APPENDIX

EXHIBIT A

Aa

NEW JERSEY STATE BAR ASSOCIATION
WAYNE J. POSITAN, ESQ.
PRESIDENT
Lum, Danzis, Drasco & Positan, LLC
103 Eisenhower Parkway • Roseland
New Jersey • 07068
(973) 228-6730 • Fax (973) 403-9021
E-MAIL: WPOSITAN@LUMLAW.COM

December 13, 2006

Re: **S-2407 (Weinberg/Codey) Revises the marriage laws; establishes civil unions; establishes the "New Jersey Civil Union Review Commission**

Dear Member of the Senate:

On behalf of the New Jersey State Bar Association, I respectfully express our concern with S-2407 (Weinberg/Codey), which revises the marriage laws; establishes civil unions; establishes the "New Jersey Civil Union Review Commission."

The New Jersey State Bar Association Board of Trustees voted to oppose this legislation because we believe the 71 page bill creates a convoluted, burdensome and flawed statutory scheme that fails to create for same-sex couples the same rights and remedies provided to heterosexual married couples as required by the New Jersey Supreme Court in its recent landmark decision on October 25, 2006 of Lewis v. Harris, 188 N.J. 415 (2006) and the New Jersey constitution. This legislation will create a separate, unequal and unnecessarily complex legal scheme. We remain unconvinced that this legislation will satisfy the Supreme Court's determination that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated".

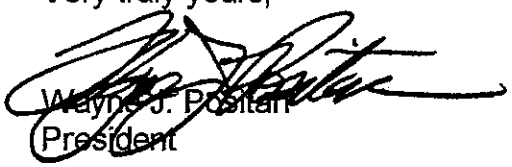
In addition, the NJSBA questions the prudence of rushing to pass this bill even though so much time remains within the 180-day deadline for action imposed by the Supreme Court to deliberate on its merits. We believe that there has not been enough time devoted by the Legislature to deal with the significant issues that need to be addressed by the bill.

For the foregoing reasons, I would respectfully urge you to vote "NO" on Senate Bill 2407, and instead consider the more prudent step of enacting "civil marriage" legislation.

Ac

For further information, please contact Valerie Brown, Legislative Counsel at 732-937-7512, vbrown@njsba.com or D. Todd Sidor, Director of Judicial Administration at 732-937-7544, tsidor@njsba.com.

Very truly yours,



Wayne J. Positan
President

c: Ellen Davenport, Secretary of the Senate
Lynn Fontaine Newsome, President-Elect
Thomas Prol, Esq.
Stephen Hyland, Esq.
Thomas Snyder, Esq.
Felice Londa, Esq.
Ivette Alvarez, Esq.

EXHIBIT B

NEW JERSEY STATE BAR ASSOCIATION
Allen A. Etish, Esq. – NJSBA President
New Jersey Law Center • One Constitution Square
New Brunswick, New Jersey 08901-1500
(732) 249-5000 • Fax (732) 249-2815

January 6, 2010

NEW JERSEY STATE BAR ASSOCIATION SUPPORTS SENATE BILL 1967, WHICH WOULD ENACT THE "FREEDOM OF RELIGION AND EQUALITY IN CIVIL MARRIAGE ACT

Dear Senator:

The New Jersey State Bar Association respectfully urges you to support Senate Bill 1967 (Weinberg) which would enact the "Freedom of Religion and Equality in Civil Marriage Act."As the voice of the state's largest lawyers group, we have had ample feedback from lawyers and citizens of the state that the existing Domestic Partnership Act and Civil Union Law have not put the rights of same-sex clients and their children on equal footing as married heterosexual couples and families, despite the good intentions of these laws.

In *Lewis v. Harris*, the Court held that "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1 [of the State Constitution]." While the Court declined to mandate "marriage", it made it clear that same-sex couples are constitutionally entitled to the same rights and benefits afforded by civil marriage. Rather than accomplish this, the Domestic Partnership Act and Civil Union Law have created a flawed statutory scheme, and it has become abundantly clear that these measures have resulted in a failed experiment in discrimination. The civil union law created a separate, inequitable and unnecessarily complex legal scheme and the New Jersey State Bar Association remains unconvinced that this law satisfies the Supreme Court's determination that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated." Recent events and publicized failures of the civil union law bear this out. For these reasons, the New Jersey State Bar Association supports S-1967.

The NJSBA has advocated for this bill for many years. Association representatives testified before the New Jersey Civil Union Review Commission and before the Senate Judiciary Committee.

From the Bar's perspective, civil unions are a failed experiment. Family law, estate planning, and labor and employment law are some of the areas replete with instances where same-sex couples are treated differently than married, heterosexual couples. As a result, attorneys who represent domestic partners are frequently forced to fashion creative agreements and other legal documents to address potential gaps or misapplications of the laws' protections in various settings, including at hospitals and places of employment. Despite the good intentions of the existing laws, equity

has yet to be achieved. Too often attorneys are not able to protect their client's rights, and, as a result, clients must withstand years of costly and complicated litigation.

Lewis promised equality, but the civil union statute did not deliver it.

Just as there was a clarion call for action in the 1960s for equality for minorities, this legislation is the civil rights issue of our day which demands action now by the New Jersey State Senate on behalf of the gay and lesbian community in this state. The experience of our attorney-members, the report of the NJ Civil Union Review Commission, and the testimony before the Senate Judiciary Committee regarding thousands of federal laws and the laws of other jurisdictions which provide an unfair and inequitable result for New Jersey citizens in relationships who are not classified as married versus those who are, make the passage of this law of paramount importance to guaranteeing equal protection under the laws of this state. It is clear there is no piecemeal remedy which can accomplish this goal.

For these reasons, the New Jersey State Bar Association respectfully and strongly supports passage of S-1967, the "Civil Marriage and Religious Protection Act."

Again, we respectfully urge you to vote 'YES' on S-1967.

EXHIBIT C

JON S. CORZINE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

STUART RABNER
Attorney General

ROBERT J. GILSON
Director

February 16, 2007

Joseph Komosinski
State Registrar of Vital Statistics
Health and Agriculture Building
P.O. Box 360
Trenton, New Jersey 08625-0360

Formal Opinion No. 3-2007

Re: Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations.

Dear Mr. Komosinski:

Questions have been raised whether, once L. 2006, c. 103, the statute authorizing civil unions in our State, becomes effective, New Jersey will recognize as valid same-sex relationships formed under the laws of other States and foreign nations. You are advised that government-sanctioned, same-sex relationships validly established under the laws of other States and foreign nations will be valid in New Jersey beginning on February 19, 2007, either as civil unions or domestic partnerships. The name of the relationship selected by other jurisdictions, however, will not control its treatment under New Jersey law. Rather, it is the nature of the rights conferred by another jurisdiction that will determine how a relationship will be treated under New Jersey law. This requires both a comparison of the rights granted by the other jurisdiction to those afforded under New Jersey's civil union statute and domestic partnership law, as well as fidelity to the intent of the New Jersey Legislature.

As a result, those same-sex relationships from other jurisdictions that most closely approximate a New Jersey civil union - that is, relationships that provide substantially all of the rights and benefits of marriage – will be treated as civil unions under our law. Those same-sex relationships from other jurisdictions that most closely approximate New Jersey domestic partnerships - that is, relationships that provide some, but not all of the rights and obligations of marriage - will be treated as domestic partnerships under our law. Treatment of government-sanctioned, same-sex relationships from other jurisdictions in this fashion is consistent with the Legislature's decision to provide all of the rights and obligations of marriage, to same-sex couples through civil unions rather than marriage and to maintain domestic partnerships as a distinct government-sanctioned relationship after civil unions become effective.

Under this analysis, same-sex civil unions established under the current laws of Vermont and Connecticut, as well as same-sex domestic partnerships established under the laws of California, which provide rights that closely approximate those of New Jersey civil unions, will be valid in New Jersey and treated as civil unions in our State. In addition, same-sex marriages established under the current laws of Massachusetts, Canada, the Netherlands, Belgium, South Africa and Spain will be valid in New Jersey and treated as civil unions in our State. Great Britain, New Zealand, Iceland, and Sweden provide government-sanctioned, same-sex relationships that provide rights and obligations that closely approximate those offered to married couples. These relationships, which have a variety of names, will also be valid in New Jersey and treated as civil unions in New Jersey.

Couples in these relationships need not secure a New Jersey civil union license or solemnize their relationships in this State in order to enjoy all of the rights and obligations of a New Jersey civil union. However, pursuant to N.J.S.A. 37:1-7, a same-sex couple in a civil union or comparable relationship as noted above established under the laws of another jurisdiction may reaffirm their relationship under New Jersey law. Couples who reaffirm their relationships under this provision will receive a New Jersey civil union license and certificate of reaffirmation of civil union and will be registered as being in a civil union in this State. Ibid.

Same-sex couples in other government-sanctioned, same-sex relationships, such as the domestic partnerships recognized by

Aa9

Maine and the District of Columbia, the reciprocal beneficiary relationships authorized under the laws of Hawaii, and the various same-sex relationships recognized by foreign nations that provide a set of rights and obligations fewer in number and scope than those afforded to married couples will be valid in New Jersey and treated as domestic partnerships in our State.

Couples in these relationship also need not register as domestic partners in New Jersey to enjoy the rights and obligations of domestic partnership in our State. However, same-sex couples in government-sanctioned relationships from other jurisdictions that approximate domestic partnerships, and who otherwise meet the requirements of New Jersey law, may enter into a New Jersey civil union with each other and secure all of the rights and obligations of a civil union in this State.

1. Background: Government-Sanctioned, Same-Sex Relationships.

Massachusetts is the only State that permits same-sex couples to marry. Marriage is available to same-sex couples in that State on the same terms as it is available to mixed-gender couples. See Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003). In addition, marriage is available to same-sex couples on the same terms that it is available to mixed-gender couples in five countries: Canada, the Netherlands, Belgium, South Africa and Spain. See Netherlands Legal Code, Art. 1:30; Moniteur Belge, 28.02.2003 Ed. 3 9880-9883; S.C. 2005, c. 33, s.2 and s.4; Laws of South Africa 2006, No. 17; Boletin Ofical De Las Cortes Generalses, No. 18-1, 21 June 2005, 121/000018.

Civil unions, which provide all of the legal rights and obligations of marriage, are distinct legal relationships available to same-sex couples in Vermont and Connecticut. See Vt. Stat. Ann. tit. 15, §1204(a); Conn. Gen. Stat. Ann. §46b-38nn. New Jersey's civil union statute, L. 2006, c. 103, which will offer all of the rights and obligations of marriage to same-sex couples, will become effective on February 19, 2007.

Domestic partnerships, which generally provide same-sex couples some, but not all, of the rights and obligations of marriage, are recognized in several States and foreign nations. An exception in this category is California, which provides domestic partners with a host of rights approximating those afforded to married couples. Cal. Fam. Code §297.5(a). The majority of

jurisdictions that recognize domestic partners, including Maine, the District of Columbia and Hawaii (where the unions are called "reciprocal beneficiary relationships") provide notably fewer rights to domestic partners than to married couples. See 2003 Me. Laws c. 672; D.C. Code §32-702; Haw. Rev. Stat. §572C-2, et seq.

New Jersey's domestic partnership statute, which provides some, but not all, of the rights and obligations of marriage, took effect on July 10, 2004, L. 2003, c. 246, and will remain in place when the law authorizing civil unions takes effect. The rights and responsibilities of domestic partnerships existing before the effective date of L. 2006, c. 103 will not be altered. N.J.S.A. 26:8A-4.1. However, all same-sex couples in domestic partnerships will be provided with notice and an opportunity to enter into a civil union with each other. Ibid. If they elect to do so, their domestic partnerships will be dissolved automatically when their civil union comes into being. Ibid. In addition, once the law authorizing civil unions becomes effective, the only new domestic partnerships that will be authorized are for couples, either same-sex or mixed-gender, both of whom are over 62 years of age. Ibid.

Government-sanctioned, same-sex relationships other than marriage exist in, among other nations, Andorra, Colombia, Croatia, Czech Republic, Denmark, Finland, France, Germany, Great Britain, Hungary, Iceland, Israel, Luxembourg, New Zealand, Norway, Portugal, Slovenia, Sweden, Switzerland, and parts of Argentina, Brazil, Italy, Mexico, and in all Australian States. The terminology for these unions is not standardized and the names given to these relationships translate into, among other things, life partnerships, stable unions, civil pacts, registered partnerships, domestic partnerships, civil partnerships, reciprocal beneficiary relationships, and significant relationships. The recognized relationships in Great Britain, New Zealand, Iceland, and Sweden offer rights that match those offered to married couples. See Laws of Great Britain 2004, c. 33; Laws of New Zealand 2004, No. 102; Laws of Iceland No. 87 12 June 1996; Laws of Sweden 1994.1117, c. 3, §1.

2. Recognition of Civil Unions, Domestic Partnerships, Reciprocal Beneficiary Relationships, and other Same-Sex Relationships Established Under the Laws of Other States and Foreign Nations.

New Jersey law expressly mandates recognition of same-sex relationships other than marriage validly established under the laws of other jurisdictions. The Domestic Partnership Act provides that a "domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State." N.J.S.A. 26:8A-6c. In addition, the law authorizing civil unions provides that a "civil union relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the civil union relationship was created, shall be valid in this State." N.J.S.A. 37:1-34; L. 2006, c. 103, §95.

