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Court of Appeals

STATE OF NEW YORK

DEBRA H.,

Petitioner-Appellant,

-against-

JANICE R.,

Respondent-Respondent

BRIEF OF AMICI CURIAE CITIZENS' COMMITTEE FOR CHILDREN, LAWYERS FOR CHILDREN AND CHILDREN'S LAW IN SUPPORT OF APPELLANT

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Citizens' Committee for Children of New York

Citizens' Committee for Children of New York ("CCC") is a sixty-six year old independent, multi-service advocacy organization dedicated to ensuring that every New York City child is healthy, housed, educated and safe. CCC is an independent voice for New York City's children and its goal is to secure the rights, protections, and services children deserve. Many of CCC's activities directly affect the lives of individual children, but most of its efforts are spent identifying the causes and effects of disadvantage and poverty, promoting the development of services in the community, and working to make public and private institutions more responsive to children. CCC is unique among child advocacy organizations in that citizen members and staff work side-by-side assuming the roles of spokesperson, researcher, coordinator and watchdog for the City's children. Its staff and members include specialists in health, mental health, education, child care, housing, homelessness, income security, child welfare, juvenile justice and child and youth development. CCC recognizes that children do not distinguish their relationships with caregivers according to legal or biological categories, and that child-caregiver relationships endure even when caregivers' relationships with each other dissolve.

Lawyers for Children

Lawyers for Children ("LFC"), founded in 1984, provides free legal and social work services to children in custody, visitation, paternity, guardianship, adoption, abuse, neglect, and voluntary foster care placement proceedings in New York City Family Court. This year, LFC will provide services to children and young adults in over 6,000 Family Court cases. In addition, LFC publishes guidebooks and other materials for both children and legal practitioners, conducts professional legal and social work training sessions, and works to reform systems affecting vulnerable children. LFC and the Children's Law Center are the two organizations that have been selected by the NYS Unified Court System to provide representation to the children who are assigned counsel in custody and visitation proceedings in the New York City Family Courts. LFC's insight into the issues raised in the instant case is borne of nearly twenty-five years' experience representing the child's perspective in thousands of high-conflict custody and visitation cases.

Children's Law Center

The Children's Law Center ("CLC"), founded in 1997, provides free interdisciplinary representation to children in custody/visitation, guardianship, domestic violence and connected child protective cases in New York City. CLC's mission is to give a child a strong and effective

voice in a legal proceeding that has a critical impact on his or her life. CLC represents over 9,000 children annually. The cases CLC handles are varied and complex and have a direct and substantial impact upon the lives of children, determining such issues as where and with whom they will live, whether or not they will visit a parent, grandparent, or sibling, and who will be their legal guardian. CLC's extensive involvement in high-conflict custody and visitation cases informs its analysis of how the courts can protect and promote the best interests of New York's children.

PRELIMINARY STATEMENT

The paramount concern in New York Family Court cases is the best interests of the child. In recent years, however, numerous courts have interpreted this Court's decisions in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991) and *Ronald FF. v. Cindy GG.*, 70 N.Y.2d 141 (1987),[1] to prohibit any consideration of the best interests of the child in certain disputes over

[1] In *Ronald FF.*, this Court held that the "extraordinary circumstances" doctrine set forth in *In re Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976) could not be extended to a non-biological parent seeking visitation. In *Bennett*, this Court found that in "extraordinary circumstances," non-legal parents could have standing to petition for custody. 40 N.Y.2d at 549-50 (stating that before a court could interfere with the rights and responsibilities of a "natural" parent or make a determination about what would be in the best interests of the child, there must be a "judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child"). Consequently, even in the context of a custody proceeding, the best interests of children such as M.R. cannot be protected by the court unless a *de facto* parent is able to prove the existence of extraordinary circumstances.

custody and visitation – arguably two of the most critical issues affecting a child's life and well-being. In these courts' view, a parent has no standing to seek visitation or custodial rights unless (i) he or she has a biological or adoptive relationship with the child, even if there is overwhelming evidence that a positive and nurturing parental relationship exists between the two, or (ii) in the context of custody proceedings, "extraordinary circumstances" exist, such as abandonment, surrender or unfitness, such that the termination of the biological or adoptive parent's custodial rights is warranted.[2]

