Brooke S.B. v. Elizabeth A. C.C.: A Long-Overdue Victory for Estranged Same-Sex Parents in New York's Highest Court

I. OVERVIEW

Brooke S.B. and Elizabeth A. C.C. began dating in 2006; after a year, because same-sex couples could not legally marry in New York at the time, they publically and symbolically proclaimed their lifelong commitment to their relationship and their intent to start a family.[1] Soon after, Brooke and Elizabeth decided to have a child together and agreed that Elizabeth would carry the baby.[2] Elizabeth was then artificially inseminated and carried their child to term, though Brooke remained highly involved throughout the pregnancy.[3] When Elizabeth went into labor in June of 2009, Brooke was right there at her side.[4] Elizabeth gave birth to a healthy baby boy; Brooke cut the baby's umbilical cord and gave him her own last name.[5] Brooke and Elizabeth lived together and raised the child jointly, assuming coequal parental duties and responsibilities, although Brooke never legally adopted the child.[6] Brooke remained involved in raising her child even after her relationship with Elizabeth ended in 2010 and, when Elizabeth terminated contact between Brooke and her son, sought legal recognition of her rights as a *de facto* parent.[7]

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1. Brooke S.B. v. Elizabeth A. C.C., 28 N.Y.3d 1, 2 (N.Y. 2016). This case presented a consolidated appeal of two cases with remarkably similar facts.
2. *Id.* at 3.
3. *Id.*
4. *Id.*
5. *Id.* at 3.
6. *Id.*
7. *Id.*

Brooke petitioned the New York Family Court for visitation or joint custody of the child; Elizabeth moved to dismiss the petition, arguing that Brooke, without a biological or adoptive connection to the child, lacked standing to seek either remedy.[8] The court-appointed attorney for the child determined that regular visitation with Brooke would be in the child's best interest and, alongside Brooke, opposed the motion to dismiss, asserting that the Marriage Equality Act and other changes in the law contradicted New York's outdated definition of a "parent".[9] However, Family Court granted the motion[10] and the Appellate Division unanimously affirmed, bound by the New York Court of Appeals' prior holding in *Alison D. v. Virginia M.*: that an unmarried partner of a biological parent, without a biological or adoptive relationship to the child, cannot seek visitation or custody as a "parent" under Domestic Relations Law (DRL) section 70,[11] regardless of any existing relationship with the child.[12]

In this final appeal, the Court of Appeals of New York *held* that under DRL section 70, a non-biological, non-adoptive partner has standing to seek visitation and custody where she shows by clear and convincing evidence that the parties agreed to conceive and raise a child together, overruling its prior decision that had unduly restricted the Family Court and Appellate Division. *Brooke S.B. v. Elizabeth A. C.C.*, 28 N.Y.3d 1 (N.Y. 2016).

II. BACKGROUND

A. The Parens Patriae Doctrine

While it originally described the absolute power of the king as the father and protector of his citizens, the *parens patriae* doctrine now refers to the common prerogative of the courts to protect children's moral, physical, emotional, and mental welfare.[13] The parental custodial right of

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8. *Id.*

9. *Id.*

10. *Id.* In the second matter of this consolidated appeal, the Family Court denied the motion, conferring standing onto petitioner based only on the doctrine of judicial estoppel.

11. *Id.* at 4-5. N.Y. DOM. REL. LAW (DRL) § 70 (LexisNexis 2017) states:

> Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time.

12. *Id.* at 4-5 (citing Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A. C.C., 28 N.Y.3d, (2016)).

13. Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (explaining the development of *parens patriae* doctrine as it relates to custody).

a biological or adoptive parent protects her fundamental interest in controlling her child's upbringing.[14] A parent's right to control her child's custody and care is perhaps one of the oldest fundamental principles of liberty still recognized by our courts; however, the right is not absolute.[15] Long-standing principles of equity allow the state to protect its recognizable interest in children's general well-being through reasonable regulation of parental rights.[16] Invoking its inherent parental jurisdiction requires a court to peer through the lens of a "wise, affectionate, and careful parent," in order to serve the child's best interest.[17]

The child's best interest is paramount; if a conflict arises between asserted parental rights and a child's best interest, the child's interest prevails.[18] Generally, parental rights and children's interests are in line with one another.[19] For example, it is usually both in the interest of the child to be raised by a natural parent and in the interest of the parent to raise her biological offspring, but sometimes those interests diverge.[20] In *Bennett v. Jeffreys*, the biological mother of eight-year old girl sought custody of her daughter from a former schoolmate of the child's grandmother, to whom she had informally entrusted her daughter's custody for the prior eight years.[21] The New York Court of Appeals devised a two-prong inquiry, the "best interest" test, to determine whether a nonparent may obtain custody as against a biological parent.[22] Beginning with the presumption that being raised by biological parents is in the child's best interest, a court first inquires into the circumstances surrounding the child's custody and care.[23] Only if it finds "extraordinary circumstances" will it make the second inquiry into the best interests of the child.[24]

In other words, despite its name, the best interest test strictly precludes consideration of the child's best interests unless and until the first prong has been satisfied.[25] Hence, to establish standing to seek custody, the nonparent first must prove the existence of rare,

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14. Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976).
15. *Id.* at 281-82 (citing Spence-Chapin Adoption Service v. Polk, 274 N.E.2d 431 (1971)).
16. *Id.*
17. *Finlay*, 148 N.E. at 626 (citing Queen v. Gyngall, 1893, 2 Q. B. Div. 232).
18. *Bennett*, 356 N.E.2d at 281.
19. *Id.* at 282.
20. *Id.*
21. *Id.* at 280.
22. *Id.* at 283.
23. *Id.* at 282-83.
24. *Id.* at 283.
25. *Id.*

extraordinary circumstances, which would drastically affect the child's well-being.[26] These extraordinary circumstances create a narrow class of exceptions where, lacking an explicit statutory authority, a court is allowed to supplant the parental authority of the natural parent in light of the child's best interests.[27]

If, and only if, a court finds the existence of extraordinary circumstances such as in *Bennett*, where the child was separated from her biological mother for nearly all of her life and formed a strong, familial bond with her custodian, may the court consider what would be in the best interest of the child.[28]

B. New York and the Definition of Parenthood

Fifteen years after *Bennett*, the New York Court of Appeals departed from its prior method of interpreting DRL section 70 to effectuate the legislative purpose and created a bright-line rule to determine who can and cannot claim to be a parent.[29] In *Alison D. v. Virginia M.*, the court considered facts nearly identical[30] to those in the noted case, but twenty-five years earlier.[31] The New York legislature left the definition of the term "parent" to the discretion of the courts, which analyzed its meaning in *Alison D.*[32] The New York Court of Appeals held that a person who is not the biological or adoptive parent of a child in the custody of a biological parent does not have the right to seek custody or visitation with the child because the person is not a "parent" within the scope of DRL section 70.[33] The court restated a long-recognized legal principle that a nonparent may not displace the parental custody of a biological parent without showing grievous cause, unfit parenting, or necessity.[34] While the court remained "mindful of [the nonparent's] understandable concern for and interest in the child and of her expectation and desire

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26. *Id.*
27. *Id.*
28. *Id.* at 284.
29. Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991). The legislative purpose for DRL section 70 is to serve the child's best interests.
30. *Id.* at 28-29. A lesbian couple in a long-term relationship jointly agreed to have and raise a child together. Although the non-biological mother never formally adopted the child, she shared the parenting responsibilities until the relationship ended. She moved out but continued to visit her son until the birth mother terminated contact, at which point the non-biological mother petitioned for visitation rights.
31. *Compare Alison D.*, 572 N.E.2d at 28-29, *with* Brooke S.B. v. Elizabeth A. C.C., 28 N.Y.3d 1, 2-5 (N.Y. 2016).
32. *Alison D.*, 572 N.E.2d at 29.
33. *Id.*
34. *Id.* (citing Ronald FF v. Cindy GG, 511 N.E.2d 75 (N.Y. 1987)).

