.* at 99.

many children experience.²⁴

Also in dissent, Justice Stevens noted that disputes between a parent and third parties, with whom, children have an interest in maintaining a relationship necessitate a different approach, that is, a consideration of the child's interests.²⁵ According to Justice Stevens, a parent's liberty interest is not an "isolated right," but is one that must be viewed within the greater context of a child's relationships.²⁶ In fact, in some circumstances, a child might have "a stronger interest at stake than mere protection from serious harm" and may even possess "liberty interests in preserving established familial or family-like bonds" similar to those parental liberty interests the Court has long upheld.²⁷

Although the *Troxel* opinion revealed deep divisions regarding the nature of parental rights, the Court ultimately upheld a legal parent's right to the care, nurture, and custody of his or her children. Several justices expressed awareness of the changing landscape of the American family, including the importance of *de facto* parents, and both Justices Kennedy and Stevens indicated that the plurality's opinion fell far short of recognizing that transformation.

IV. The Benefits of Maintaining Sibling Relationships

Social science evidence, legal scholarship, and case law support the importance of the maintenance of sibling relationships. In 2004, twelve percent of all children lived with at least one half-sibling, and another two percent lived with at least one adopted sibling.²⁸ Although a limited number of states have sibling visitation laws, they often are not "practically

24. *Id.* at 98. For example, Justice Kennedy noted that the plurality seemed to assume that legal parents contesting visitation have, in fact, acted as primary caregivers, that third parties who seek visitation have "no legitimate and established relationship with the child," and that the "conventional nuclear family ought to establish the visitation standard" in all cases, even though the plurality itself recognized that such a model is not the "prevailing condition in many households." *Id.*

25. *Id.* at 86 (Stevens, J., dissenting).

26. *Id.* at 88. As he explains:

A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, and critically, the child's own complementary interest in preserving relationships that serve their welfare and protection. *Id.*

27. *Id.* at 88, 90. Justice Stevens' dissent is not the first time the Supreme Court has indicated that children may have interests that directly conflict with those of their parents. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting in part).

28. Rose M. Kreider, *U.S. Census Bureau, Living Arrangements of Children: 2004*, at 8 (2008), available at <http://www.census.gov/prod/2008pubs/p70-114.pdf>.

enforceable.”²⁹ Children who have been raised in same-sex households are particularly at risk of being separated from their biological or adoptive siblings. The outcomes for these children vary widely from state to state, and, thus, the recognition of gay and lesbian *de facto* parental rights is crucial to preserving sibling relationships.

Three main arguments support the importance of maintaining sibling relationships: (1) separating biological or adoptive siblings has a negative impact on children’s development and causes them psychological harm and emotional distress; (2) the sibling relationship is different in kind from a child’s relationship with other third parties; and (3) the preservation of sibling relationships has larger societal consequences because it safeguards a child’s network of social connections and support, which often becomes important during adulthood.

A. The Negative Impact of Sibling Separation on Children’s Development

The intellectual, psychological, social, and emotional growth of children is affected by their relationships with their siblings, but is often impaired when siblings are separated.³⁰ Frequent sibling interaction influences a child’s intellectual development in numerous ways, including fostering complex thinking and advancing conversational skills and vocabulary usage. For example, extensive interaction with siblings helps children develop higher order thinking, such as understanding false belief.³¹ When both a parent and an older sibling engage in make-believe play with younger children, the children are more likely to imitate the actions of the sibling, rather than those of the adult. This may indicate that a sibling’s actions are more understandable to and manageable for a young child, and, thus, that a young child is likely to learn more quickly from siblings who are close in age to him or her than from adults. As children grow older and enter more strenuous intellectual environments, older siblings often help younger siblings with academic and peer challenges.³²

Children may be less likely to join in conversations between adults, so interaction with a sibling will positively enhance a young child’s conversational skills. For example, toddlers will closely monitor conversation between older siblings and parents, often attempting to join in. When they join in, “verbal exchanges last longer, with each participant taking more

29. Robin L. Marshall, Comment, *In the Best Interest of the Child: Establishing a Right for Half Siblings to Remain Together After the Death of the Common Parent*, 22 J. JUV. L. 100, 100 (2001).

30. JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 175 (2006).

31. LAURA E. BERK, *CHILD DEVELOPMENT* 451 (8th ed. 2009).

32. *Id.* at 583.

turns.” Additionally, older siblings often make comments to younger siblings that suggest the older children are regulating aspects of social interaction (e.g., taking turns speaking).³³

The sibling relationship helps children develop their understanding of family and influences social development.³⁴ Acting as “socialization agents,” siblings “teach one another social skills through their long-term interactions,” including motor and language skills, a moral compass, and a sense of gender roles. Interactions with siblings build “a foundation for later learning and personality development.”³⁵ While only children often have closer relationships with their parents, they “tend to be less well-accepted in the peer group, perhaps because they have not had opportunities to learn effective conflict-resolution strategies through sibling interactions.”³⁶ In general, “positive sibling ties predict favorable adjustment, even among hostile children at risk for social difficulties.”

Siblings also share emotional bonds, love, and affection. Over the course of their relationships with siblings, children experience and develop a wide range of emotions, including resentment, affection, and sympathetic concern.³⁷ When parents encourage positive sibling relationships, children learn to turn to one another for emotional support.³⁸ “Children with siblings—especially older siblings—participate in more family talk about thoughts, beliefs, and emotions.”³⁹ This develops a high level of emotional intelligence and maturity, which likely contributes to future relationship success. Finally, siblings have a “history of shared experiences,” as well as, shared medical and genetic histories, all of which contribute to a more highly developed sense of identity.

Courts that refuse to consider or grant the custody and visitation claims of gay and lesbian *de facto* parents harm children by severing important ties with their siblings, in some cases, permanently. Such “emotional losses” have a deep impact on children, and are not lessened by the fact that a child has been raised in a same-sex family.⁴⁰ When considering custody or visitation disputes between same-sex parents, courts should endeavor

33. *Id.* at 389.

34. Marshall, *supra* note 29, at 104–05.

35. Joel V. Williams, *Sibling Rights to Visitation: A Relationship Too Valuable To Be Denied*, 27 U. TOL. L. REV. 259, 260–61 (1995).

36. *Id.* at 583.

37. *Id.* at 582. For example, older children will often comfort distressed younger siblings and alert parents to their needs. In turn, younger siblings often feel comforted by the presence of their siblings during a parent’s absence.

38. *Id.* at 583.

39. *Id.* at 451.

40. David D. Meyer, *The Modest Promise of Children’s Relationship Rights*, 11 WM. & MARY BILL OF RTS. J. 1117, 1137 (2003). See *In re Parentage of L.B.*, 122 P.3d 161, 174 (Wash. 2005) (relying on *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999)).

to respect and understand a child's reality, rather than "expressing sunny optimism about children's natural resiliency in the face of grievous emotional loss."⁴¹ The termination of sibling relationships jeopardizes children's intellectual, psychological, emotional, and social development. It deprives children of support and affection that would be beneficial to them following a significant disruption in their lives—the separation of their parents and the dissolution of their family unit, which could also involve relocation and a change in financial circumstances.⁴²

B. The Unique Nature of Sibling Relationships

Sibling relationships are unique from the parent-child relationship and from children's relationships with third parties because "the sibling bond crosses a lifespan,"⁴³ having the potential to become a person's most enduring relationship of his or her life. Siblings, especially those who are close in age, experience stages of development and important achievements—including childhood, puberty, young adulthood, marriage, parenthood, and old age—at or around the same time, and can share, learn from, and enrich each other's experiences. Siblings who differ significantly in age may develop relationships that function on multiple levels: sibling, parent, friend, and confidant. Siblings may also be more inclined to interact with each other more frequently or on a deeper level than with their parents.⁴⁴ Preserving sibling relationships provides children with a "potential life-long familial relationship" and "life-long companionship."⁴⁵ Such relationships are different in kind from the intergenerational relationships often litigated in contemporary case law.

C. The Societal Benefits of Sibling Relationships

Society benefits from the preservation of sibling relationships. Children who are separated from siblings may experience a decreased sense of stability, identity, family, and culture. Thus, "sibling relationships are more than mere conveniences to a healthy society,"⁴⁶ because they provide important benefits. If siblings are not permitted to preserve those relationships, such benefits are never realized. Access between siblings is imper-

41. *Id.* at 1134.

42. Williams, *supra* note 35, at 282 (citations omitted) "[W]hile parents are *potentially* the most stable figure[s] in a child's life," sibling relationships have significant value because they can help children cope with the absence of parental figures. Dana E. Prescott, *Biological Altruism, Splitting Siblings and the Judicial Process: A Child's Right to Constitutional Protection in Family Dislocation*, 71 UMKC L. REV. 623, 641 (2003).