This inflexible approach to determining parental rights does more to endanger than to protect the best interests of the child. The social science literature is replete with studies finding that children form attached relationships with non-biological non-adoptive parents and that severing such relationships is traumatic and can have long-term negative consequences for a child's development. Moreover, in many cases, New York courts apply principles of equitable estoppel to affirm the parental rights and obligations of men who have held themselves out to be children's

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[2] In 1991, this Court, in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), narrowly interpreted "parent" in Section 70 of the New York Domestic Relations Law so as not to include a non-biological and non-adoptive parent. However, the Court did not address when it would be appropriate for a New York court, in its *parens patriae* role, to exercise its equitable jurisdiction to protect the interests of a child in such circumstances. Similarly, in *Ronald FF.*, the doctrine of equitable estoppel was never raised. Particularly in light of the increasing number of family arrangements in New York where one of the intended parents is not related by biology or adoption, this remains a significant question that must be answered.

parents – whether or not they are biologically related to the children or have adopted them. Thus, *de facto* parenthood has been recognized for some children whose parents are of different sexes, but in almost every instance, not for children whose parents are of the same sex. From a child's perspective, the gender of his parents is irrelevant. What is relevant, and what has been shown to be critical to a child's healthy development, is the continuity of a child's relationship with those persons with whom he has developed an emotional parent-child bond.

Given the complexity of today's families and the growing number of same-sex couples who create families in which only one parent has a biological link to their child, it is imperative that children's relationships with their *de facto* parents be protected from abrupt termination only when it is in the best interest of the child, and not simply at the sole whim of the biological or adoptive parent.[3]

This Court should no longer allow lower courts to abdicate their *parens patriae* responsibilities towards children who have a parent unrelated

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[3] From 1990 to 2006, the number of same-sex couples increased 21 times faster than the U.S. population, and 23.2% of unmarried, same-sex couples have their own children under 18 living in the household. Williams Institute, *Geographic Trends Among Same-Sex Couples in the U.S. Census and the American Community Survey*, at 1 (Nov. 2007), *available at* http://www.law.ucla.edu/williamsinstitute/publications/ACSBriefFinal.pdf; Martin O'Connell and Daphne Lofquist, *Counting Same-sex Couples: Official Estimates and Unofficial Guesses* (May 2009), *available at* http://paa2009.princeton.edu/download.aspx?submissionId=91177.

to them by biology or adoption. Instead, this Court should compel the appropriate exercise of equitable jurisdiction by reversing the First Department's ruling and remanding to the trial court so that it can determine (i) whether or not Petitioner in fact had a *de facto* parental relationship with M.R. and, if so, (ii) whether it is in the child's best interest to preserve this relationship.

FACTUAL BACKGROUND

The facts of this case, some of which are contested, are laid out in detail in the parties' briefs and will only be briefly summarized here. Debra alleges that, in the context of a committed, long-term relationship, she and Respondent (Janice R.) undertook having a family together using assisted reproductive technology and an anonymous sperm donor. The parties entered into a New York City registered domestic partnership and a Vermont civil union. Janice gave birth to their child, M.R., and the family lived together for 2½ years after M.R.'s birth, at which time, the women's relationship ended, though Debra and M.R.'s parent-child relationship continued.

According to Debra, she has been an active and engaged parent who loves and supports her child emotionally as well as financially. Debra claims that through daily interaction and care, she and M.R. formed a deep psychological bond, that she is M.R.'s "psychological" or "*de facto*" parent

and that it is critical to M.R.'s health and well-being that her relationship with M.R. be allowed to continue. Janice contests many of these factual allegations and claims that Debra substantially exaggerates her role in M.R.'s life.

The trial court ordered an evidentiary hearing to determine whether Debra is in fact M.R.'s *de facto* parent. The Appellate Division reversed that order, ruling in reliance on *Alison D.* that Debra has no standing to pursue custody or visitation rights and obligations of support, regardless of whether M.R.'s best interests are served by such an outcome. Debra seeks reversal of the Appellate Division's order so that the trial court can proceed to determine, in light of the conflicting evidence, whether continuation of her relationship with M.R. is in the best interests of the child.