Current Vermont and Connecticut civil unions, like their New Jersey counterpart, provide all of the rights and obligations of marriage to the civil union partners. See Vt. Stat. Ann. tit. 15 §1204(a); Conn. Gen. Stat. Ann. §46b-38nn. These unions, therefore, are valid in New Jersey and should be accorded all of the rights and obligations of a New Jersey civil union. The current California domestic partnership, despite its name, has been expanded to include rights and benefits indistinguishable from marriage. Cal. Fam. Code §297.5(a). Given the scope of California's domestic partnership, this relationship more closely approximates a New Jersey civil union than a New Jersey domestic partnership and should be treated as the equivalent of a New Jersey civil union. The same is true for the civil partnerships authorized by Great Britain, Sweden, New Zealand and Iceland, where same-sex couples are afforded rights and benefits identical to civil marriage. See Laws of Great Britain 2004, c. 33; Laws of New Zealand 2004, No. 102; Laws of Iceland No. 87 12 June 1996; Laws of Sweden 1994.1117, c. 3, §1.

Domestic partnerships, reciprocal beneficiary relationships and other government-sanctioned, same-sex relationships that afford rights and obligations less expansive than the rights and benefits of marriage are valid in New Jersey and will provide all of the rights and obligations of a New Jersey domestic partnership. The domestic partnerships authorized by the current laws of Maine and the District of Columbia fall into this category. See Me. Pub. L. 2003, c. 672; D.C. Pub. L. 9-114. These

relationships, like New Jersey's domestic partnerships, provide for limited health care, inheritance, property rights, and other rights and obligations, but do not approach the broad array of rights and obligations afforded to married couples. Government-sanctioned, same-sex relationships provided by other jurisdictions that approximate New Jersey domestic partnerships are valid in this State and should provide all of the rights and obligations of a New Jersey domestic partnership.

Government-sanctioned, same-sex relationships other than marriage authorized by foreign nations not addressed in this Formal Opinion should be examined under the analysis set forth herein. Those that approximate a New Jersey domestic partnerships are valid in New Jersey and provide all of the rights and obligations of a New Jersey domestic partnership. Any that more closely approximate a civil union also are valid in New Jersey and provide all of the rights and obligations of a New Jersey civil union.

3. Recognition of Same-Sex Marriages Established under the Laws of Massachusetts and Foreign Nations.

In Lewis v. Harris, 188 N.J. 415 (2006), our Supreme Court held that the State Constitution requires that same-sex couples be afforded access to a government-sanctioned relationship that provides all of the rights and obligations of marriage. The Court held that this mandate could be satisfied either by extending the ability to marry to same-sex couples or by providing a distinct, government-sanctioned relationship that would provide same-sex couples with all of the rights and obligations of marriage. The Legislature decided not to authorize same-sex marriages, but to create civil unions as the vehicle for providing the rights and obligations of marriage to same-sex couples.

This history is instructive in deciding how to treat same-sex marriages established in Massachusetts and foreign nations under New Jersey law. Consistent with Lewis v. Harris, such marriages could be called either marriages or civil unions, so long as all of the rights and obligations of marriage were provided. It is reasonable to conclude that the Legislature intended that these same-sex relationships be considered civil unions in view of the Legislature's response to the holding in Lewis v. Harris. The Legislature's lawful policy judgment should be respected and followed.

Accordingly, same-sex marriages established under the laws of Massachusetts and foreign nations are valid in New Jersey and should be treated as civil unions in our State.[1]

4. Conclusion

In light of your authority to supervise local registrars of vital statistics who will have authority to issue marriage licenses and civil union licenses, see N.J.S.A. 26:8-24, and in the interest of uniform Statewide practices, it would be appropriate to inform local registrars of the advice provided in this letter.

Sincerely yours,

STUART RABNER
ATTORNEY GENERAL OF NEW JERSEY

---

1 Although the Full Faith and Credit Clause of the United States Constitution mandates that States recognize the "public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, §1, that requirement is not absolute. The Clause does not require "'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" Baker v. General Motors Corp., 522 U.S. 222, 232 (1998) (quoting Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939)); see Franchise Tax Bd. v. Hyatt, 538 U.S. 488 (2003) (Full Faith and Credit Clause does not require a State to adopt another State's sovereign immunity statutes). Recognizing same-sex marriages established under Massachusetts law as civil unions in New Jersey both gives substantial effect to the Massachusetts relationships by providing all of the rights and obligations of marriage and comports with the intent of the New Jersey Legislature to provide those rights to same-sex couples through a civil union. Similarly, with respect to same-sex marriages formed under the laws of foreign nations, as "'a general matter, the laws of one nation do not have force or effect beyond its borders.'" Hennefeld v. Township of Montclair, 22 N.J. Tax 166, 178 (Tax 2005) (quoting In re: Kandu, 315 B.R. 123, 133 (Bankr. W.D. Wash. 2004)). Comity, however, permits States to give effect to foreign laws. Recognizing same-sex marriages established in foreign nations respects foreign laws and comports with New Jersey's legislative decisions regarding the provision of rights and obligations to same-sex couples.

EXHIBIT D

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

PHILIP S. CARCHMAN, J.A.D.
ACTING ADMINISTRATIVE DIRECTOR OF THE COURTS

DAVID P. ANDERSON. JR.
Director
OFFICE OF PROFESSIONAL
AND GOVERNMENTAL SERVICES

P.O. BOX 037
TRENTON, NEW JERSEY 08625-0037
(609) 292-8553
FAX (609) 777-0551

January 22, 2007

To: **Assignment Judges**

From: **David P. Anderson, Jr.**

Subject: **P.L. 2007, c.6 (S-1467) - Adds a new cause of action for divorce based on irreconcilable differences**

On January 20, 2007, Governor Corzine signed S-1467 into law as P.L. 2007, c.6. The new law was effective January 20, 2007. Attached is a copy of the law for your information.

The new law amends N.J.S.A.2A:34-2, which sets forth the causes of action for divorce, to provide that a divorce may be granted on grounds of "irreconcilable differences which have caused the breakdown of the marriage for a period of six months and which make it appear that the marriage should be dissolved and that there is no reasonable prospect of reconciliation."

Please note that section 4.b. of P.L. 2006, c.103 (enacted December 21, 2006), which established civil unions in New Jersey, provides that: "The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage." While P.L. 2006, c.103 was enacted before P.L. 2007, c.6, the Governor notes in the signing statement to S-1467 that it is his clear understanding that the new cause of action for divorce based on irreconcilable differences is applicable to civil unions as well as marriages.

Kindly advise appropriate staff of this new law. Please contact Harry Cassidy, Assistant Director, AOC Family Division at 609-984-4228 if you have any questions regarding Chapter 6.

attachment
c: Philip S. Carchman
Family Division Judges
Theodore J. Fetter
Directors
Assistant Directors
Clerks of the Court
Trial Court Administrators
Family Division Managers

EXHIBIT E

ASSEMBLY, No. 2517

STATE OF NEW JERSEY

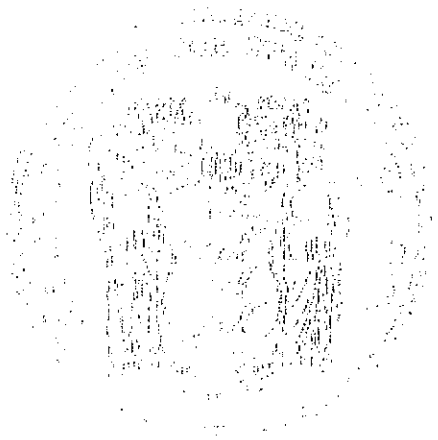
214th LEGISLATURE

INTRODUCED MARCH 16, 2010

Sponsored by:
Assemblyman JOHN DIMAIO
District 23 (Warren and Hunterdon)
Assemblywoman VALERIE VAINIERI HUTTLE
District 37 (Bergen)

SYNOPSIS
Authorizes unemployment benefits for shared work programs.

CURRENT VERSION OF TEXT
As introduced.



(Sponsorship Updated As Of: 5/7/2010)

AN ACT concerning unemployment insurance, amending P.L.2007, c.212 and R.S.43:21-4 and supplementing chapter 21 of Title 43 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) For the purposes of this act:

"Division" means the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development.

"Full-time hours" means not less than 30 and not more than 40 hours per week.

"Shared work employer" means an employer who is providing a shared work program approved by the division pursuant to section 2 of this act.

"Short-time benefits" means benefits provided pursuant to sections 1 through 8 of this act.

2. (New section) An employer who has not less than 10 employees, who are each employed for not less than 1,500 hours per year, may apply to the division for approval to provide a shared work program, the purpose of which is to stabilize the employer's work force during a period of economic disruption by permitting the sharing of the work remaining after a reduction in total hours of work. Any subsidizing of seasonal employment during off season, of employers who traditionally use part-time employees, or of temporary part-time or intermittent employment on an ongoing basis, is contrary to the purpose of a shared work program approved pursuant to this act. The application for a shared work program shall be made according to procedures and on forms specified by the division and shall include whatever information the division requires. In deciding whether to approve the application, the division may consider the nature and size of the employer, its frequency of personnel turnover, its geographical location, and any other factors which may affect the efficacy and utility of the shared work program. The division may approve the program for a period of one year and may, upon employer request, renew the approval of the program annually. The division shall not approve an application unless the employer:

a. Certifies to the division that it will not hire additional part-time or full-time employees while short-time benefits are being paid;

b. Agrees with the division not to reduce health insurance or pension coverage, paid time off, or other benefits provided to

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

A2517

employees before the application was made, or make unreasonable revisions of workforce productivity standards;

c. Certifies to the division that any collective bargaining agent representing the employees has entered into a written agreement with the employer regarding the terms of the program, including terms regarding attendance in training programs while receiving short-time benefits, and provides a copy of the agreement to the division; and

d. Agrees to provide the division with whatever information the division deems necessary to administer the shared work program and monitor compliance with all agreements and certifications required pursuant to this section.

3. (New section) The division may revoke approval of an employer's application previously granted for good cause shown, including any failure to comply with any agreement or certification required pursuant to section 2 of this act or other conduct or occurrences which the division determines to defeat the purpose, intent and effective operation of a shared work program.

4. (New section) An individual who is employed by an employer with a shared work program approved by the division shall be eligible for short-time benefits during a week if:

a. The individual was employed by the employer for not less than 1,500 hours during the individual's base year;

b. The individual works for the employer less than the individual's normal full-time hours during the week, and the employer has reduced the individual's weekly hours of work pursuant to a shared work program approved by the division pursuant to section 2 of this act;

c. The percentage of the reduction of the individual's work hours below the individual's normal full-time hours during a week is not less than 10%, with a corresponding reduction of wages;

d. The individual would be eligible for unemployment benefits other than short-time benefits during the week, if the individual was entirely unemployed during that week and applied for unemployment benefits other than short-time benefits; and

e. During the week, the individual is able to work and is available to work the individual's normal full-time hours for the shared work employer or is attending a training program which is in compliance with the provisions of paragraph (4) of subsection (c) of R.S.43:21-4 and the agreements and certifications required pursuant to the provisions of section 2 of this act.

5. (New section) The amount of short-time benefits paid to an eligible individual shall, for any week, be equal to the individual's weekly benefit rate multiplied by the percentage of reduction of his wages resulting from reduced hours of work. The weekly benefit

amount shall be rounded off to the nearest dollar. An individual shall not be paid short-time benefits in excess of 26 weeks during a benefit year, but the weeks may be nonconsecutive. An individual shall not receive short-time benefits during any benefit week in which the individual receives any other unemployment benefits.

Total unemployment benefits paid to an individual during any benefit year, including short-time benefits and all other unemployment benefits, shall not exceed the maximum amount to which the individual is entitled for all unemployment benefits other than short-time benefits.

6. (New section) A shared work program and payment of short-time benefits to individuals under the program shall begin with the first week following approval of an application by the division or the first week specified by the employer, whichever is later.

7. (New section) All short-time benefits paid to an individual shall be charged to the account of the shared work employer by which the individual is employed while receiving the short-time benefits. If the shared work employer is liable for payments in lieu of contributions in the case of other unemployment benefits, that employer shall be liable for payments in lieu of contributions for the entire amount of the short-time benefits paid.

8. (New section) If the United State Department of Labor finds any provision of this act to be in violation of federal law, all provisions of this act shall be inoperative.

9. Section 5 of P.L.2007, c.212 (C.34:21-5) is amended to read as follows:

5. a. There is established, in the Department of Labor and Workforce Development, a response team. The purpose of the response team is to provide appropriate information, referral and counseling, as rapidly as possible, to workers who are, or may be, subject to plant closings or mass layoffs, and the management of establishments where those workers are or were employed.

b. In the case of each transfer or termination of the operations in an establishment which results in the termination of 50 or more employees, the response team shall:

(1) Offer to meet with the representatives of the management of the establishment to discuss available public programs which may make it possible to delay or prevent the transfer or termination of operations, including economic development incentive and workforce development programs, shared work unemployment compensation benefit programs, and coordinated utilization of any of those programs which are applicable;

(2) Meet on site with workers and provide information, referral and counseling regarding:

(a) Available public programs which may make it possible to delay or prevent the transfer or termination of operations, including economic development incentive and workforce development programs, shared work unemployment compensation benefit programs, and coordinated utilization of any of those programs which are applicable;

(b) Public programs or benefits which may be available to assist the employees, including, but not limited to, unemployment compensation benefits, job training or retraining programs, and job search assistance; and

(c) Employee rights based on this act or any other law which applies to the employees with respect to wages, severance pay, benefits, pensions or other terms of employment as they relate to the termination of employment; and

(3) Seek to facilitate cooperation between representatives of the management and employees at the establishment to most effectively utilize available public programs which may make it possible to delay or prevent the transfer or termination of operations or to assist employees if it is not possible to prevent the termination.

(cf:P.L.2007, c.212, s.5)

10. R.S.43:21-4 is amended to read as follows:

43:21-4. Benefit eligibility conditions. An unemployed individual shall be eligible to receive benefits with respect to any week eligible only if:

(a) The individual has filed a claim at an unemployment insurance claims office and thereafter continues to report at an employment service office or unemployment insurance claims office, as directed by the division in accordance with such regulations as the division may prescribe, except that the division may, by regulation, waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs, and as to such other types of cases or situations with respect to which the division finds that compliance with such requirements would be oppressive, or would be inconsistent with the purpose of this act; provided that no such regulation shall conflict with subsection (a) of R.S.43:21-3.