43. Marshall, *supra* note 29, at 104 (internal citation omitted).

44. *Id.* at 100.

45. Williams, *supra* note 35, at 260–61, 281–82.

46. Prescott, *supra* note 42, at 632.

ative, and helps preserve important, life-long relationships, even if the siblings no longer live together.⁴⁷ Children of same-sex unions possess important social and family connections, which they may lose if they are not allowed to maintain sibling relationships after their parents separate.

D. The Problem of Sibling Access

When siblings live in the same household, access is natural. When the adult relationship dissolves, parents determine access among siblings and may not always act in their children's best interests, either intentionally or unintentionally, particularly if doing so is inconvenient or causes the adults emotional turmoil.⁴⁸ Although no hard and fast rules exist regarding the separation of siblings, most courts are reluctant to separate siblings.⁴⁹ In a typical divorce case, the potential separation of siblings is usually one factor among many in the best-interests-of-the-child analysis, however, some courts apply an exceptional or compelling circumstances test to split custody of children. Even if extraordinary circumstances support split custody, the split usually must still be in the children's best interests.⁵⁰ In instances where siblings are separated, liberal visitation generally preserves at least some access. Siblings may also be able to take advantage of third-party access statutes, and courts can invoke their equitable powers to prevent a sibling separation.⁵¹ Whether courts are "properly equipped to enforce such visitation" is a separate, but concerning issue.⁵²

E. Sibling Access After a Same-Sex Family Dissolves

Because only a few cases have raised the issue of sibling access in the context of same-sex families, it is difficult to determine what courts will do. While courts could use a best-interests-of-the-child analysis, some scholars have argued that the best-interests standard is actually more reflective of parents' interests, particularly in the case of adoptive or half-siblings, making it an ineffectual tool "unless the law contemplates the

47. Williams, *supra* note 35, at 262. ("the continuation of interactions between siblings over a lifespan is dependent upon three factors: whether a living sibling exists, whether that sibling resides within an accessible distance, and whether the siblings have actual contact through visitation, telephoning, and/or letter writing").

48. Williams, *supra* note 35, at 262.

49. Prescott, *supra* note 42, at 641. Factors that are often taken into consideration in determining whether to separate siblings include: the relative ages of the children, school and academic activities, relocation, special emotional or disability needs of the children, preference of the children, gender correlation between the children and parents, and animosity between the children and parents. *Id.* at 638–40.

50. Prescott, *supra* note 42, at 637.

51. Williams, *supra* note 35, at 269. See, e.g., *Smith v. Smith*, 893 A.2d 934 (Del. 2006).

52. Marshall, *supra* note 29, at 101.

child's best interests from the child's perspective."⁵³ Unfortunately, a child's desire to retain access to a half-sibling is likely to be considered a mere "wish," rather than a protected interest, one that will be "balanced against finances, convenience, and tradition in a conventional manner."⁵⁴

In same-sex families, a child's access to his or her half-sibling likely depends on the success or failure of a *de facto* parent's petition for visitation or custody of her ex-partner's child. For example, in *Smith v. Smith*, four children were born into and raised in a same-sex family.⁵⁵ Erica Smith gave birth to triplets; several years later, her partner, Shelia Smith, used the same sperm donor and gave birth to another child, Samantha. After the parties' relationship ended, a Delaware family court held that Shelia was the triplets' *de facto* parent over Erica's objections and granted Shelia's petition for joint custody and visitation.⁵⁶ Although Erica did not seek visitation with Samantha, the family court concluded that "such visitation should occur frequently and regularly, particularly since the triplets appear[ed] to have a strong relationship with Samantha."⁵⁷ Therefore, although the Delaware Supreme Court did not impose visitation on Erica, it upheld the lower court's decision, encouraging and permitting such visitation because doing so would benefit all of the Smith children.

Other courts have considered the child support obligations for children born into same-sex relationships, but failed to ensure that sibling relationships were maintained. In *Elisa B. v. Superior Court*, a lesbian couple used a common sperm donor to create a family. Elisa B. gave birth to Chance, and Emily B. gave birth to twins less than a year later. The women then raised the children together. After their relationship dissolved, the California Supreme Court required Elisa B. to pay child support to Emily B. for the twins, but did not consider whether the women should have access to their nonbiological children or whether the three siblings should be permitted to have access to each other.⁵⁸

Other courts, including the *Black* court, have expressed only marginal concern for sibling relationships in same-sex families. Within the context of litigation regarding same-sex families, courts sometimes preserve a traditional conception of the family (the parent-child relationship) at the expense of a larger family unit (the sibling-sibling relationship) that might

53. *Id.* at 106. Although Marshall's article only discusses half-siblings who have been separated or faced separation after the death of a common parent, such a situation makes for an apt comparison of half-siblings of same-sex couples.