that her contact with the child would continue," it ultimately held that she could not be a parent under section 70.[35]

The court recognized the special problem severing contact between children and nonparents who have developed beneficial relationships with the children, but concluded that these nonparents had no right to seek visitation or custody against the decision of a fit parent, and at the expense of the parental right to custody.[36] Thus, the court made it clear that absent extraordinary circumstances, parenthood and the attendant custody rights are exclusive to biological or adoptive parents and not available to third parties with established, emotional child-parent relationships.[37]

C. The Supreme Court's Analysis of Parental Rights Under the Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution provides, *inter alia*,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[38]

Several decisions of the Supreme Court of the United States apply the Fourteenth Amendment to parental rights. In *Santosky v. Kramer*, the Court held that in cases of neglect or abuse, due process requires the state to support its allegations by clear and convincing evidence before terminating parental rights.[39] The Court reasoned that constitutional due process would be protected by increasing the standard of proof from "fair preponderance of the evidence" to "clear and convincing evidence," reducing the risk of erroneous deprivation of private interests.[40] Similarly, in *Troxel v. Granville* the Court held that the due process clause of the

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35. *Id.*

36. *Id.* at 29-30.

37. *Id.* at 30. Furthermore, the court reasoned that the specifically enumerated categories of persons with standing under DRL section 70 indicate that the legislature intended to preclude *de facto* parents from petitioning for visitation rights as against biological parents, even where visitation would likely be beneficial to the child's best interests.

38. U.S. CONST. amend. XIV.

39. Santosky v. Kramer, 455 U.S. 745, 769 (1982). Plaintiffs, facing accusations of neglecting their three children, challenged the constitutionality of the removal the children from their home and the termination of their parental rights to the children under the "fair preponderance of the evidence" standard.

40. *Id.* at 761.

Constitution did not allow a state to infringe on the parental right to make decisions regarding child rearing.[41]

Furthermore, the Court in *Stanley v. Illinois* held that denial to a single father of a hearing on parental fitness before the removal of children from his custody violated the equal protection clause of the Fourteenth Amendment.[42] Where the State assumed custody of children of married parents, divorced parents, and unmarried mothers only after a hearing to prove neglect, the plaintiff in *Stanley* was denied those same rights because of his status as an unmarried father.[43] However, in *Quilloin v. Walcott* the Court held that the due process and equal protection rights of the father of an illegitimate child were not violated when a court prohibited him from vetoing his child's adoption by a stepfather.[44] The Court reasoned that even though the father was not an unfit parent, the father's rights under the Fourteenth Amendment could not have been violated because he had never sought or had custody of his child.[45] Finally, in *Obergefell v. Hodges* the Court held that the Fourteenth Amendment requires states to grant marriage licenses to same sex couples and to recognize same sex marriages performed in other states.[46] The Court reasoned that,

> By giving recognition and legal structure to their parents' relationship, marriage allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. Marriage also affords the permanency and stability important to children's best interests.[47]

Indeed, the Court has used the Fourteenth Amendment to protect the interests of parents and parental figures in a variety of familial situations. The Court has made clear that the best interests of the child are of the utmost importance. The Court's discussion in *Obergefell* of the importance of "permanency and stability" in a child's life further perpetuates the idea that two people connected to a child in a parental relationship should be afforded parental rights.

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41. Troxel v. Granville, 530 U.S. 57, 75 (2000). The order of visitation granted to plaintiff grandparents for the right to visit their grandchildren was found to be an unconstitutional infringement on the defendant mother's right to decision making regarding her daughters.

42. Stanley v. Illinois, 405 U.S. 645, 658 (1972).

43. *Id.*

44. Quilloin v. Walcott, 434 U.S. 246, 254 (1978).

45. *Id.*

46. Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015).