(b) The individual has made a claim for benefits in accordance with the provisions of subsection (a) of R.S.43:21-6.

(c)(1) The individual is able to work, and is available for work, and has demonstrated to be actively seeking work, except as hereinafter provided in this subsection or in subsection (f) of this section.

(2) The director may modify the requirement of actively seeking work if such modification of this requirement is warranted by economic conditions.

(3) No individual, who is otherwise eligible, shall be deemed ineligible, or unavailable for work, because the individual is on

vacation, without pay, during said week, if said vacation is not the result of the individual's own action as distinguished from any collective action of a collective bargaining agent or other action beyond the individual's control.

(4) (A) Subject to such limitations and conditions as the division may prescribe, an individual, who is otherwise eligible, shall not be deemed unavailable for work or ineligible because the individual is attending a training program approved for the individual by the division to enhance the individual's employment opportunities or because the individual failed or refused to accept work while attending such program.

(B) For the purpose of this paragraph (4), any training program shall be regarded as approved by the division for the individual if the program and the individual meet the following requirements:

(i) The training is for a labor demand occupation and is likely to enhance the individual's marketable skills and earning power, except that the training may be for an occupation other than a labor demand occupation if the individual is receiving short-term benefits pursuant to the provisions of P.L. , c. (C.) (pending before the Legislature as this bill) and the training is necessary to prevent a likely loss of jobs;

(ii) The training is provided by a competent and reliable private or public entity approved by the Commissioner of Labor and Workforce Development pursuant to the provisions of section 8 of the "1992 New Jersey Employment and Workforce Development Act," P.L.1992, c.43 (C.34:15D-8);

(iii) The individual can reasonably be expected to complete the program, either during or after the period of benefits;

(iv) The training does not include on the job training or other training under which the individual is paid by an employer for work performed by the individual during the time that the individual receives benefits; and

(v) The individual enrolls in vocational training, remedial education or a combination of both on a full-time basis, except that the training or education may be on a part-time basis if the individual is receiving short-term benefits pursuant to the provisions of P.L. , c. (C.) (pending before the Legislature as this bill).

(C) If the requirements of subparagraph (B) of this paragraph (4) are met, the division shall not withhold approval of the training program for the individual for any of the following reasons:

(i) The training includes remedial basic skills education necessary for the individual to successfully complete the vocational component of the training;

(ii) The training is provided in connection with a program under which the individual may obtain a college degree, including a post-graduate degree;

(iii) The length of the training period under the program; or

(iv) The lack of a prior guarantee of employment upon completion of the training.

(D) For the purpose of this paragraph (4), "labor demand occupation" means an occupation for which there is or is likely to be an excess of demand over supply for adequately trained workers, including, but not limited to, an occupation designated as a labor demand occupation by the Center for Occupational Employment Information pursuant to the provisions of subsection d. of section 27 of P.L.2005, c.354 (C.34:1A-86).

(5) An unemployed individual, who is otherwise eligible, shall not be deemed unavailable for work or ineligible solely by reason of the individual's attendance before a court in response to a summons for service on a jury.

(6) An unemployed individual, who is otherwise eligible, shall not be deemed unavailable for work or ineligible solely by reason of the individual's attendance at the funeral of an immediate family member, provided that the duration of the attendance does not extend beyond a two-day period.

For purposes of this paragraph, "immediate family member" includes any of the following individuals: father, mother, mother-in-law, father-in-law, grandmother, grandfather, grandchild, spouse, child, child placed by the Division of Youth and Family Services in the Department of Children and Families, sister or brother of the unemployed individual and any relatives of the unemployed individual residing in the unemployed individual's household.

(7) No individual, who is otherwise eligible, shall be deemed ineligible or unavailable for work with respect to any week because, during that week, the individual fails or refuses to accept work while the individual is participating on a full-time basis in self-employment assistance activities authorized by the division, whether or not the individual is receiving a self-employment allowance during that week.

(8) Any individual who is determined to be likely to exhaust regular benefits and need reemployment services based on information obtained by the worker profiling system shall not be eligible to receive benefits if the individual fails to participate in available reemployment services to which the individual is referred by the division or in similar services, unless the division determines that:

(A) The individual has completed the reemployment services; or

(B) There is justifiable cause for the failure to participate, which shall include participation in employment and training, self-employment assistance activities or other activities authorized by the division to assist reemployment or enhance the marketable skills and earning power of the individual and which shall include any other circumstance indicated pursuant to this section in which an individual is not required to be available for and actively seeking work to receive benefits.

(9) An unemployed individual, who is otherwise eligible, shall not be deemed unavailable for work or ineligible solely by reason of the individual's work as a board worker for a county board of elections on an election day.

(10) An individual who is employed by a shared work employer and is otherwise eligible for benefits shall not be deemed ineligible for short-time benefits because the individual is unavailable for work with employers other than the shared work employer, so long as:

(A) The individual is able to work and is available to work the individual's normal full-time hours for the shared work employer; or

(B) The individual is attending a training program which is in compliance with the provisions of paragraph (4) of subsection (c) of this section and the agreements and certifications required pursuant to the provisions of section 2 of P.L. , c. (C.) (pending before the Legislature as this bill).

(d) With respect to any benefit year commencing before January 1, 2002, the individual has been totally or partially unemployed for a waiting period of one week in the benefit year which includes that week. When benefits become payable with respect to the third consecutive week next following the waiting period, the individual shall be eligible to receive benefits as appropriate with respect to the waiting period. No week shall be counted as a week of unemployment for the purposes of this subsection:

(1) If benefits have been paid, or are payable with respect thereto; provided that the requirements of this paragraph shall be waived with respect to any benefits paid or payable for a waiting period as provided in this subsection;

(2) If it has constituted a waiting period week under the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-25 et al.);

(3) Unless the individual fulfills the requirements of subsections (a) and (c) of this section;

(4) If with respect thereto, claimant was disqualified for benefits in accordance with the provisions of subsection (d) of R.S.43:21-5.

The waiting period provided by this subsection shall not apply to benefit years commencing on or after January 1, 2002. An individual whose total benefit amount was reduced by the application of the waiting period to a claim which occurred on or after January 1, 2002 and before the effective date of P.L.2002, c.13, shall be permitted to file a claim for the additional benefits attributable to the waiting period in the form and manner prescribed by the division, but not later than the 180th day following the effective date of P.L.2002, c.13 unless the division determines that there is good cause for a later filing.

(e) (1) (Deleted by amendment, P.L.2001, c.17).

(2) (Deleted by amendment, P.L.2008, c.17).

(3) (Deleted by amendment, P.L.2008, c.17).

(4) With respect to benefit years commencing on or after January 7, 2001, except as otherwise provided in paragraph (5) of this subsection, the individual has, during his base year as defined in subsection (c) of R.S.43:21-19:

(A) Established at least 20 base weeks as defined in paragraphs (2) and (3) of subsection (t) of R.S.43:21-19; or

(B) If the individual has not met the requirements of subparagraph (A) of this paragraph (4), earned remuneration not less than an amount 1,000 times the minimum wage in effect pursuant to section 5 of P.L.1966, c.113 (C.34:11-56a4) on October 1 of the calendar year preceding the calendar year in which the benefit year commences, which amount shall be adjusted to the next higher multiple of $100 if not already a multiple thereof.

(5) With respect to benefit years commencing on or after January 7, 2001, notwithstanding the provisions of paragraph (4) of this subsection, an unemployed individual claiming benefits on the basis of service performed in the production and harvesting of agricultural crops shall, subject to the limitations of subsection (i) of R.S.43:21-19, be eligible to receive benefits if during his base year, as defined in subsection (c) of R.S.43:21-19, the individual:

(A) Has established at least 20 base weeks as defined in paragraphs (2) and (3) of subsection (t) of R.S.43:21-19; or

(B) Has earned remuneration not less than an amount 1,000 times the minimum wage in effect pursuant to section 5 of P.L.1966, c.113 (C.34:11-56a4) on October 1 of the calendar year preceding the calendar year in which the benefit year commences, which amount shall be adjusted to the next higher multiple of $100 if not already a multiple thereof; or

(C) Has performed at least 770 hours of service in the production and harvesting of agricultural crops.

(6) The individual applying for benefits in any successive benefit year has earned at least six times his previous weekly benefit amount and has had four weeks of employment since the beginning of the immediately preceding benefit year. This provision shall be in addition to the earnings requirements specified in paragraph (4) or (5) of this subsection, as applicable.

(f) (1) The individual has suffered any accident or sickness not compensable under the workers' compensation law, R.S.34:15-1 et seq. and resulting in the individual's total disability to perform any work for remuneration, and would be eligible to receive benefits under this chapter (R.S.43:21-1 et seq.) (without regard to the maximum amount of benefits payable during any benefit year) except for the inability to work and has furnished notice and proof of claim to the division, in accordance with its rules and regulations, and payment is not precluded by the provisions of R.S.43:21-3(d); provided, however, that benefits paid under this subsection (f) shall be computed on the basis of only those base

year wages earned by the claimant as a "covered individual," as defined in subsection (b) of section 3 of P.L.1948, c.110 (C.43:21-27); provided further that no benefits shall be payable under this subsection to any individual:

(A) For any period during which such individual is not under the care of a legally licensed physician, dentist, optometrist, podiatrist, practicing psychologist, advanced practice nurse, or chiropractor, who, when requested by the division, shall certify within the scope of the practitioner's practice, the disability of the individual, the probable duration thereof, and, where applicable, the medical facts within the practitioner's knowledge;

(B) (Deleted by amendment, P.L.1980, c.90.)

(C) For any period of disability due to willfully or intentionally self-inflicted injury, or to injuries sustained in the perpetration by the individual of a crime of the first, second or third degree;

(D) For any week with respect to which or a part of which the individual has received or is seeking benefits under any unemployment compensation or disability benefits law of any other state or of the United States; provided that if the appropriate agency of such other state or the United States finally determines that the individual is not entitled to such benefits, this disqualification shall not apply;

(E) For any week with respect to which or part of which the individual has received or is seeking disability benefits under the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-25 et al.);

(F) For any period of disability commencing while such individual is a "covered individual," as defined in subsection (b) of section 3 of the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-27).

(2) The individual is taking family temporary disability leave to provide care for a family member with a serious health condition or to be with a child during the first 12 months after the child's birth or placement of the child for adoption with the individual, and the individual would be eligible to receive benefits under R.S.43:21-1 et seq. (without regard to the maximum amount of benefits payable during any benefit year) except for the individual's unavailability for work while taking the family temporary disability leave, and the individual has furnished notice and proof of claim to the division, in accordance with its rules and regulations, and payment is not precluded by the provisions of R.S.43:21-3(d) provided, however, that benefits paid under this subsection (f) shall be computed on the basis of only those base year wages earned by the claimant as a "covered individual," as defined in subsection (b) of section 3 of P.L.1948, c.110 (C.43:21-27); provided further that no benefits shall be payable under this subsection to any individual:

(A) For any week with respect to which or a part of which the individual has received or is seeking benefits under any

unemployment compensation or disability benefits law of any other state or of the United States; provided that if the appropriate agency of such other state or the United States finally determines that the individual is not entitled to such benefits, this disqualification shall not apply;

(B) For any week with respect to which or part of which the individual has received or is seeking disability benefits for a disability of the individual under the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-25 et al.);

(C) For any period of family temporary disability leave commencing while the individual is a "covered individual," as defined in subsection (b) of section 3 of the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-27); or

(D) For any period of family temporary disability leave for a serious health condition of a family member of the claimant during which the family member is not receiving inpatient care in a hospital, hospice, or residential medical care facility and is not subject to continuing medical treatment or continuing supervision by a health care provider, who, when requested by the division, shall certify within the scope of the provider's practice, the serious health condition of the family member, the probable duration thereof, and, where applicable, the medical facts within the provider's knowledge.

(3) Benefit payments under this subsection (f) shall be charged to and paid from the State disability benefits fund established by the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-25 et al.), and shall not be charged to any employer account in computing any employer's experience rate for contributions payable under this chapter.

(g) Benefits based on service in employment defined in subparagraphs (B) and (C) of R.S.43:21-19 (i)(1) shall be payable in the same amount and on the terms and subject to the same conditions as benefits payable on the basis of other service subject to the "unemployment compensation law"; except that, notwithstanding any other provisions of the "unemployment compensation law":

(1) With respect to service performed after December 31, 1977, in an instructional research, or principal administrative capacity for an educational institution, benefits shall not be paid based on such services for any week of unemployment commencing during the period between two successive academic years, or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms;

(2) With respect to weeks of unemployment beginning after September 3, 1982, on the basis of service performed in any other capacity for an educational institution, benefits shall not be paid on the basis of such services to any individual for any week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms, except that if benefits are denied to any individual under this paragraph (2) and the individual was not offered an opportunity to perform these services for the educational institution for the second of any academic years or terms, the individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of this clause;

(3) With respect to those services described in paragraphs (1) and (2) above, benefits shall not be paid on the basis of such services to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such period or holiday recess;

(4) With respect to any services described in paragraphs (1) and (2) above, benefits shall not be paid as specified in paragraphs (1), (2), and (3) above to any individual who performed those services in an educational institution while in the employ of an educational service agency, and for this purpose the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing those services to one or more educational institutions.

(h) Benefits shall not be paid to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sports seasons (or similar periods) if such individual performed such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the later of such seasons (or similar periods).

(i) (1) Benefits shall not be paid on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time the services were performed and was lawfully present for the purpose of performing the services or otherwise was permanently residing in the United States under color of law at the time the services were performed (including an alien who is lawfully present in the United

States as a result of the application of the provisions of section 212(d)(5) (8 U.S.C. s.1182 (d)(5)) of the Immigration and Nationality Act (8 U.S.C. s.1101 et seq.)); provided that any modifications of the provisions of section 3304(a)(14) of the Federal Unemployment Tax Act [28U.S.C. s.3304 (a)(14)], (26 U.S.C. s. 3304 (a) (14) as provided by Pub.L.94-566, which specify other conditions or other effective dates than stated herein for the denial of benefits based on services performed by aliens and which modifications are required to be implemented under State law as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, shall be deemed applicable under the provisions of this section.