54. Marshall, *supra* note 29, at 101–02, 109.

55. *Smith v. Smith*, 893 A.2d 934 (Del. 2006).

56. *Id.* at 936.

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

58. *Elisa B. v. Superior Court*, 117 P.3d 660, 114 (Cal. 2005).

have greater long-term benefits for children than permitting legal parents to have absolute control over the custody of their children.

V. The Louisiana Court of Appeal's Reasoning in *Black v. Simms*

A. Custody and Visitation Standard Versus Third-Party Disputes

Louisiana has long held that a legal parent's right to the custody of his or her child is paramount against any third party.⁵⁹ Currently, Louisiana Civil Code article 133 governs custody disputes between legal parents⁶⁰ and third parties, and article 136 governs visitation rights for third parties and for legal parents who have not been granted custody. Article 133 states:

If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment.⁶¹

Article 133's current language appears to retain the primacy of a legal parent's paramount right of custody, and likely provides limited room for third parties to seek custody or visitation.

Custody and visitation law in Louisiana as it relates to untraditional families is currently unclear. A split has developed among the circuits of the Louisiana Court of Appeal, and, after the *Black* decision, among the panels of the third circuit, regarding the appropriate test to be applied under Art. 133.⁶² The first circuit has interpreted Art. 133 strictly, finding that legal parents' rights are paramount (even if those parents were not involved in their children's lives for significant periods) and that a finding of substantial harm is necessary before awarding sole or joint custody to

59. LA. CIV. CODE ANN. art. 133 (1994) [hereinafter art. 133] cmt. (b) (citing *Deville v. LaGrange*, 388 So.2d 696, 697–98 (La. 1980)). Prior to 1982, a legal parent could only be deprived of custody if he or she had forfeited his or her right to parenthood, was found unfit, or was unable to provide a home for the child. Art. 133 cmt. (b). Additionally, the use of the best interest standard was improper in custody contests between legal parents and third parties. *Id.* (citing *Jones v. Jones*, 415 So.2d 300 (La. Ct. App. 1982)). In 1982, the Louisiana legislature sought to provide courts with “more freedom or latitude to pursue the goal of insuring that the best interest of the child is served in resolving custody disputes between parent and nonparent litigants.” Art. 133 cmt. (b) (citing *Boyett v. Boyett*, 448 So.2d 819, 822 (La. Ct. App. 1984)). However, parental primacy was still paramount in such custody disputes.

60. In Louisiana, the legal relationship between a parent and child is demonstrated by establishing maternity or paternity or through adoption. LA. CIV. CODE ANN. art. 179 (2009).

61. Art. 133.

62. See *Williams v. Boone*, 733 So. 2d 1257 (La. Ct. App. 1999); *In re Landrum*, 704 So. 2d 872 (La. Ct. App. 1997). But see *Robert v. Gaudet*, 691 So. 2d 780 (La. Ct. App. 1997); *Rupert v. Swinford*, 671 So. 2d 502 (La. Ct. App. 1995).

a third party.⁶³ In contrast, prior to the *Black* decision, the third circuit had developed an approach that was potentially much more favorable to untraditional families.

In disputes between a legal parent and grandparents who had stepped into caregiving for their grandchildren, either out of necessity or at the request of a legal parent, the third circuit held in *Williams v. Boone* and *In re Landrum*⁶⁴ that the substantial harm standard does not need to be applied when joint custody is awarded to a legal parent and a third party as long as that award is in the child's best interest.⁶⁵ Both *Williams* and *Landrum* held that an initial determination of joint custody between a legal parent and a third party—such as a *de facto* parent—could be made without requiring the third party to establish that substantial harm would result if sole custody were awarded to a legal parent.⁶⁶ Based on this precedent, the *Black* court could have made a similar determination.