47. *Id.* at 2600.

III. COURT'S DECISION

In the noted case, the New York Court of Appeals at last overruled *Alison D.*, replacing its restrictive bright-line rule with a multi-factor analysis of the child's best interest.[48] The court invoked the doctrines of *stare decisis* and equitable jurisdiction to justify returning to the pre-*Alison D.* interpretation of DRL section 70 to effectuate the explicit legislative purpose.[49] The court undermined its holding in *Alison D.* by citing its harmful effect on children in nontraditional families, outdated foundational presumptions, and paradoxical impact on the parental rights of same-sex couples.[50] Recognizing the biological parent's inherent custodial right, the court emphasized consent as a critical factor in any parentage analysis.[51] However, the court declined to adopt any one test, simply concluding that the non-biological, non-adoptive mothers before it had proffered sufficient proof of an agreement with the biological parent to conceive and raise a child together so as to fall within the meaning of a "parent" under DRL section 70.[52]

The court relied on principles of equity to justify overruling its outdated precedent because an "extraordinary combination of factors undermines [its] reasoning and practical viability."[53] Before *Alison D.* provided the first official definition of a "parent" under DRL section 70, the court traditionally invoked its inherent equity powers to determine whether establishing parentage would be in the best interest of the child.[54] Thus, while arguably offending *stare decisis* by overruling *Alison D.*, the court reasoned that the original offense was abandoning this tradition in favor of *Alison D.*'s bright-line rule.[55]

The court also cited a number of other factors that supported overruling their prior decision. First, the court lent much credence to Judge Kaye's dissent, which recognized that the rule of *Alison D.*, severing the bonds children formed with non-biological, non-adoptive parental figures, "has fall[en] hardest on the children."[56] Heeding the concerns of various legal commentators, the court agreed that children suffer extreme trauma as a result of being separated from their parental

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48. Brooke S.B. v. Elizabeth A. C.C., 28 N.Y.3d 1, 2 (N.Y. 2016).
49. *Id.* at 7-10.
50. *Id.* at 11.
51. *Id.* at 12.
52. *Id.* at 8-9.
53. *Id.* at 8.
54. *Id.* at 8-9.
55. *Id.* at 8-10.
56. *Id.* at 11 (quoting Alison D. v. Virginia M., 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting)).

figures, regardless of biological or adoptive ties.[57] Furthermore, the court held that *Alison D.* was unsustainable in light of recent demographic,[58] judicial,[59] and legislative[60] changes. The concept of the "average American family" has transformed as the number of children raised in nontraditional families has grown.[61] Resting on the premise that a family is headed by heterosexual parents, *Alison D.* contradicted both the New York Marriage Equality Act as well as the United States Supreme Court's recent holding in *Obergefell v. Hodges*.[62] Thus *Alison D.* had created an unsustainable, unreasonable inconsistency in the rights and obligations of heterosexual versus same-sex parents.[63]

However, the court still recognized its responsibility to adopt an appropriately narrow test so as to protect the custodial right of biological or adoptive parents.[64] Because this right is one of the oldest fundamental rights, the court mandated caution in expanding the definition of parent and emphasized consent of the biological or adoptive parent as a critical factor.[65] The parties encouraged different tests: one considering various factors relating to the post-birth relationship between the child and non-biological, non-adoptive parent, and the other focusing on whether there is clear and convincing evidence that the couple jointly agreed to conceive and raise the child as co-parents.[66] The court rejected the premise that one test would be appropriate to apply to all situations, leaving the option for the lower courts to explore any test that keeps the child's best interest as the deciding factor.[67] The court left undecided the issue of whether a non-biological, non-adoptive parent that agrees to raise the child with the biological parent after conception may achieve

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57. *Id.* at 6.

58. *Id.* at 9 ("Demographic changes in the past 25 years have further transformed the elusive concept of the 'average American family'; recent census statistics reflect the large number of same-sex couples residing in New York, and that many of New York's same-sex couples are raising children who are related to only one partner by birth or adoption." (citations omitted)).