(2) Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits.

(3) In the case of an individual whose application for benefits would otherwise be approved, no determination that benefits to such individual are not payable because of alien status shall be made except upon a preponderance of the evidence.

(j) Notwithstanding any other provision of this chapter, the director may, to the extent that it may be deemed efficient and economical, provide for consolidated administration by one or more representatives or deputies of claims made pursuant to subsection (f) of this section with those made pursuant to Article III (State plan) of the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-25 et al.).

(cf: P.L.2008, c.17, s.14)

11. This act shall take effect on the 90th day after enactment.

STATEMENT

This bill is designed to encourage employers who must reduce their employees' work hours because of economic conditions to avoid layoffs by sharing the remaining work. That is achieved by permitting, under certain circumstances, a full-time employee to receive unemployment benefits when the employee's weekly work time is reduced by 10% or more. The bill also permits the employee to attend an approved training program while receiving those benefits.

The bill provides that an employer of at least 10 full-time non-seasonal employees may provide a shared work program if approved by the Department of Labor and Workforce Development. The program may be approved for one year with annual renewals upon request. The employer is required to sustain existing fringe benefits levels, not to hire additional part-time or full-time

employees; or make unreasonable revisions of workloads; to provide information needed to monitor compliance; and to certify that if a labor union represents the employees, it has agreed to the terms of the program.

Under an approved program, an employee is eligible for "short-time" unemployment benefits if:

1. The employee's weekly work hours are reduced at least 10% from normal full-time hours;

2. The employee would be eligible for regular unemployment benefits during the week if the employee was entirely unemployed; and

3. The employee is available to work normal full-time hours.

Short-time weekly benefits paid to an eligible individual are equal to the individual's weekly benefit rate multiplied by the percentage of reduction of his wages for the week. The benefits are limited to 26 weeks during a benefit year, but the weeks may be nonconsecutive. No person may receive both short-time benefits and regular unemployment benefits during the same week. The combined total of regular and short-time unemployment benefits for an employee during a benefit year is limited to the maximum amount of regular unemployment benefits allowed.

All short-time benefits are charged to the account of the employer that provides the shared work program.

The bill also requires that when the Department of Labor and Workforce Development's response team provides information, referral and counseling at a workplace which may have mass layoffs or plant closings, it provides those services to management as well as to workers and that it provides information on shared work unemployment compensation benefit programs.

EXHIBIT F

LEXSEE 2010 N.Y. LEXIS 620

[*1] Debra H., Appellant, v Janice R., Respondent.

No. 47

COURT OF APPEALS OF NEW YORK

2010 NY Slip Op 3755; 2010 N.Y. LEXIS 620

May 4, 2010, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

PRIOR HISTORY: *Debra H. v. Janice R., 61 A.D.3d 460, 877 N.Y.S.2d 259, 2009 N.Y. App. Div. LEXIS 2605 (N.Y. App. Div. 1st Dep't, 2009)*

DISPOSITION: [**1] Order reversed, with costs, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

COUNSEL: Susan L. Sommer, for appellant.

Jennifer L. Colyer, for appellant child.

Sherri L. Eisenpress, for respondent.

National Association of Social Workers et al.; Richard Allen et al.; Citizens' Committee for Children of New York et al.; New York State Bar Association; New York City Bar Association; New York Civil Liberties Union et al.; National Center for Lesbian Rights et al.; American Civil Liberties Union et al.; New Yorkers for Constitutional Freedoms, Ltd.; Single Mothers by Choice et al.; Family Watch International, amici curiae.

JUDGES: Opinion by Judge Read. Judges Graffeo, Pigott and Jones concur, Judge Graffeo in a separate concurring opinion in which Judge Jones also concurs. Judge Ciparick concurs in result in an opinion in which Chief Judge Lippman concurs. Judge Smith concurs in result in an opinion.

OPINION BY: READ

OPINION

READ, J.:

Respondent Janice R. is the biological mother of M.R., a six-year old boy conceived through artificial insemination and born in December 2003. Janice R. and petitioner Debra H. met in 2002 and entered into a civil union in the State of [**2] Vermont in November 2003, the month before M.R.'s birth. Janice R. repeatedly rebuffed Debra H.'s requests to become M.R.'s second parent by means of adoption.

After the relationship between Janice R. and Debra H. soured and they separated [*2] in the spring of 2006, Janice R. allowed Debra H. to have supervised visits with M.R. each week on Sunday, Wednesday and Friday for specified periods of time, as well as daily contact by telephone. In the spring of 2008, however, Janice R. began scaling back the visits. By early May 2008, she had cut off all communication between Debra H. and M.R.

In mid-May 2008, Debra H. brought this proceeding against Janice R. in Supreme Court by order to show cause. She sought joint legal and physical custody of M.R., restoration of access and decisionmaking authority with respect to his upbringing, and appointment of an attorney for the child [1]. After a hearing on May 21, 2008, the judge signed the order to show cause, which set a briefing schedule, and the parties, at his instance, entered into a "so-ordered" stipulation that reinstated the three-day-a-week visitation schedule previously followed. The

stipulation required M.R.'s nanny or a mutually agreed-upon [**3] third party to accompany M.R. when he visited Debra H.

> 1 After Janice R. and Debra H. broke up, Janice R. conceived another child through artificial insemination. Debra H. does not claim to have developed any relationship with this child, who was born after she brought this action.

As Supreme Court later put it, "few facts . . . [were] undisputed" at the hearings and in the parties' submissions, which "differ[ed] substantially with respect to the nature and extent of [Debra H.'s] relationship with [Janice R.] and, more significantly, with M.R." (*2008 NY Misc LEXIS 6367, *1, *4-5 [Sup Ct, NY County 2008]*). At the hearing on July 10, 2008, Debra H. acknowledged our decision in *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 [1991])*, which held that only a child's biological or adoptive parent has standing to seek visitation against the wishes of a fit custodial parent, but contended that *Matter of Shondel J. v Mark D. (7 NY3d 320, 853 N.E.2d 610, 820 N.Y.S.2d 199 [2006])* endorsed a nonbiological or nonadoptive parent's right to invoke equitable estoppel to secure visitation or custody notwithstanding *Alison D.* In support of this interpretation of our precedents, Debra H. emphasized that *Shondel J.* cited *Jean Maby H. v Joseph H. (246 AD2d 282, 676 N.Y.S.2d 677 [2d Dept 1998])*, [**4] a divorce proceeding in which the husband successfully invoked equitable estoppel to seek custody and visitation with a child born to the wife prior to the marriage, whom he neither fathered nor adopted. Debra H. also urged Supreme Court to consider the effect of the parties' civil union, and alluded to the Vermont Supreme Court's decision in *Miller-Jenkins v Miller-Jenkins (180 Vt 441, 912 A2d 951 [2006], cert denied 550 U.S. 918, 127 S. Ct. 2130, 167 L. Ed. 2d 863 [2007])*.

In opposition to Debra H.'s application, Janice R. stressed that she had always spurned Debra H.'s entreaties to permit a second-parent adoption. She argued that *Alison D.*, which interpreted *Domestic Relations Law § 70*, was not eroded or overruled by *Shondel J.*, a case involving a filiation determination; pointed out that the Legislature did not amend *section 70* after *Alison D.* was handed down, or elsewhere enact any provision broadening standing to seek [*3] visitation or custody; and observed that Janice R. conceived M.R. prior to entering into the civil union with Debra H. in Vermont. At the hearing's conclusion, Supreme Court reserved decision and continued visitation in a further "so-ordered" stipulation.

In a decision and order filed on October 9, [**5] 2008, Supreme Court ruled in Debra H.'s favor. The judge reasoned that "it [was] inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid support obligations, but preclude a nonbiological parent from invoking [equitable estoppel] against the biological parent in order to maintain an established relationship with the child" since, in either event, "the court's primary concern should be furthering the best interests of the child" (*2008 NY Misc LEXIS 6367, *25*).

Supreme Court concluded that the facts alleged by Debra H., if true, "establish[ed] a prima facie basis for invoking the doctrine of equitable estoppel" (*id., at *25-26*). In this regard, the judge considered the parties' civil union to be "a significant, though not necessarily a determinative, factor in [Debra H.'s] estoppel argument" because, under Vermont law, "parties to a civil union are given the same benefits, protections and responsibilities . . . as are granted to those in a marriage," which "includes the assumption that the birth of a child during a couple's legal union is 'extremely persuasive evidence of joint parentage'" (*id., at *26*, quoting *Miller-Jenkins, 180 Vt at 466, 912 A2d at 971*).

Because [**6] of the many contested facts, however, Supreme Court ordered another hearing to resolve whether Debra H. stood in loco parentis to M.R., as she asserted, and therefore possessed standing to seek visitation and custody. The judge noted that, in the event Debra H. succeeded in proving the facts that she alleged, a further hearing would then be required to assess whether it was in M.R.'s best interest to award Debra H. visitation and/or custodial rights. Supreme Court continued the existing "so-ordered" stipulation permitting supervised visitation, and also granted Debra H.'s request for appointment of an attorney to represent the child.

Janice R. appealed, and obtained a stay of the equitable-estoppel hearing ordered by Supreme Court, pending disposition of the appeal. On April 9, 2009, the Appellate Division unanimously reversed on the law, vacated Supreme Court's order, denied the petition, and dismissed the proceeding. The court acknowledged that while the "record indicate[d] that [Debra H.] served as a loving and caring parental figure during the first 2 1/2 years of [M.R.'s] life, she never legally adopted [him]" and, in accordance with *Alison D.*, "a party who is neither the biological [**7] nor the adoptive parent of a child lacks standing to seek custody or visitation rights under *Domestic Relations Law § 70*" (*61 AD3d 460, 461, 877 N.Y.S.2d 259 [1st Dept 2009]*). The Appellate Division commented that, to the extent that denial of any right to equitable estoppel in this case might be considered inconsistent with *Shondel J.* and *Jean Maby H.*, its own "reading of precedent [was] such that the doctrine of equitable estoppel may not be invoked where a party lacks standing to assert at least a right to visitation" (*id.*).

[*4] Both Debra H. and the attorney for the child asked the Appellate Division for a stay of enforcement so as to allow visitation to continue until further appellate proceedings were completed, and for leave to appeal to us. Pending resolution of those motions, a Justice of the Appellate Division granted Debra H.'s emergency application for an interim stay and allowed Sunday visitation. After the Appellate Division denied the motions on June 25, 2009, Debra H. and the attorney for the child separately asked us for leave to appeal and sought another stay.

On July 13, 2009, a Judge of this Court signed a "so-ordered" stipulation continuing one-day-a-week visitation. And on September [**8] 1, 2009, we granted Debra H. and the attorney for the child permission to appeal *(13 NY3d 702, 914 N.E.2d 1011, 886 N.Y.S.2d 93 [2009])*. We also approved their request for a further stay to the extent of reinstating and permitting enforcement of so much of Supreme Court's order as allowed Debra H. to have Sunday visitation with M.R. *(13 NY3d 753, 914 N.E.2d 1006, 886 N.Y.S.2d 89 [2009])*. We now reaffirm our holding in *Alison D.*, but reverse the Appellate Division's order in this case for reasons of comity in light of Debra H.'s status as M.R.'s parent under Vermont law.

I.

Domestic Relations Law § 70 (a) provides that

> "[w]here 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, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is [**9] for the best interest of the child, and what will promote its welfare and happiness, and make award accordingly" (emphasis added).

In *Alison D.*, we decided that *section 70* does not confer standing on a biological stranger to seek visitation with a child in the custody of a fit parent. Debra H. urges us to exercise what she characterizes as longstanding common law and equitable powers to recognize the parentage of a nonbiological, nonadoptive individual on a theory of equitable estoppel and in the child's best interest. As a consequence, she asks us to revisit and either distinguish or overrule *Alison D.*, a case that closely resembles this one factually.

Alison D., the former romantic partner of Virginia M., petitioned for visitation with Virginia M.'s child under *Domestic Relations Law § 70*. According to Alison D., she and Virginia M. established a relationship, began living together, and decided to have a child whom Virginia M. would conceive through artificial insemination. They agreed to share all parenting [*5] responsibilities, and continued to do so for the first two years of the child's life. When the child was about 21/2 years old, however, the parties ended their relationship and [**10] Alison D. moved out of the family home. The parties adhered to a visitation schedule for a time, but Virginia M. at first restricted and eventually stopped Alison D.'s contact with the child.

When the case reached us, we rejected Alison D.'s argument that she "acted as a *'de facto' parent* or that she should be viewed as a *parent 'by estoppel'" (Alison D., 77 NY2d at 656* [emphasis added]). As we explained,

> "[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent . . . To allow the courts to award visitation -- a limited form of custody -- to a third person would necessarily impair the parents' right to custody and control" (*id. at 656-657*).

Because Alison D. "concede[d] that [Virginia M. was] a fit parent," she had "no right to petition the court to displace the choice made by the fit parent in deciding what is in the child's best interests" (*id. at 657*).

Citing *Domestic Relations Law §§ 71* and *72* (permitting siblings and grandparents respectively to petition for visitation), we emphasized that [**11] "[w]here the Legislature deemed it appropriate, it gave other categories of persons standing to seek visitation and it gave the courts the power to determine whether an award of visitation would be in the child's best interests" (*id.*). Thus, we refused to "read the term parent in *section 70* to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child" (*id.*).