63. *Robert*, 691 So. 2d 780; *Rupert*, 671 So. 2d at 505. In *Rupert*, the first circuit held that in order to award joint custody to a legal parent and a third party, a trial court must determine that joint custody to the legal mother and father would result in substantial harm to the child; sole custody to the legal mother would result in substantial harm to the child; and sole custody to the legal father would result in substantial harm to the child. *Rupert*, 671 So. 2d at 504. According to *Rupert*, however, even if a court found that awarding one legal parent sole custody would result in substantial harm to the child, that parent could still receive joint custody with a third party. *Id.* at 505. Based on cases subsequent to *Black v. Simms*, it is clear that in the first circuit, gay and lesbian *de facto* parents have little, if any, chance of obtaining custody of their ex-partners' children, even if the legal parent agrees to or desires joint custody. See *In re Melancon*, 62 So. 3d 759 (La. Ct. App. 2010) (denying the unopposed petition to share custody of a child with the biological mother because the *de facto* parent (the mother's ex-partner) failed to allege that an award of sole custody to the biological mother would result in substantial harm to the child as required by art. 133); see also *id.* at *10 (Pettigrew, J., concurring) ("I am constrained to follow the law as it presently exists in the State of Louisiana. . . . I further note that if there is going to be any change of the existing law, it should be addressed by the Louisiana State Legislature."). See also *Lovell v. Billiot*, 30 So. 3d 1182 (La. Ct. App. 2010) (permitting visitation but not joint custody when maternal grandparents failed to show that an award of sole custody to the child's biological father would result in substantial harm).

64. Both *Williams* and *Landrum* involved disputes between a legal parent and grandparents when the grandparents had stepped in to care for their grandchildren either out of necessity or at the request of a legal parent.

65. *Williams*, 733 So. 2d at 1260 ("This language [the introductory language under Art. 133] does not contemplate application of the substantial harm standard when joint custody is awarded to a parent and a non-parent."); *In re Landrum*, 704 So. 2d at 875 ("However, we note that Article 133 states, 'If an award of joint custody . . . to either parent would result in substantial harm to the child, [then] the court shall award custody to another person. . . .' In this case the court *did* award joint custody to the mother. Hence, we find the burden of proving 'substantial harm to the child' inapplicable. To that extent we disagree with *Robert*."). (emphasis in original).

66. *Williams*, 733 So. 2d at 1259–60; *In re Landrum*, 704 So. 2d at 876.

B. The Black v. Simms Decision

In *Black*, the Louisiana Court of Appeal again considered the appropriate test to be applied under article 133, albeit in the context of a same-sex family, and found that a legal parent's interest in the care, custody, and control of her child was paramount against the claims of her ex-partner.⁶⁷ The *Black* court addressed two questions: (1) under Louisiana's statutory scheme, what is the appropriate standard by which to judge a gay or lesbian *de facto* parent's petition for sole or joint custody over a legal parent's objection, and (2) can "substantial harm" encompass the separation of a child from an adult who planned for the child's birth and subsequently lived with and parented that child?⁶⁸

1. AWARD OF CUSTODY TO A PERSON OTHER THAN A PARENT

Black held that a gay or lesbian *de facto* parent is not precluded from being considered for an award of joint custody. Before a court may award custody, however, it must find that substantial harm will result to the child if sole custody is, instead, awarded to the legal parent. Thus, the *Black* court closely followed the reasoning of the first circuit, rather than of the third circuit. The *Black* court also held that the appropriate test between a legal parent and a third party consisted of two prongs: (1) the court must determine that an award of custody to the legal parent would cause substantial harm to the child, and (2) only *after* making such a finding, may a court then apply a best interests analysis to determine whether an award of custody to a *de facto* parent would serve the child's best interests.⁶⁹

The *Black* court disagreed with the *Williams* and *Landrum* decisions. In particular, *Black* criticized *In re Landrum*, which emphasized Louisiana's concern with the best interests of the child as evidenced by the plain language of article 131 and its commentary.⁷⁰ *Black* also relied on *Troxel* to bolster its findings.⁷¹ Although the *Black* court acknowledged that litigation frequently occurs between psychological and legal parents, it stated that the legislature provided for such circumstances under article 136—which permits reasonable visitation for legal parents not granted joint or

67. *Black v. Simms*, 12 So. 3d 1140 (La. Ct. App. 2009).

68. *Id.* Under Louisiana law, there is a presumption of joint custody in disputes between legal parents. LA. CIV. CODE ANN. article 132 (1994). Also, as noted *infra*, the *Black* court did not specifically address Braelyn's separation from her half-brother, Eli.

69. *Black*, 12 So. 3d at 1142-43.