59. *Id.* ("*Alison D.*'s foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of . . . the United States Supreme Court's holding in *Obergefell v. Hodges* which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.").

60. *Id.* at 14 ("[Through the] passage of the Marriage Equality Act . . . the legislature has formally declared its intention that '[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage' (L. 2011, ch. 95, § 2).").

61. *Id.* at 9.

62. *Id.* (citing Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

63. *Id.*

64. *Id.* at 10.

65. *Id.* at 12.

66. *Id.* at 10-11.

67. *Id.* at 11.

rights as a "parent" under DRL section 70.[68] Instead, the court limited its holding to instances where the putative parent presents clear and convincing evidence of an agreement with the biological parent to both conceive and raise the child as co-parents.[69]

In his concurring opinion, Judge Pigott agreed with the result but nonetheless would have refused to overturn *Alison D.* absent legislative action encouraging the court to do so.[70] He maintained that the *Alison D.* definition of a "parent" has never been altered by the legislature, although they had multiple opportunities to expand it if they disagreed with the court's interpretation of that term.[71] In his view, the court wrongly intruded upon the legislature's prerogative to perform the kind of policy analysis necessary to define "parent" in a way that would serve the child's best interest.[72] He further argued that *Alison D.* did not offend *Obergefell* or the Marriage Equality Act because, under these laws, "a child born to a married person by means of artificial insemination with the consent of the other spouse" is considered both spouses' legal child, regardless of their sexual orientation.[73] Since the petitioners here lacked these protections because they did not have the opportunity to marry before conception, they could be allowed to seek custody or visitation under the "extraordinary circumstances" exception.[74] Judge Pigott thus advocated for adding a new category of persons to the list of extraordinary circumstances exceptions to *Alison D.* rather than overruling it, to avoid offending the powers of the legislature.[75]

IV. ANALYSIS

The court was correct to overturn *Alison D.*, at long last removing the barriers that partners in unmarried same-sex couples faced when seeking custody or visitation of a child that they agreed to conceive and raise jointly. Consistent with *Obergefell* and the Marriage Equality Act, the court's decision finally grants the same parentage rights to same-sex couples as to heterosexual couples.[76] The concept of a traditional family—one headed by a married, heterosexual couple—is entirely outdated. The number of children raised in nontraditional families is

68. *Id.*
69. *Id.* at 10.
70. *Id.* at 12 (Pigott, J., concurring).
71. *Id.*
72. *Id.*
73. *Id.* at 14.
74. *Id.*
75. *Id.*
76. *Id.* at 1.

close to surpassing that of children raised in a traditional family.[77] By finally removing biology as the key to parental custodial rights, the court made the right decision of returning to the prior focus on the child's best interest.[78] While the fundamental rights of parents will always be recognized, they must now be considered in conjunction with the fundamental rights of children to maintain intimate, family-like bonds.

The court's decision to expand the definition of parent significantly advances the protection of same-sex couples' parental rights. Policies that refuse to recognize the parental rights of those parents that are not biologically or legally tied to their children have victimized same-sex parents and their children throughout the United States.[79] Courts justify these policies through the subjective standard of the "child's best interests."[80] This standard transfers the decision-making power of what is best for the child from loving parents to judges who will be heavily influenced by their own personal ideas about values,[81] signaling a drastic departure from the backbone of parentage law which should "emphasize that parents have a critical responsibility to raise their children in love, to provide for their physical, emotional, and educational needs, and to encourage them to develop their talents."[82] The court here supports a modern interpretation of parenthood, which prioritizes affording children of same-sex couples the same opportunity to have protected relationships with both parents.[83] However, the jurisprudence surrounding parental rights often revolves too much around traditional notions of family and forgets the needs of children from nontraditional families.[84]