In support of our decision in *Alison D.*, we cited *Matter of Bennett v Jeffreys (40 NY2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 [1976])* and *Matter of Ronald FF. v Cindy GG. (70 NY2d 141, 511 N.E.2d 75, 517 N.Y.S.2d 932 [1987])*, cases which set forth bedrock principles of family law. In *Bennett*, we held that the State "may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*40 NY2d at 544*). Where extraordinary circumstances are present, the court determines custody based on the child's best interest. Concomitantly, in *Ronald FF.*, we held that "[v]isitation rights may not be granted on the authority of the . . . *Bennett* . . . extraordinary circumstances rule, to a biological [**12] stranger where the child, born out of wedlock, is properly in the custody of his mother" (*70 NY2d at 142*); and further noted that the mother possessed a fundamental right "to choose those with whom her child associates," which the State may not "interfere with . . . unless it shows some compelling State purpose which furthers the child's best interests" (*id. at 144-145*).

[*6] In *Matter of Jacob (86 NY2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 [1995])*, decided four years after *Alison D.*, we construed *section 110 of the Domestic Relations Law*, New York's adoption statute, to permit "the unmarried partner of a child's biological mother, *whether heterosexual or homosexual*, who is raising the child together with the biological parent, [to] become the child's second parent by means of adoption" (*id. at 656* [emphasis added]). We stressed that permitting such second-parent adoptions "allows . . . children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle we faced in *[Alison D.]" (id. at 659)*. [2]

> 2 While Judge Ciparick criticizes *Alison D.* for taking an "unwarranted hard line stance, fixing biology above all else as the key to determining parentage" (*see* concurring op, Ciparick, J., at 3), [**13] our subsequent decision in *Jacob* softened any such "hard line" by permitting second-parent adoption.

Although Debra H. argues otherwise, we did not implicitly depart from *Alison D.* in *Shondel J.*, where there were affirmed findings of fact that Mark D. had held himself out as the child's biological father, and had treated her as his daughter for the first 4 1/2 years of her life. When Shondel J. sought orders of filiation and support, Mark D. requested DNA testing. The Family Court hearing examiner ordered genetic marker tests, which revealed that Mark D. was not, in fact, the child's biological father. As we pointed out, *Shondel J.* was an unusual case because "the process was inverted": "The procedure contemplated by *[sections 418 (a)* and *532 (a) of the Family Court Act]* is that Family Court should consider paternity by estoppel *before* it decides whether to test for biological paternity" (*7 NY3d at 330* [emphasis added]; *see Family Court Act §§ 418 [a]* [governing paternity where there is a marriage] and *532 [a]* [governing paternity where there is no marriage], which both specify that "[n]o (genetic marker or DNA) tests shall be ordered . . . upon a written finding by the court that it [**14] is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman"]).

We held in *Shondel J.* that "a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment" (*7 NY3d at 324*). We premised our decision on "our precedents, the affirmed findings of fact and the legislative recognition of paternity by estoppel" (*id. at 326*). On the latter point, we highlighted that although paternity by estoppel for purposes of child support "originated in case law," it was "now secured by statute in New York"; namely, *sections 418 (a)* and *532 (a) of the Family Court Act* (*id. at 327*).

We did not mention *Alison D.* in *Shondel J.* Nor did we intend to signal [*7] disaffection with *Alison D.* by citing *Jean Maby H.*, one of a handful of lower court decisions applying equitable estoppel to custody and visitation proceedings despite *Alison D.*, where we considered and explicitly rejected this approach (*see Alison D., 77 NY2d at 656*). Specifically, after [**15] noting that "New York courts have long applied the doctrine of estoppel in *paternity and support proceedings* [because of] the best interests of the child" (*Shondel J., 7 NY3d at 326*), we cited *Jean Maby H.* The pinpoint citation was made to a page where the Appellate Division similarly observed that courts have recognized equitable estoppel "as a defense in various proceedings involving *challenges to paternity*, including cases where there is evidence that the person seeking to avoid estoppel is not a biological parent" (*see Jean Maby H., 246 AD2d at 285* [internal citations omitted] [emphasis added]); and that "[t]he paramount concern in applying equitable estoppel in *these cases* has been, and continues to be, the best interests of the child" (*id.* [emphasis added]).

Our holding in *Shondel J.* was limited to the context in which that case arose -- the procedure for determining the paternity of an "alleged father." Moreover, we see no inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody are sought. As already noted, the Legislature has drawn the distinction for us: *sections 418 (a)* and *532 (a) of the Family Court Act* [**16] direct the courts to take equitable estoppel into

Ap 31

account before ordering paternity testing, while *section 70 of the Domestic Relations Law* does not even mention equitable estoppel. The procedure dictated by *sections 418 (a)* and *532 (a)* is intended to prevent someone who has held himself out as a child's biological father from later evading the financial obligations of paternity by means of a scientific litmus test, thereby endangering the child's economic security or even rendering the child a ward of the State. This may on occasion result in deeming a biological relationship to exist where the putative father is, in fact, a biological stranger to the child, as turned out to be the case in *Shondel J. (see Shondel J., 7 NY3d at 332* [cautioning that "a man who harbors doubts about his biological paternity has a choice to make. He may either put the doubts aside and initiate a parental relationship with the child, or insist on a scientific test of paternity *before* initiating a parental relationship"]). Debra H. would have us upend this rationale by allowing someone who is a *known* biological stranger to a child assert a parental relationship over the objections of the child's biological [**17] parent. *Shondel J.* is consistent with *Alison D.'s* core holding that parentage under New York law derives from biology or adoption. In sum, *Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of "disruptive . . . battle[s]" (*Jacob, 86 NY2d at 659*) over parentage as a prelude to further potential combat over custody and visitation. While Debra H. and various amici in this case complain that *Alison D.* is formulaic, or too rigid, or out of step with the times, we remain [*8] convinced that the predictability of parental identity fostered by *Alison D.* benefits children and the adults in their lives. All four departments of the Appellate Division have consistently followed *Alison D. (see e.g. Anonymous v Anonymous, 20 AD3d 333, 797 N.Y.S.2d 754 [1st Dept 2005], appeal dismissed 6 NY3d 740, 843 N.E.2d 1149, 810 N.Y.S.2d 409 [2005]; Bank v White, 40 AD3d 790, 837 N.Y.S.2d 181 [2d Dept 2007], lv dismissed 9 NY3d 1002, 879 N.E.2d 169, 849 N.Y.S.2d 28 [2007]; Gulbin v Moss-Gulbin, 45 AD3d 1230, 846 N.Y.S.2d 743 [3d Dept 2007], lv denied 10 NY3d 705, 886 N.E.2d 802, 857 N.Y.S.2d 37 [2008]; Matter of Lynda A.H. v Diane T.O., 243 AD2d 24, 673 N.Y.S.2d 989 [4th Dept 1998], lv denied 92 NY2d 811, 703 N.E.2d 269, 680 N.Y.S.2d 457 [1998]).*

Despite this evidence to the contrary, Debra H. also [**18] protests that *Alison D.* has spawned doubt and confusion in the law in the 19 years since it was handed down. To cure this ostensible ill, though, Debra H. asks us to replace the bright-line rule in *Alison D.* with a complicated and non-objective test for determining so-called functional or de facto parentage [3] at [*9] an equitable-estoppel hearing to be conducted by the trial court after discovery and fact-intensive inquiry in the individual case. These equitable-estoppel hearings -- which would be followed by a second, best-interest hearing in the event functional or de facto parentage is demonstrated to the trial court's satisfaction -- are likely often to be contentious, costly, and lengthy. Here, for instance, the two sides collectively submitted affidavits to Supreme Court from at least 60 individuals, any or all of whom might be expected to testify at the equitable-estoppel hearing.

3 At oral argument, Debra H. advocated for the standard established by the Wisconsin Supreme Court in *Matter of H.S.H.-K. (193 Wis 2d 649, 533 NW2d 419 [1995]).* After first concluding that Wisconsin's visitation statute was not the exclusive means of obtaining court-ordered visitation and therefore did [**19] not preclude an exercise of its equitable powers, the Wisconsin Supreme Court, "mindful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child," decided that a trial court may "determine whether visitation is in a child's best interest if the petitioner *first proves* that he or she has *a parent-like relationship* with the child and that *a significant triggering event* justifies state intervention in the child's relationship with a biological or adoptive parent" (*193 Wis 2d at 658, 533 NW2d at 421* [emphases added]). The court further determined that "[t]o meet these two requirements, the petitioner must prove the component elements of each one" (*id. at 658, 533 NW2d at 421*). Specifically, "[t]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant [**20] responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature" (*id. at 658-659, 533 NW2d at 421*). The contribution to a child's support (the third element) need not be monetary. Finally, "[t]o establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that the this parent has interfered substan-

> tially with the petitioner's parent-like relationship with the child, and that petitioner sought court ordered visitation within a reasonable time after the parent's interference" (*id. at 658, 533 NW2d at 421*).

More to the point, the flexible type of rule championed by Debra H. threatens to trap single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly know for sure when another adult's level of involvement in family life might reach the tipping point and jeopardize their [**21] right to bring up their children without the unwanted participation of a third party [4]. Significantly, "the interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court (*Troxel v Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 [2000]*). Courts must be sensible of "the traditional presumption that a fit parent will act in the best interest of his or her child" and protect the parent's "fundamental constitutional right to make decisions concerning the rearing of" that child (*id. at 69-70*). In our view, this fundamental right entitles biological and adoptive parents to refuse to allow a second-parent adoption, as Janice R. did, even if they have permitted or encouraged another adult to become a virtual parent of the child, as Debra H. insists was the case here. [*10] Next, we agree with Janice R. that any change in the meaning of "parent" under our law should come by way of legislative enactment rather than judicial revamping of precedent. Many states have adopted statutes expanding standing so that individuals who are not legal parents or blood relatives of a child may seek visitation and/or [**22] custody. Indiana, for example, authorizes a court to award custody to a "de facto custodian," defined as "a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least: (1) six (6) months if the child is less than three (3) years of age; or (2) one (1) year if the child is at least three (3) years of age" (*see Ind Code Ann §§ 31-17-2-8.5; 31-9-2-35.5*). Several other states, including Colorado, Texas and Minnesota, likewise incorporate a temporal element in their third-party standing statutes, which contributes to predictability (*see e.g. Colo Rev Stat Ann § 14-10-123 [1] [c]* [person "other than a parent" may file a petition seeking allocation of parental responsibilities for the child if the person "has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care"]; *Tex Fam Code Ann § 102.003 [a] [9]* ["An original suit may be filed at any time by: . . . (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date [**23] of the filing of the petition"]; *Minn Stat Ann § 257C.08 [4]* ["If an unmarried minor has resided in a household with a person, other than a foster parent, for two years or more and no longer resides with the person, the person may petition the district court for an order granting the person reasonable visitation rights to the child during the child's minority"]; *see also DC Code Ann § 16-831.01 [1]; Or Rev Stat Ann § 109.119 [1]; Wyo Stat Ann § 20-7-102 [a]*).

> 4 Judge Ciparick counters that the biological or adoptive parent may simply withhold "consent[] to the formation of [a] parental relationship between the [third party] and the child" (*see* concurring op, Ciparick, J., at 6). This is no answer since the parent can not predict the inherently unpredictable -- i.e., how a judge might someday rule on the question of whether or when there had been sufficient "consent" such that, as a consequence, a "parental relationship" had been "formed." And erecting a Chinese wall to isolate the child from those adults who play a significant role in the parent's life is probably not practical, and is certainly not desirable for either the child or the parent.

Before granting custody to a nonparent over [**24] the parent's objection, a court in California must "make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child" (*Cal Fam Code § 3041 [a]*). "Detriment to the child" is defined to include "the harm of removal from a stable placement . . . with a person who has assumed, on a day-to-day basis, the role of [the child's] parent, fulfilling both the child's physical needs and . . . psychological needs for care and affection, and who has assumed that role for a substantial period of time" (*id. § 3041 [c]*). Notably, "[a] finding of detriment does not require any finding of unfitness of the parents" (*id.*). When making custody determinations in Virginia, the court must "give primary consideration to the best interests of the child [and] assure minor children of frequent and continuing contact with both parents, when appropriate" (*Va Code Ann § 20-124.2 [B]*). In addition, while "[t]he court shall give due regard to the primacy of the parent-child relationship," it "may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award [**25] custody or visitation to any other person with a legitimate interest" (*id.*).

As this brief discussion of how some other states have tackled the standing issue [*11] shows, different policies and approaches have been implemented legislatively throughout the nation. Debra H. would have us preempt our Legislature by sidestepping *section 70 of the Domestic Relations Law* as presently drafted and inter-

preted in *Alison D.* to create an additional category of parent -- a functional or de facto parent -- through the exercise of our common law and equitable powers. But the Legislature is the branch of government tasked with assessing whether *section 70* still fulfills the needs of New Yorkers. The Legislature may conduct hearings and solicit comments from interested parties, evaluate the voluminous social science research in this area cited by Debra H. and the amici, weigh the consequences of various proposals, and make the tradeoffs needed to fashion the rules that best serve the population of our State. In conclusion, *Alison D.*, coupled with the right of second-parent adoption secured by *Jacob*, furnishes the biological and adoptive parents of children -- and, importantly, those children themselves [**26] -- with a simple and understandable rule by which to guide their relationships and order their lives. For the reasons set out in this opinion, we decline Debra H.'s invitation to distinguish or overrule *Alison D.* Whether to expand the standing to seek visitation and/or custody beyond what *sections 70, 71* and *72 of the Domestic Relations Law* currently encompass remains a subject for the Legislature's consideration.

II.

Our reaffirmation of *Alison D.* does not dispose of this case, however. Debra H. and Janice R. entered into a civil union in Vermont before M.R.'s birth. This circumstance presents two issues for us to decide: whether Debra H. is M.R.'s parent under Vermont law and, in the event that she is, whether as a matter of comity she is his parent under New York law as well, thereby conferring standing for her to seek visitation and custody in a best-interest hearing.