70. Louisiana Civil Code Annotated article 131 states that courts "shall award custody of a child in accordance with the best interest of the child," and the commentary clarifies that the best interest standard is the "overriding test" and "govern[s] all articles of [the Child Custody Section]," including initial determinations of custody as well as modifications. LA. CIV. CODE ANN. art. 131 (1994); art. 131 cmt. (a) & (d).

71. *Black*, 12 So. 3d at 1143.

sole custody⁷² as well as reasonable visitation rights for relatives, by blood or affinity, or former stepparents or step grandparents—and Louisiana Revised Statutes § 9:344, which provides for grandparent and sibling visitation rights.⁷³

The court also rejected *Black*'s arguments that it should exercise its equitable powers in light of the lack of statutory provisions governing same-sex families. Although the court agreed that no such laws exist in Louisiana, it stated there were also no laws that governed "heterosexual relationships in which only one of the parties is the biological parent."⁷⁴ The court stated: "Any non-parent who has a relationship with a biological parent and develops a relationship with the child has to meet the same standard in establishing a basis for custody of the child," including grandparents and stepparents. While *Black* did not preclude gay and lesbian *de facto* parents from seeking custody or visitation under article 133, it held that a legal parent's rights are generally paramount.⁷⁵ Additionally, since the *Black* court concluded that a substantial harm standard was appropriate, rather than, for example, a presumption in favor of the legal parent, a court may not even reach the best-interests-of-the-child analysis in many Louisiana custody and visitation cases.

2. SUBSTANTIAL HARM

The *Black* court held that "substantial harm" cannot encompass the separation of a child from a gay or lesbian *de facto* parent who planned for the child's birth and subsequently lived with and parented that child. *Black* did not specifically address whether separating Braelyn from her half-brother, Eli, would cause her substantial harm. The *Black* court stated that the term "substantial harm" includes situations such as parental unfitness, neglect, abuse, inability to provide a home, abandonment of parental rights, prolonged separation of the child from his or her natural parents, and "other circumstances that would cause the child to suffer positive and substantial harm."⁷⁶ *Black* argued that cutting off Braelyn's access to Black and Eli would cause Braelyn substantial harm. Black introduced evidence that she shared a parent-child bond with Braelyn, which would be terminated if she were not awarded access. Additionally,

72. An award of reasonable visitation is presumed for parents who do not have custody unless the court finds that it is not in the best interests of the child. LA. CIV. CODE ANN. art. 136 (2009).

73. *Black*, 12 So. 3d at 1143; Art. 136; LA. REV. STAT. ANN. § 9:344 (1999).

74. *Black*, 12 So. 3d at 1143.

75. *But see In re Melancon*, 62 So. 3d 759 (La. Ct. App. 2010); *Lovell v. Billiot*, 30 So. 3d 1182 (La. Ct. App. 2010).

76. *Black*, 12 So. 3d at 1144 (relying on *Merritt v. Merritt*, 550 So. 2d 882 (La. Ct. App. 1989); *Mills v. Wilkerson*, 785 So. 2d 69 (La. Ct. App. 2001)).

Black argued that an award of sole custody to Simms would sever Braelyn from the loving, involved family unit of which she was a part for the first six years of her life.⁷⁷

Despite its misgivings about the behavior of both parties,⁷⁸ the *Black* court found that Black failed to meet her burden of proving that an award of sole or joint custody to a legal parent would cause a child substantial harm.⁷⁹ While characterizing Simms' actions as "harsh and inconsiderate," the court concluded that it could not state for certain that Braelyn's separation from a "*family friend*," presumably Black, would amount to substantial harm.⁸⁰ The court acknowledged that Braelyn had an "obvious affection and attachment" to the Blacks,⁸¹ but never specifically discussed Braelyn's attachment to Eli or whether separation from him would cause either child substantial harm or would be in the children's best interests.

VI. Louisiana's Lost Opportunity to Benefit Children by Preserving Sibling Relationships

Like other courts before it,⁸² the Louisiana Court of Appeal missed an important opportunity to provide children in same-sex families with the benefit of legally recognized access to their *de facto* parents and siblings. Rather than permitting Braelyn to maintain relationships with Black and Eli, which Braelyn herself expressed were significant to her, the Louisiana Court of Appeal erred on the side of protecting Simms' paramount interest in the care, custody, and control of her daughter without ever considering the best interests of Braelyn.

This section discusses four main critiques of *Black v. Simms*. First, the Louisiana Court of Appeal interpreted *Troxel* too broadly. Second, the

77. *Black*, 12 So. 3d at 1144.