Contrary to Judge Pigott's assumption, *Alison D.* cannot be reconciled with the prevailing notion that laws concerning marriage must not result in a different outcome for same-sex couples than for heterosexual couples. A mere "extraordinary circumstances" exception for the petitioners here would not actually grant them the same rights as

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77. PEW RESEARCH CTR., PARENTING IN AMERICA 15 (Dec. 17, 2015), http://www.pewsocialtrends.org/files/2015/12/2015-12-17_parenting-in-america_FINAL.pdf ("The declining share of children living in what is often deemed a 'traditional' family has been largely supplanted by the rising shares of children living with single or cohabiting parents.").

78. *Brooke S.B.*, 28 N.Y.3d at 1.

79. Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 842 (1997).

80. Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 211 (2006).

81. *Id.*

82. *Id.* at 261-62.

83. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1188 (2016).

84. *Id.*

heterosexual couples. The laws today do provide that both spouses are considered the parent of a child born to a married person by artificial insemination with the consent of the other spouse;[85] however, they do not protect unmarried same-sex couples in the same circumstances.

Also, if Judge Pigott had his way, only unmarried same-sex couples that did not have the opportunity to marry before conceiving a child would receive such an exception. This exception, paired with the law's guarantee that children born by means of artificial insemination belong to both spouses, simply moves the needle from biology to marriage. Voluntarily unmarried same-sex couples that nonetheless plan to raise a child together receive unequal treatment to voluntarily unmarried heterosexual couples who have standing based on their biological connection to the child. The majority's test guarantees equal treatment of unmarried couples, regardless of sexual orientation, and they were correct to overrule *Alison D.* in its entirety.

While the Supreme Court has yet to examine the issue resolved in the noted case, the Court has based its holdings in similar cases on Fourteenth Amendment Principles. The Court has consistently upheld the idea that parents have a fundamental right in the care and custody of their children, unless a court finds them unfit.[86] Gay and lesbian parents and their children are disadvantaged when courts cannot give non-biological, non-adoptive parents the same rights as all other parents, when they planned, conceived, and expected to raise the child together. "Ultimately, intentional- and functional-parenthood principles would enable recognition of parents not on the basis of biology, gender, sexual orientation, or even marriage, but instead on the basis of actual familial relationships."[87] Thus, the Court should examine the issue of parents' rights to custody and visitation under the due process and equal protection clauses of the Fourteenth Amendment, in order to grant familial protections to homosexual parents and their children.

Although this decision marks a major victory in the ongoing war for equal rights, it comes as one that is long overdue. It is important to reflect upon the court's previous laissez-faire attitude towards determining who is a parent in terms of the child's best interest. The court, despite many opportunities to do so, avoided overturning *Alison D.*

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85. Brooke S.B. v. Elizabeth A. C.C., 28 N.Y.3d 1, 13 (N.Y. 2016) (Pigott, J., concurring).

86. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 769 (1982); Troxel v. Granville, 530 U.S. 57, 80 (2000); Stanley v. Illinois, 405 U.S. 645, 658 (1972); Quilloin v. Walcott, 434 U.S. 246, 254 (1978).

87. NeJaime, *supra* note 83, at 1188-89.

by instead engaging in "the 'deft, legal maneuvering' necessary to read fairness into an overly-restrictive definition of 'parent.'"[88] As predicted by Judge Kaye twenty-five years ago, the brunt of the harm has been felt by the children that DRL section 70 is designed to protect.[89] Lower courts have been forced to ignore what is best for the child and permanently sever intimate bonds between children and *de facto* parents.[90] Biological, adoptive, and *de facto* children suffer the consequences of the separation all the same. Let this come as a warning as the law continues to evolve so that we do not repeat the mistakes of our past: family law protects the children's best interests. If the children are wronged, then the law is wrong.

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88. *Brooke S.B.,* 28 N.Y.3d at 10.

89. *Id.* at 11-12 (citing Alison D. v. Virginia M., 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting)).

90. *Id.*

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