Vermont's civil union statute provides that parties to a civil union shall have "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage" (*Vt Stat Ann tit 15, § 1204 [a]*); and that they shall enjoy the same rights "with respect to a child of whom either becomes [**27] the natural parent during the term of the civil union," as "those of a married couple" (*Vt Stat Ann tit 15, § 1204 [ff]*). In *Miller-Jenkins*, the Vermont Supreme Court relied upon these provisions to hold that a child born by artificial insemination to one partner of a civil union should be deemed the other partner's child under Vermont law for purposes of determining custodial rights following the civil union's dissolution (*Miller-Jenkins, 180 Vt at 464-465, 912 A2d at 969-970*). The court concluded that in the context of marriage, a child born by artificial insemination was deemed the child of the husband even absent a biological connection. In light of *section 1204* and by parity of reasoning, the court decided that the same result pertained to the partner in the civil union with no biological connection to the child.

Janice R. counters that in *Miller-Jenkins* the child was conceived by artificial [*12] insemination after the parties entered into their civil union, while M.R. was conceived before her civil union with Debra H. We see no reason why the Vermont Supreme Court would reach a different result about parentage based on this distinction. The court repeatedly emphasized how important [**28] it was that the child was *born* during the civil union (*id. at 465, 912 A2d at 970* ["Many factors are present here that support a conclusion that (the partner with no biological connection to the child) is a parent, including first and foremost that (she and the child's biological mother) were in a valid legal union at the time of the child's birth"]; *id. at 466, 912 A2d at 971* ["Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue . . . We do note that, in accordance with common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage"]). Indeed, entering into the civil union at a time when both partners know that one of them is pregnant by artificial insemination might well be viewed as presenting an even stronger case than *Miller-Jenkins* to support the nonbiological partner's parentage. There is certainly no potential for misunderstanding, ignorance or deceit under such circumstance.

Janice R. does not challenge the civil union's validity. She protests, though, that it was "of utterly [**29] no consequence" to her, and that while she "gave into" Debra H.'s "demand(s)," she did not enter into the civil union "blindly." Rather, Janice R. -- who is a practicing attorney -- professes to have conducted research and to have "found that [entering into a Vermont civil union] was of no legal significance in the State of New York, which is still the case today." Moreover, she claims to have "conferred with an attorney to make certain that a 'civil union' was of no legal consequence," and to have been "assured that it was not." Finally, she avers that "[k]nowing that the civil union was of no legal consequence in New York and did not confer . . . any additional rights and responsibilities, combined with [her] desire to put an end to [Debra H.'s] nagging, [she] acquiesced to the civil union."

In fact, the potential legal ramifications in New York of entering into a civil union in Vermont were uncertain in 2003, [5] and remain unsettled except to the extent we resolve the [*13] specific issue -- i.e., parentage -- presented by this case. Whatever her motivation or expectation, Janice R. chose to travel to Vermont to enter into a civil union with Debra H. In light of the *Miller-Jenkins* decision, [**30] we conclude that Debra H. is

M.R.'s parent under Vermont law as a result of that choice. The question then becomes whether New York courts should accord comity to Vermont and recognize Debra H. as M.R.'s parent under New York law as well.

> 5 The first Supreme Court decision to consider the consequences in New York of a Vermont civil union was issued in April 2003 -- several months before Debra H. and Janice R. entered into their civil union -- and was widely publicized. Although reversed by the Appellate Division in 2005, the trial court concluded that the surviving partner of a civil union validly contracted in Vermont was entitled to recognition as a "spouse" under New York's wrongful death statute and therefore had standing to recover for the wrongful death of his partner in the civil union (*see Langan v St. Vincent's Hosp. of N.Y., 196 Misc 2d 440, 765 N.Y.S.2d 411 [Sup Ct, Nassau County 2003]), revd 25 AD3d 90, 802 N.Y.S.2d 476 [2d Dept 2005], appeal dismissed based on lack of finality, 6 NY2d 890, 160 N.E.2d 920, 190 N.Y.S.2d 700 [2006]).*

The doctrine of comity

> "does not of its own force compel a particular course of action. Rather, it is an expression of one State's entirely voluntary decision to defer to the policy of another. Such a decision may [**31] be perceived as promoting uniformity of decision, as encouraging harmony among participants in a system of co-operative federalism, or as merely an expression of hope for reciprocal advantage in some future case in which the interests of the forum are more critical" (*Ehrlich-Bober & Co. v University of Houston, 49 NY2d 574, 580, 404 N.E.2d 726, 427 N.Y.S.2d 604 [1980]* [internal citation omitted]).

New York's "determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict" (*id.*). The court locates the public policy of the state in "the law as expressed in statute and judicial decision" and also considers "the prevailing attitudes of the community" (*id.*). Even in the case of a conflict, however, New York's public policy may yield "in the face of a strong assertion of interest by the other jurisdiction" (*id.*).

New York will accord comity to recognize parentage created by an adoption in a foreign nation (*see L.M.B. v E.R.J., 2010 NY Slip Op 01345, *4-5, 14 N.Y.3d 100 [2010]* [comity may be extended to a Cambodian adoption certificate so that an individual who is a child's father under Cambodian law is also his father under New York law]). We [**32] see no reason to withhold equivalent recognition where someone is a parent under a sister state's law. Janice R., as was her right as M.R.'s biological parent, did not agree to let Debra H. adopt M.R. But the availability of second-parent adoption to New Yorkers of the same sex negates any suggestion that recognition of parentage based on a Vermont civil union would conflict with our State's public policy. Nor would comity undermine the certainty that *Alison D.* promises biological and adoptive parents and their children: whether there has been a civil union in Vermont is as determinable as whether there has been a second-parent adoption. And both civil union and adoption require the biological or adoptive parent's legal consent, as opposed to the indeterminate implied consent [*14] featured in the various tests proposed to establish de facto or functional parentage [6]. In sum, our decision does not lead to protracted litigation over standing and is consistent with New York's public policy by affording predictability to parents and children alike.

> 6 Vermont, like New York, does not provide by statute or caselaw for functional or de facto parentage (*see Titchenal v Dexter, 166 Vt 373, 385, 693 A2d 682, 689 [1997]* [**33] [Vermont Supreme Court concludes that lesbian companion of adoptive mother has no right to parent-child contact as equitable or de facto parent, noting that "[g]iven the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem" of third parties claiming a parent-like relationship and seeking court-compelled contact with a child]).

Although she sought more expansive rulings, Debra H. also made the narrower case on this appeal that "comity should be accorded to the civil union at least to recognize [her] as a parent to M.R.," and that "[a]cknowledging the significance to M.R. of his parents' Vermont civil union *does not require resolving* whether New York extends comity to the civil union for other purposes" (emphasis added) (*see e.g. Godfrey v Spano, 13 NY3d 358, 892 N.Y.S.2d 272 [2009]* [deciding taxpayer challenges on grounds not implicating New York's common law marriage recognition rule]). We agree for the reasons given, and thus in this case decide only that New York will recognize parentage created by a civil union in Vermont. Our determination that [**34] Debra H. is M.R.'s parent allows her to seek visitation and custody at a best-interest hearing. There, she will have to

establish facts demonstrating a relationship with M.R. that warrants an award in her favor.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to Supreme Court for a best-interest hearing in accordance with this opinion.

CONCUR BY: GRAFFEO; CIPARICK; SMITH

CONCUR

GRAFFEO, J.: (concurring)

I concur with Judge Read's analysis as well as the result she reaches but write [*15] separately to explain why I believe our decision in *Matter of Alison D. v Virgina M. (77 NY2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 [1991])* must be reaffirmed. There, we held that the term "parent" in *Domestic Relations Law § 70* encompasses a biological or adoptive parent, i.e., only a person with a legally-recognized parental relationship to the child. We noted that a child's parent has a constitutionally protected right to determine with whom the child may associate. Under New York law, a legal parent's right to make such determinations "may not be displaced absent grievous cause or necessity" (*Alison D., 77 NY2d at 657*; *see Matter of Ronald FF v Cindy GG, 70 NY2d 141, 144, 511 N.E.2d 75, 517 N.Y.S.2d 932 [1987]*; *Bennett v Jeffreys, 40 NY2d 543, 549, 356 N.E.2d 277, 387 N.Y.S.2d 821 [1976])*. [**35] A similar right has been recognized under the federal constitution (*see Troxel v Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 [2000])*. The Legislature authorizes parents to bring proceedings to ensure the proper care and custody of their children and has permitted a limited class of other persons -- siblings and grandparents -- standing to seek visitation in specified circumstances (*see Domestic Relations Law § 72*; *Matter of E.S. v P.D., 8 NY3d 150, 863 N.E.2d 100, 831 N.Y.S.2d 96 [2007])*. Rather than employing an "equitable estoppel" or "in loco parentis" basis for establishing parental status, *Alison D.* created a bright-line rule that made it possible for biological and adoptive parents to clearly understand in what circumstances a third party could obtain status as a parent and have standing to seek visitation or custody with a child. For 19 years the rule articulated in *Alison D.* has provided certainty and predictability to New York parents and their children.

The *Alison D.* decision was criticized by some because it was unclear at that time whether a same-sex partner that was not biologically related to a child could become a legal parent through second parent adoption. Any concern in that regard was resolved four years later in *Matter of Jacob (86 NY2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 [1995])* [**36] where we held that the adoption statutes permit second-parent adoption by the unmarried partner of a child's biological parent. Thus, the law in New York is clear: a person who lacks a biological relationship to a child and desires to become a legal parent must undertake a second-parent adoption. Parents -- whether in heterosexual or same-sex relationships, whether married or unmarried -- have been able to order their lives accordingly. This rule has avoided confusion, particularly in the event a relationship is dissolved years later, as to whether the party lacking biological or legal ties to the child (i.e., who failed to pursue an adoption) would have standing to petition for custody or visitation.

As Judge Read points out, our decision in *Matter of Shondel J. v Mark D. (7 NY3d 320, 853 N.E.2d 610, 820 N.Y.S.2d 199 [2006])* applying equitable principles in the context of a paternity dispute was fully consistent with *Alison D.* Beyond the fact that the Legislature has incorporated an equitable standard in the Family Court Act provisions governing paternity determinations (*see Family Ct Act §§ 418[a], 532[a]*), Shondel J. -- the biological mother in that case -- did not object to a finding that Mark D. was the father [**37] of the child. To the contrary, Shondel J. initiated a proceeding expressly seeking to have Mark D. adjudicated the father for purposes of obtaining [*16] financial support. Thus, the constitutional right of a fit parent to determine with whom her child associates was not implicated in *Shondel J.*, nor were equitable principles relied on in that case to declare a person lacking biological or adoptive ties to a child to be a parent over the objection of the child's fit biological mother. Consistent with the relevant statute, and with the consent of the biological mother, equitable estoppel was merely used as a vehicle to preclude Mark D. from withdrawing his prior sworn and unsworn statements that he was the child's father and from relying on genetic marker or DNA tests to disprove paternity.

Shondel J. did not undermine *Alison D.* and the objective standard for determining parental status emanating from that case continues to serve the interests of both parents and children. *Alison D.'s* clear standard encourages a party who seeks to form a parental relationship with a child but lacks biological ties to pursue a legal adoption as soon as possible, without leaving a question as important as parental [**38] status undetermined perhaps for years, subject to the credibility battles that characterize equitable estoppel hearings held long after the relationships between the parties have soured. By encouraging early adoptions, the *Alison D.* rule serves the best interests of New York's children as it is optimal to expeditiously establish legal parenthood, especially to protect a child against unforeseen events such as the death of a biological parent. And since the express written consent of the biological parent is a condition precedent to a second-parent adoption, the rule also guarantees that standing to seek visitation or custody will never

hinge on an after-the-fact dispute as to whether the other party's relationship with the child was sufficiently close or had been fostered by the biological parent. Under *Alison D.*, when a romantic relationship ends, whether the parties were same-sex or heterosexual partners, a hearing to determine who is the child's legal parent is generally unnecessary as the parentage issue can readily be determined as a matter of law based on objective genetic proof or documentary evidence. Thus, protracted litigation on the standing of a party hoping to obtain custodial [**39] rights or visitation is avoided, which further promotes the settlement of these issues rather than the contentious litigation that is all too frequently harmful to children.

Judge Smith proposes a standard that addresses the parental status of certain same-sex partners that employ artificial insemination to conceive a child. He proposes that "where a child is conceived through ADI [artificial donor insemination] by one member of a same sex couple living together, with the knowledge and consent of the other, the child is as a matter of law -- at least in the absence of extraordinary circumstances -- the child of both" (*see* Smith conc op, at 5). Like the equitable estoppel test, this formulation invites litigation over whether the parties were "living together" (presumably, they must be living together in a romantic relationship, not merely as roommates) at the time of insemination, whether the insemination was "with the knowledge and consent" of the other partner, and whether "extraordinary circumstances" exist, whatever those might be. Under this set of factors, the same [*17] types of factual controversies that typify the equitable estoppel analysis would ensue. [7]

> 7 Although *Matter of H.M. v E.T.* (NY3d [**40] [decided today]) does not involve an application for custody or visitation, the allegations in that case demonstrate some of the issues that arise in this context. There, twelve years after a same-sex relationship ended, the biological mother of a child born during the relationship through artificial insemination sought child support from her former same-sex partner and the same-sex partner denied that she was a parent of the child. The former partner alleged that, although she and the biological mother were living in the same household during the relevant period, this was not the product of a romantic relationship -- she and her husband had hired the biological mother as a live-in nanny to their children and the mother had remained in the home in that capacity after the marriage ended. The former partner asserted that she had assisted the biological mother with the process of insemination because they were close friends; although they had been involved in a brief romantic relationship at that time, she denied that she had ever agreed to become a parent to the child. Obviously, under Judge Smith's approach, these disputes as to the parties' living and relationship status more than [**41] a decade ago, as well as whether they consented to parent the child together, would be the subject of a hearing.