78. According to the court, both parties made "bad decisions." *Id.* at 1145. Black used drugs two years prior to the dissolution of the parties' relationship and three years prior to her petition for custody. However, no evidence was presented that Black currently used drugs. The court also characterized Simms' actions as "harsh and inconsiderate." *Id.*

79. *Id.* at 1144–45.

80. *Id.* at 1145 (emphasis added). The Louisiana Court of Appeal refused to deal with the proverbial "elephant in the room: whether [same-sex individuals] in an intimate domestic relationship each have the right to parent the children they mutually agree that one party will adopt [or conceive]." *Kulstad v. Maniaci*, 220 P.3d 595, 610 (Mont. 2009) (Nelson, J., concurring). After concluding that the Louisiana legislature was silent on the issue of children of same-sex families, the Louisiana Court of Appeal dismissed Black's arguments by stating that "there are no laws governing heterosexual relationships in which only one of the parties is the biological parent." *Black*, 12 So. 3d at 1143. Despite the *Black* court's representation, this is not strictly true as stepparents are entitled to petition for reasonable visitation under LA. CIV. CODE ANN. article 136(B). Thus, the *Black* court's dismissal of Black's arguments appears not only to be incorrect, but also disingenuous.

81. *Black*, 12 So. 3d at 1145.

82. See, e.g., *Elisa B. v. Superior Court*, 37 Cal. 4th 108 (2005).

Black court interpreted Louisiana's statutory scheme too narrowly because it could have found that Black was entitled to joint custody of Braelyn based on previous decisions of the third circuit. Third, the court could have incorporated the concept of *de facto* parenthood into Louisiana's statutory scheme without compromising the liberty interests of legal parents. Finally, the court should have incorporated the concept of *de facto* parenthood into Louisiana's statutory scheme because doing so would have been in the best interests of Braelyn and Eli and of children generally.

A. The Louisiana Court of Appeal Interpreted Troxel Too Broadly

The *Black* court interpreted *Troxel* too broadly because the Supreme Court left room for recognition of *de facto* parents' claims, especially if doing so would benefit the children involved. The Supreme Court expressly stated it was not adopting a *per se* rule for third-party claims.⁸³ The *Black* court relied too heavily on the plurality statement that "so long as a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family."⁸⁴ However, the lower court's intervention in *Troxel* was not the problem. Rather, the lower court failed to honor the long-held presumption in favor of a legal parent's decision making, which a third party might then rebut.⁸⁵

The *Black* court also failed to take into account some of the fine distinctions drawn in *Troxel*—explicitly by the dissenters and more subtly by the plurality—between various third parties. Justice Kennedy expressed concern that the plurality's reasoning might be interpreted too broadly and might be unjustifiably applied against third parties who have a "legitimate and established relationship with the child," including *de facto* parents and siblings.⁸⁶ Although it approached the issue more cautiously, the plurality noted that its opinion concerned "persons outside the nuclear family" and suggested that the "intergenerational relationship" between children and grandparents was likely distinguishable from an established *de facto* parent-child or sibling relationship.⁸⁷ The *Black* court erroneously treated a parent's liberty interest as something akin to a mandate, as opposed to one that might be rebutted in appropriate circumstances. Rather, the *Black* court should have considered more fully the import of the *Troxel* opinion, which left room for untraditional families.

83. *Troxel v. Granville*, 530 U.S. 57, 73 (2000) (plurality).

84. *Id.* at 68–69.

85. *Id.*

86. *Id.* at 98 (Kennedy, J., dissenting).

87. *Id.* at 70 (plurality).

*B. The Black Court Interpreted Louisiana's
Statutory Scheme Too Narrowly*

While the Louisiana Court of Appeal interpreted *Troxel* too broadly, it interpreted the Louisiana statutory scheme for custody and visitation too narrowly. In particular, the *Black* court failed to address the issue of sibling visitation, which is provided for under Louisiana law, even though this issue was raised at trial and on appeal. Two Louisiana statutes govern sibling visitation.⁸⁸ Visitation decisions under statutes are made on a best-interests-of-the-child analysis. References in Louisiana's statutory scheme regarding marriage and blood suggest intent to allow sibling visitation between children who are biologically related.