I do not suggest that a specialized approach should not be developed for same-sex couples who conceive children through artificial insemination or other assisted reproduction technologies (ART), particularly as medical techniques continue to evolve. But the criteria for establishing parental rights should be objective to ensure certainty for the parties and consistency in application. For these reasons, I believe it is more appropriate for the Legislature to develop the standards and procedures under which parenthood will be determined for same-sex couples in the artificial insemination and ART context, just as it has done for married couples under *Domestic Relations Law § 73* (providing that any child born to a married woman through artificial insemination is the child of her husband if he gave prior written consent to the procedure).

Indeed, some states have enacted statutes that specifically address the parental rights of same-sex partners who rely on artificial insemination or ART to conceive a child. For example, the New Mexico Legislature adopted a provision stating that [**42] "[a] person who provides eggs, sperm or embryos for or consents to assisted reproduction . . . with the intent to be the parent of a child is a parent of the resulting child" (*NM Stat Ann § 40-11A-703*). The statute contemplates that the "intended parent or parents shall consent to the assisted reproduction in a record signed by them before the placement of the eggs, sperm or embryos" (*NM Stat Ann § 40-11A-704*). The New York Legislature could craft a provision addressing the parental status of [*18] same-sex partners in the artificial insemination or ART context either by incorporating an objective standard that promotes predictability for parents and children, or by pursuing a different approach. But, to date it has not done so, nor has it legislatively overruled *Alison D.* I therefore conclude that there is no basis for this Court to depart from the analysis applied in that case and emphasize that, at present, the surest way for same-sex couples to protect the interests of children born during their relationships is to promptly undertake second parent adoptions that constitute conclusive proof of parental status.

Although parental status for visitation and custody depends on a biological [**43] or adoptive relationship under New York law, Judge Read aptly demonstrates why it is appropriate in this case to consider Vermont Law. Here, unable to marry or enter into a civil union in New York, the parties chose to enter into a civil union in

Vermont when Janice R. was eight months pregnant. At that time, as is the case today, the Vermont civil union statute clearly stated that "[t]he rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage" (*Vt Stat Ann tit 15, § 1204[ff]*). Under Vermont's statute, a child born by artificial insemination to one partner of a civil union becomes the child of the other partner, meaning that this non-biological parent has automatic standing to seek custody or visitation if there is a breakdown in the adult relationship (*see Miller-Jenkins v Miller-Jenkins, 180 Vt 441, 912 A.2d 951 [2006], cert denied 550 U.S. 918, 127 S. Ct. 2130, 167 L. Ed. 2d 863 [2007]*). The parties in this case are presumed to have understood the legal ramifications of their decision to enter into a civil union [**44] and one of those legal ramifications was that each partner would be a parent of any child born during the union [8]. A legal, parental relationship was therefore created between Debra H. and the child.

> 8 Another child was born to Janice R. after the parties relationship ended but during the course of the civil union (which apparently has not been dissolved). Having failed to promptly attempt to establish a relationship with the second child and petition for custody or visitation, I believe that Debra H. has likely forfeited any right she may have had to assert parental rights.

Of course, the doctrine of comity would be inapplicable if the parentage provision in Vermont's civil union statute was inconsistent with New York public policy. But, in this regard, our sister-state's law -- like New York's -- predicates parentage on objective evidence of a formal legal relationship -- the civil union. Since Debra H.'s status as a parent under Vermont Law does not turn on the application of amorphous equitable standards but depends on the fact that she and Janice R. entered into a civil union before the child was born, it does not run afoul of the policy underlying *Alison D.* as it does not undermine [**45] New York's interest in ensuring certainty for parents and children.

[*19] CIPARICK, J. (concurring in result):

Although I agree with the majority that principles of comity require the recognition of Debra H.'s parentage of M.R. because of the Vermont civil union between the parties, I write separately to set forth my view that *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 [1991]* should be overruled as outmoded and unworkable.

In *Alison D.*, the dissent predicted that the impact of the decision would be felt "far beyond th[e] particular controversy" of that case, by a "wide spectrum of relationships," including "heterosexual stepparents, 'common-law' and nonheterosexual partners . . ., and even participants in scientific reproduction procedures" (*77 NY2d at 657-658* [Kaye, J., dissenting]). That prediction has been borne out. In countless cases across the state, the lower courts, constrained by the harsh rule of *Alison D.*, have been forced to either permanently sever strongly formed bonds between children and adults with whom they have parental relationships (*see e.g. Matter of Janis C. v Christine T., 294 AD2d 496, 496-497, 742 N.Y.S.2d 381 [2d Dept 2002], lv denied 99 NY2d 504, 784 N.E.2d 76, 754 N.Y.S.2d 203 [2002]*; *Gulbin v Moss-Gulbin, 45 AD3d 1230, 1231, 846 N.Y.S.2d 743 [3d Dept 2007]*) [**46] or engage in deft legal maneuvering to explain away the apparent applicability of *Alison D. (see e.g. Jean Maby H. v Joseph H., 246 AD2d 282, 283, 288-289, 676 N.Y.S.2d 677 [2d Dept 1998]*; *Beth R. v Donna M., 19 Misc 3d 724, 734, 853 N.Y.S.2d 501 [Sup Ct, New York County 2008]*). Moreover, the decision in *Alison D.* has been both questioned by judges (*see e.g. Anonymous v Anonymous, 20 AD3d 333, 333-334, 797 N.Y.S.2d 754 [1st Dept 2005]* [Ellerin and Sweeny, JJ., concurring]) and roundly criticized by legal scholars (*see e.g.* Schepard, *Revisiting Alison D.: Child Visitation Rights for Domestic Partners*, NYLJ, June 27, 2002, at 3 [col 1]; Ettelbrick, *Who is a Parent?*, 10 NYL Sch J Hum Rts 513, 516-517, 522-532 [1993]).

To be sure, we are not in the practice of casting aside good legal precedent based merely on harsh results and scholarly criticism. *Alison D.*, however, has never been good legal precedent. Rather, the majority in that case took an unwarranted hard line stance, fixing biology above all else as the key to determining parentage and thereby foreclosing any examination of a child's best interests (*see 77 NY2d at 657-658* [Kaye, J., dissenting]). As the dissent explained, the majority in *Alison D.* rendered an opinion that fell "hardest [**47] on the children of [non-traditional] relationships, limiting their opportunity to maintain bonds that may be crucial to their development. The majority[] retreat[ed] from the [C]ourts' proper role . . . [by] tightening . . . rules that should . . ., above all, retain the capacity to take the children's interests into account" (*id. at 658*).

[*20] Since *Alison D.*, our decisions and the decisions of many of the lower courts have properly focused on the best interests of the children when determining questions of parentage, including the application of equitable estoppel to determine paternity and support obligations (*see e.g. Matter of Shondel J. v Mark D., 7 NY3d 320, 324, 853 N.E.2d 610, 820 N.Y.S.2d 199 [2006]*). The majority here insists that it was appropriate to apply

the doctrine of equitable estoppel in *Shondel J.* and consider the child's best interests, but to apply the doctrine here would be inappropriate. The majority sees no "inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to establish standing when visitation and custody are sought" (majority op., at 12-13) because *section 70 of the Domestic Relations Law* makes no mention of equitable estoppel. The majority infers [**48] that economic considerations are present in paternity and child support proceedings but not custody and visitation proceedings (*see id.*). I disagree. Support obligations flow from parental rights; the duty to support and the rights of parentage go hand-in-hand and it is nonsensical to treat the two things as severable. Moreover, while it is true that *section 70 of the Domestic Relations Law* makes no mention of equitable estoppel, it is also true that the statute does not specifically define the term "parent." Notably, as Judge Kaye observed in the *Alison D.* dissent, one thing the Legislature *did* include in the statute was its intention that the courts "shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness" (*Domestic Relations Law § 70 [a]*; *see also Alison D., 77 NY2d at 659*).

Other state courts have developed better, more flexible, multi-factored approaches to determine whether a parental relationship exists, thus conferring upon a petitioner standing to seek custody or visitation. Rather than relying strictly on biology or an adoptive relationship, as *Alison D.* does, other tests focus on a functional examination of the [**49] relationship between the parties and the child. For example, the approach developed by the Wisconsin Supreme Court is, in my opinion, properly protective of both the best interests of the children and the rights of biological and adoptive parents. Under the Wisconsin test, "[t]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature" (*Matter of Custody of H.S.H.-K., 193 Wis 2d 649, 658-659, 533 NW2d 419, 421 [1995]).* In [*21] short, I believe that, in order to demonstrate [**50] the existence of a parental relationship sufficient to confer standing under *Domestic Relations Law § 70*, a petitioner unrelated to a child by biology or adoption must prove that (1) the biological or adoptive parent consented to and encouraged the formation of a parental relationship; and (2) that the petitioner intended to and actually did assume the typical obligations and roles associated with parenting (*see* Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents?, 40 Fam LQ 23, 49 [2006]*; Ettelbrick, *Who is a Parent?*, 10 NYL Sch J Hum Rts at 516-517; Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage, 53 Hastings LJ 597, 640 [2002]*; *see also Matter of Custody of H.S.H.-K., 193 Wis 2d at 658*; *VC v MJB, 163 NJ 200, 225, 748 A2d 539, 553 [2000]* [discussing formation of parental relationship as relevant to determination of parentage]), as is alleged here.

Although the majority believes that a functional approach would "trap" single biological and adoptive parents "in a limbo of doubt" (majority op., at 16), I strongly disagree. In a test such as Wisconsin's, for example, one element that must be proven is that the biological [**51] or adoptive parent consented to the formation of parental relationship between the petitioner and the child. If a biological or adoptive parent does not consent, he or she may elect to continue raising the child on his or her own, without interference, as is a parent's constitutional right (*see Troxel v Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 [2000]).*

The majority claims that adopting a functional approach would "sidestep[]" *section 70 of the Domestic Relations Law* and "preempt our Legislature" by "creat[ing] an additional category of parent" (majority op., at 19). However, as noted above, *section 70 of the Domestic Relations Law* contains no definition of the term "parent." In my view, it was the majority in *Alison D.* that "sidestepped" *section 70* by refusing to give appropriate weight to the clear Legislative intent, expressed in the statute, to protect the "best interests" and "welfare and happiness" of children.

Thus, taking into consideration the social changes that have occurred since *Alison D. (see Godfrey v Spano, 13 NY3d 358, 380-381, 892 N.Y.S.2d 272 [2009]* [Ciparick, J., concurring]; *see also Matter of Jacob, 86 NY2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 [1995])* and recognizing that Supreme Court has inherent equity powers and authority [**52] pursuant to *Domestic Relations Law § 70* to determine who is a parent and what will serve a child's best interests, [1] I would reverse on both grounds and hold that Debra H. [*22] has standing to proceed with a hearing on the merits of her petition.

1 I agree with Judge Smith's concurrence insofar as he suggests that the presumption of legitimacy could be used to ascertain whether the same-sex partner of a biological parent is also a parent to a child born during the course of the parties' rela-

tionship, but would extend the presumption to include biological children of same-sex male couples as well. I believe that such a presumption, however, would constitute only one facet of a functional approach such as the one I suggest.

SMITH, J. (concurring in *Debra H. v Janice R.* and *Matter of H.M. v E.T.*):

These two cases present (though neither majority decision ultimately turns on) the question of whether a person other than a biological or adoptive mother or father may be a "parent" under New York law. In *Debra H. v Janice R.*, a visitation case, a majority of the Court reaffirms the holding in *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 [1991])* that New York parenthood requires a biological or adoptive [**53] relationship, though the majority also holds -- correctly in my view -- that we should recognize Debra H.'s parental status under the law of Vermont. In *H.M. v E.T.*, a child support case, the majority holds -- again correctly in my view -- that Family Court has jurisdiction of the case, and does not reach the *Alison D.* question, while the dissent suggests that *Alison D.* requires dismissal.

Though I concur with the result in both cases, and join the *H.M. v E.T.* majority opinion in full, I would depart from *Alison D.*, both for visitation and child support purposes. I grant that there is much to be said for reaffirming *Alison D.*, but I conclude that there is even [*23] more to be said against it.

I begin by expressing wholehearted agreement with much of what the *Debra H.* majority opinion, and Judge Graffeo's concurring opinion, say. It is indeed highly desirable to have "a bright-line rule that promotes certainty in the wake of domestic breakups," and to avoid litigation "over parentage as a prelude to further potential combat over custody and visitation" (*Debra H.* majority op at 13-14). There are few areas of the law where certainty is more important than in the rules governing who a child's [**54] parents are. For that reason, I join the *Debra H.* majority in rejecting the approach taken by the *Alison D.* dissent, which favored a multi-factor test for parenthood "that protects all relevant interests" (*77 NY2d at 662*), and by the Wisconsin Supreme Court's decision in *Matter of H.S.H.-K. (193 Wis 2d 649, 658-659, 533 NW2d 419, 421 [1995])*, which permitted a party to establish a "parent-like relationship" by proving four amorphous elements, including such things as "significant responsibility for the child's care, education and development" and "a bonded, dependent relationship" with the child. The *Debra H.* majority is quite right to see in these vague formulas a recipe for endless litigation, which would mean endless misery for children and adults alike.

These reasons lead the *Debra H.* majority and the *H.M. v E.T.* dissent to follow *Alison D.* in concluding that women in the position of Debra H. (putting aside her civil union with Janice R.) and E.T. are not parents of their former lovers' children. But despite the high value I set on certainty and predictability, I find this result unacceptable. I would therefore adopt a different "bright-line rule" -- one that includes these women [**55] and others similarly situated in the definition of "parent".

The position of Debra H. and E.T. is an increasingly common one. Each lived with her same sex romantic partner. In each case, while the couple was living together, the partner was artificially inseminated with sperm from an unknown donor (artificial donor insemination, or ADI) and gave birth. Both women in each case expected, and led the other to expect, that both of them would be the child's parents. Yet the *Debra H.* majority holds that Debra H. would never have become a parent absent the civil union, while the *H.M. v E.T.* dissent implies that E.T. never became a parent at all. This approach not only disappoints the expectations of the adults involved: much worse, it leaves each child with only one parent, rendering the child, in effect, illegitimate.