The *Black* court glossed over any interests Braelyn and Eli might have had in continued access to each other. Although the *Black* court considered the potential harm to Braelyn if she were to be separated from Black, a "family friend," it did not specifically consider the potential damage in separating her from Eli, her biological sibling with whom she was raised for several years. Even if the *Black* court made such a determination without explicitly stating it, the court concluded that since the harm threshold was not met, it could not proceed to the best interests analysis.⁸⁹ Therefore, the issue of sibling access was incorrectly conflated with Black's *de facto* parent claims and was considered under the inappropriate standard of substantial harm, rather than of best interests. The *Black* court discounted Louisiana's overriding concern for children's welfare and failed to apply the best-interests-of-the-child standard, which article 131 explicitly states must be applied in *all* custody determinations.⁹⁰ This is contrary to the Louisiana legislature's express commitment to protecting sibling relationships.

C. The Black Court Should Have Considered de Facto Parenthood

The *Black* court could have incorporated the concept of *de facto* parenthood into Louisiana's statutory scheme without compromising legal parents' liberty interests. Family courts may exercise their equitable pow-

88. LA. REV. STAT. ANN. § 9:344(D) states:

If the parents of a minor child or children of the marriage are legally separated or living apart for a period of six months, the grandparents or siblings of the child or children may have reasonable visitation rights to the child or children during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

LA. CIV. CODE ANN. art. 136 states:

Under extraordinary circumstances, a relative, by blood or affinity, or a former stepparent or step-grandparent, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child.

89. *Black*, 12 So. 3d at 1145.

90. LA. CIV. CODE ANN. art. 131.

ers when gaps exist in a state's statutory scheme, so long as the action the court takes does not contradict that statutory scheme.⁹¹ Family courts may, and often do, fill in those gaps with common law doctrines, such as *de facto* parenthood. Such "equity powers and common law responsibilit[ies]" enable courts "to respond to the needs of children and families in the face of changing realities." The *Black* court could have incorporated the concept of *de facto* parenthood into Louisiana's statutory scheme, which already includes specific provisions for custody awards to "persons other than parents."⁹² Doing so would have made it more likely that Braelyn and Eli, as well as other children, would have access to one another. Additionally, the *Black* court could have found that sibling visitation for Braelyn and Eli was appropriate since Louisiana's statutory scheme clearly supports such awards between biological siblings.⁹³

The *Black* court should have incorporated the concept of *de facto* parenthood into Louisiana's statutory scheme because it would have been in the best interests of Braelyn and Eli and of children generally. The Louisiana Court of Appeal upheld the separation of Braelyn from two members of her nuclear family. That separation was not based on the relationship between Braelyn and Eli or between Braelyn and her *de facto* parent, but on the relationship between the two adults. This is the antithesis of the best-interests standard, a fundamental foundation of family law.

Unless the situation is severe, custody and visitation decisions that result in the complete isolation of a child from a biological sibling undermine the best interests of children. Decisions to separate biological siblings should not be based on a standard that completely subordinates the child's interests to his or her legal parent's interests without regard for his or her other associational and developmental needs. Maintaining Braelyn's relationship with Eli was not only possible, but also would have been in both children's best interests.⁹⁴ As discussed *supra*, children receive substantial benefits when their sibling relationships are preserved. These benefits are not diluted by the fact that the children involved were born into a same-sex family. As the first circuit of the Louisiana Court of Appeal noted: "[v]ictories in these battles [legal parents versus *de facto* parents] hurt the child more than they help the adults. The parties do not have to . . . even like each other, but they do need to put the child first in

91. See, e.g., *In re Parentage of L.B.*, 122 P.3d 161, 169, 174 (Wash. 2005).

92. Art. 133.

93. LA. REV. STAT. ANN. § 9:344(D).

94. Even the concurrence's attempt to temper the *Black* majority failed because Judge Cooks' belief that the parties' animosity negated an award of custody or visitation to Black did not justify the total isolation of Braelyn from her half-brother, Eli. *Black v. Simms*, 12 So. 3d 1140, 1145 (La. Ct. App. 2009) (Cooks, J., concurring).

their dealings with each other.”⁹⁵ However, putting children first requires that courts ensure that children are able to maintain important sibling relationships.

VII. Conclusion

Social science evidence, legal scholarship, and case law support the maintenance of sibling relationships. In *Black v. Simms*, the Louisiana Court of Appeal missed an important opportunity to provide children in same-sex households with the benefit of legally recognized access to their siblings. When the law fails to adapt to the changing composition of the American family, it is children who suffer.

95. *Robert v. Gaudet*, 691 So. 2d 780, 785 (La. Ct. App. 1997).