To put a large and growing number of our state's children in that status seems wrong to me. Each of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced. Nor can it be said that adoption by the non-biological parent -- an option available under *Matter of Jacob (86 NY2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 [1995])* -- is [**56] an adequate recourse, for adoption is possible only by the voluntary act of the adopting parent, with the consent of the biological one. To apply the rule of *Alison D.* to [*24] children situated as are the children in these cases is to permit either member of the couple to make the child illegitimate by her whim -- as the facts of these two cases illustrate.

I have said that the interest in certainty is extremely strong in this area; but society's interest in assuring, to the extent possible, that each child begins life with two parents is not less so. That policy underlies the common law presumption of legitimacy, "one of the strongest and most persuasive known to the law" (*Matter of Findlay, 253 NY 1, 7, 170 N.E. 471 [1930]* [Cardozo, Ch. J.]; *see also Michael H. v Gerald D., 491 U.S. 110, 125, 109 S. Ct. 2333, 105 L. Ed. 2d 91 [1989]* [the strength of the presumption derives from "an aversion to declaring children illegitimate . . . thereby depriving them of rights of inheritance and succession . . . and likely making them wards of the state"]). The policy has been adopted as a matter of statute in particular circumstances (*Domestic Relations Law §§ 24, 73*) and, in one persuasively reasoned Appellate Division case, has been adapted as

[**57] a matter of common law to protect children born by ADI (*Laura WW. v Peter WW., 51 AD3d 211, 856 N.Y.S.2d 258 [3d Dept 2008]*). I would apply the common law presumption to the facts of these cases, and would hold that where a child is conceived through ADI by one member of a same sex couple living together, with the knowledge and consent of the other, the child is as a matter of law -- at least in the absence of extraordinary circumstances --the child of both.

The rule I propose is clearly defined in at least one respect: It would apply only to same sex couples -- indeed, only to lesbian couples, because I would leave for another day the question of what rules govern male couples, for whom ADI is not possible. This limitation may give some pause, for it seems intuitively that all people, male and female, gay and straight, should be treated the same way. Yet it is an inescapable fact that gay and straight couples face different situations, both as a matter of law and as a matter of biology. By the choice of our Legislature, a choice we have held constitutionally permissible (*Hernandez v Robles, 7 NY3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 [2006]*), same sex couples in New York have neither marriage nor domestic civil unions available to [**58] them. And, pending even more astounding technological developments than we have yet witnessed, it is not possible for both members of a same sex couple to become biological parents of the same child. These differences seem to me to warrant different treatment. Indeed, different treatment already exists, for both a statute (*Domestic Relations Law § 73*) and the common law (*Laura WW., 51 AD3d at 217*) give a measure of protection to the children of married opposite-sex couples who are conceived by ADI. The rule I propose would give the children of lesbian couples similar, though not identical, protection.

In one respect, the rule I have suggested would come closer to treating gay and straight couples alike than the more flexible rules advocated or adopted in many writings, including the *Alison D.* dissent, the Wisconsin decision in *Matter of H.S.H.-K.*, and Judge Ciparick's dissent today in *Debra H.*. Under these approaches, the same sex partners of biological parents would have an opportunity to become quasi-parents -- "de facto parents", [*25] parents-by-estoppel, or persons "in a parent-like relationship". As to women in the situation of Debra H. and E.T., I would drop all the hyphens and quotation [**59] marks, and call them simply parents.

For these reasons, I would hold that Debra H. is M.R.'s parent, and that E.T. is the parent of H.M.'s biological son. Therefore, in *Debra H. v Janice R.*, I would not find it necessary to reach the effect of the Vermont civil union (although, since the majority does reach it, I join in its resolution of that question); and I would hold that Family Court has jurisdiction in *H.M. v E.T.* not only on the narrow ground adopted by the majority, but also on the ground that E.T. is the child's parent and therefore "chargeable with the support of such child" within the meaning of *Family Court Act § 413 (1) (a)*.

* * * *

Order reversed, with costs, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein. Opinion by Judge Read. Judges Graffeo, Pigott and Jones concur, Judge Graffeo in a separate concurring opinion in which Judge Jones also concurs. Judge Ciparick concurs in result in an opinion in which Chief Judge Lippman concurs. Judge Smith concurs in result in an opinion.

Decided May 4, 2010

EXHIBIT G

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 18, 2010 507892

AUDREY JUANITA DICKERSON,
Appellant,
v OPINION AND ORDER

SONYA DENISE THOMPSON,
Respondent.

Calendar Date: January 7, 2010

Before: Cardona, P.J., Peters, Rose, Kavanagh and McCarthy, JJ.

Amy Schwartz, Rochester, and Geri Pomerantz, East Greenbush, for appellant.

Thomas W. Ude Jr., Lambda Legal Defense and Education Fund, Inc., New York City, for Lambda Legal Defense and Education Fund, Inc., amicus curiae.

Peters, J.

Appeal from an order of the Supreme Court (Reilly Jr., J.), entered November 13, 2008 in Schenectady County, which, sua sponte, dismissed the complaint for lack of subject matter jurisdiction.

The narrow issue before us is whether Supreme Court has subject matter jurisdiction to entertain an action for equitable and declaratory relief seeking dissolution of a civil union validly entered into outside of this state. We hold that it does.

In April 2003, plaintiff and defendant traveled to Vermont and entered into a civil union in accordance with Vermont law

(see Vt Stat Ann, tit 15, § 1201). The parties were residents of New York at all times during their relationship and neither party ever resided in Vermont. In the years that followed, the parties' relationship began to deteriorate and they ceased cohabitation in April 2006.

Unable to obtain a dissolution of the civil union in Vermont since that state's civil union law requires that one of the parties be a resident of Vermont for one year preceding the date of the final hearing (see Vt Stat Ann, tit 15, §§ 592, 1206), plaintiff commenced this action in November 2007 for equitable and declaratory relief seeking dissolution of the civil union and a declaration freeing her of all the benefits, protections and responsibilities incident thereto. After defendant failed to appear in the action, plaintiff moved ex parte for a default judgment granting the requested relief. Supreme Court, sua sponte, raised the issue of whether it had subject matter jurisdiction over the action and, after hearing from plaintiff on the question, issued an order dismissing plaintiff's complaint for lack of subject matter jurisdiction. In so doing, Supreme Court found that New York's public policy "does not recognize any legal relationship between same-sex partners, does not confer any rights or impose any obligations on such a relationship and does not afford any means by which to dissolve such a relationship." This appeal by plaintiff ensued.

Plaintiff and amicus[1] maintain that, as a matter of comity, New York should recognize her Vermont civil union status for the limited purpose of adjudicating this action to dissolve it. "The doctrine of comity is not a rule of law, but one of practice, convenience and expediency. It does not of its own force compel a particular course of action. Rather, it is an expression of one [s]tate's entirely voluntary decision to defer to the policy of another" (Ehrlich-Bober & Co. v University of Houston, 49 NY2d 574, 580 [1980] [internal quotation marks and citations omitted]; see De Rose v New Jersey Tr. Rail Operations, 165 AD2d 42, 44-45 [1991]). Thus, a determination of whether New York is to give

---

[1] An amicus brief was filed by Lambda Legal Defense and Education Fund, Inc.

effect to another state's governmental acts is based on whether such acts are consistent with New York's public policy (see Crair v Brookdale Hosp. Med. Ctr., Cornell Univ., 94 NY2d 524, 528-529 [2000]; Ehrlich-Bober & Co. v University of Houston, 49 NY2d at 580).

New York's "public policy" has long been defined as "'the law of the [s]tate, whether found in the Constitution, the statutes or judicial records'" (Mertz v Mertz, 271 NY 466, 472 [1936], quoting People v Hawkins, 157 NY 1, 12 [1898]; accord Lewis v New York State Dept. of Civ. Serv., 60 AD3d 216, 222 [2009], affd 13 NY3d 358 [2009]). Today, the public policy of our state protects same-sex couples in a myriad of ways. Two provisions of the Public Health Law define a domestic partner to include one who is "formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of the United States or of any state, local or foreign jurisdiction" (Public Health Law § 2805-q [2] [a]; § 4201 [1] [c] [i] [emphasis added]). Thus, parties to a civil union cannot be denied hospital visitation rights (see Public Health Law § 2805-q) and have the right to determine the disposition of one another's remains (see Public Health Law § 4201 [1] [c]). Furthermore, New York City's Domestic Partnership Law, which defines "domestic partners" to include members of a civil union (see City of NY Administrative Code § 3-240 [a]), forbids partners in a civil union from entering into a domestic partnership with anyone else (see City of NY Administrative Code § 3-241).

Our state has also evidenced a clear commitment to respect, uphold and protect parties to same-sex relationships by executive and local orders extending recognition to same-sex couples and granting benefits accordingly (see e.g. Directive of Governor Paterson, Memorandum from David Nocenti to All Agency Counsel re: Decision in Same Sex Marriages, May 14, 2008; Westchester County Executive Order No. 3 of 2006; 9 NYCRR 5.113.30 [surviving same-sex partners entitled to same benefits as spouses from State's Crime Victims Board]; see also B.S. v F.B., 25 Misc 3d 520, 531 n 11 [Sup Ct, Westchester County 2009]; Golden v Paterson, 23 Misc 3d 641 [Sup Ct, Bronx County 2008]). Additionally, the Legislature has taken a number of measures to treat surviving

same-sex partners of victims of the September 11, 2001 World Trade Center attacks as surviving spouses (see September 11th Victims and Families Relief Act, L 2002, ch 73, § 1 [legislative intent section specifies that domestic partners should be eligible for September 11th federal fund awards]; L 2002, ch 467, § 1 [amending Workers' Compensation Law to provide same-sex partners of September 11th victims with the same death benefits provided to spouses]; L 2002, ch 176 [same-sex domestic partners of September 11th victims and their children eligible for World Trade Center Memorial Scholarship program]).

So too has decisional law recognized such relationships. As early as 1989, same-sex life partners were recognized as family members for purposes of challenging an eviction proceeding (see Braschi v Stahl Assoc. Co., 74 NY2d 201, 211 [1989]). Further, the same-sex partner of a biological parent has been afforded the right to become the parent of the child through adoption (see Matter of Jacob, 86 NY2d 651, 669 [1995]). More recently, we concluded that the recognition of an out-of-state same-sex marriage is not contrary to public policy even if the marriage could not have been solemnized in New York (see Lewis v New York State Dept. of Civ. Serv., 60 AD3d at 221-223; see also Martinez v County of Monroe, 50 AD3d 189, 192-193 [2008], lv denied 10 NY3d 856 [2008]; C.M. v C.C., 21 Misc 3d 926, 929-930 [Sup Ct, NY County 2008]). "These judicial decisions and statutes express a public policy of acceptance that is simply not compatible with [Supreme Court's conclusion] that the recognition in our [s]tate of same-sex [civil unions] validly performed elsewhere is contrary to New York public policy" (Godfrey v Spano, 13 NY3d 358, 380 [2009] [Ciparick, J., concurring]; see Lewis v New York State Dept. of Civ. Serv., 60 AD3d at 222-223; Martinez v County of Monroe, 50 AD3d at 192-193). Indeed, although the valid Vermont civil union entered into by the parties does not bind us to confer upon them "all of the incidents which the other jurisdiction attaches to such status" (Matter of Chase, 127 AD2d 415, 417 [1987]), "we may recognize the civil union status . . . as a matter of comity" (Matter of Langan v State Farm Fire & Cas., 48 AD3d 76, 79 [2007]).

Having determined that we may recognize, as a matter of comity, the civil union status of the parties, the issue distills

to whether Supreme Court has the power to entertain an action for dissolution of that civil union (see Matter of Fry v Village of Tarrytown, 89 NY2d 714, 718 [1997]; Lacks v Lacks, 41 NY2d 71, 75 [1976]; Thrasher v United States Liab. Ins. Co., 19 NY2d 159, 166 [1967]). The NY Constitution confers upon Supreme Court "general original jurisdiction in law and equity" (NY Const, art VI, § 7). As a court of "original, unlimited and unqualified jurisdiction[, it] is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed" (Matter of Fry v Village of Tarrytown, 89 NY2d at 718 [internal quotation marks and citations omitted]; see Lacks v Lacks, 41 NY2d at 75).

Here, while New York has not created a specific mechanism for dissolution of a civil union validly entered into in another state, neither has it exercised its power, by statute or other legislative enactment, to prohibit an action for dissolution of a civil union. Since Supreme Court's jurisdiction over the subject matter of this action has not been proscribed, and this matter involves a dispute for which "adequate relief by means of an existing form of action is [un]available to the plaintiff" (Kalman v Shubert, 270 NY 375, 378 [1936]; see Doe v N.Y. City Bd. of Health, 5 Misc 3d 424, 427 [Sup Ct, NY County 2004]), Supreme Court is competent to adjudicate the case. However, we note that there is "a clear distinction between a court's competence to entertain an action and its power to render a judgment on the merits. Absence of competence to entertain an action deprives the court of 'subject matter jurisdiction'; absence of power to reach the merits does not" (Lacks v Lacks, 41 NY2d at 75 [citation omitted]; see Matter of Renee XX. v John ZZ., 51 AD3d 1090, 1092 [2008]; Wells Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239, 244 [2007]). As such, questions as to whether and to what extent relief may ultimately be afforded to the parties have no bearing on whether Supreme Court has subject matter jurisdiction. Conversely, our conclusion that subject matter jurisdiction exists does not in any way determine the ultimate question of what, if any, relief is available on the merits.

Cardona, P.J., Rose, Kavanagh and McCarthy, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, and matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision.

ENTER:

Michael J. Novack
Clerk of the Court