ARGUMENT

I. GRANTING STANDING TO *DE FACTO* PARENTS IS IN THE BEST INTERESTS OF M.R. AND CHILDREN SIMILARLY SITUATED

Contrary to Respondent's assertions, there is a near consensus among social scientists that children form attached relationships with their parents irrespective of a biological or adoptive link, and that severing these attachments is not only traumatic in the short term, but can have permanent negative effects on a child's healthy development.

A. Social Scientists Overwhelmingly Agree That Continuity Of Attached Parental Relationships – Whether With Biological, Adoptive, Or *De Facto* Parents – Is Critical To Children's Development And Well-Being

Three decades of social science research has established that the attachment bond created between a child and his parent or primary caregiver early in life has a profound effect on a child's development. *See, e.g.*, John Bowlby, *Attachment, in Attachment and Loss* (1969/1982); *see also* Mary Ainsworth et al., *Patterns of Attachment: A Psychological Study of the Strange Situation* (1978); Mary Main et al., *Security in Infancy, Childhood, and Adulthood: A Move to the Level of Representation, in Growing Points of Attachment Theory and Research* 66-104 (Inge Bretherton & Everett B. Waters eds., 1985). Indeed, interdisciplinary data gathered by developmental psychologists and neurobiologists has indicated that a child's attachment relationships are critical to optimal brain development during a child's formative years. *See, e.g.*, Allan Schore, *Effects of a Secure Attachment Relationship on Right Brain Development, Affect Regulation, and Infant Mental Health* (2001) (stating that (i) the right brain is centrally involved in processing social-emotional information, facilitating attachment functions and the control of vital functions supporting survival and enabling the organism to cope actively and passively with stress and that (ii) "the maturation of these adaptive right brain regulatory capacities is experience

dependent, and that this experience is embedded in the attachment relationship between the infant and primary caregiver"); *see also* Allan Schore, *Affect regulation and the origin of the self: The neurobiology of emotional development* (1994); *see also* Nat'l Research Council & Inst. of Med. *From Neurons to Neighborhoods: The Science of Early Childhood Development* (Jack P. Shonkoff and Deborah A. Philips eds. 2000).

These attachment bonds develop regardless of whether the parent and child are linked through biology or adoption. Adria E. Schwartz, *Thoughts on the Constructions of Maternal Representations*, 10 Psychoanalytic Psychology 331, 332, 334 n.1, 341 (1993) ("[M]otherhood is not intrinsically related either to biology or to gender."); Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics 1145, 1146 (2000); Leslie M. Singer et al., *Mother-Infant Attachment in Adoptive Families*, 56 Child Dev. 1543 (1985). Samis and Saposnek, in advocating for flexible custody arrangements that reflect the realities of today's families, cite the concept of a "psychological parent" developed by Joseph Goldstein and others in *Beyond the Best Interests of the Child.* Michelle D.C. Samis and Donald T. Saposnek, *Parent-Child Relationships in Family Mediation: A Synthesis of Views*, 14/15 Mediation Quarterly 23, 24 (Winter 1986-Spring 1987) (children have no concept of blood-tie relationships; instead, the role of psychological parent can be filled

by any caring parent based on companionship and shared experiences) (citing Goldstein, J., Freud, A., and Solnit, A., *Beyond the Best Interests of the Child* (Free Press 1973). Children develop these important psychological bonds with any adult "who, on the strength of these [day-to-day interchanges], become the parent figures to whom [children] are attached. *Id.*

A parent who forms such a bond with a child, but who is not related to his/her child by biology or adoption, is often referred to as a "*de facto*" parent. For the purposes of this brief, Amici use the term "*de facto* parent" to describe parents who, like Debra H., are not related to their child by adoption or biology, but who have nevertheless formed, with the biological or adoptive parent's encouragement and consent, a bonded and dependent parental relationship with their child.[4]

Current research indicates it is possible for a child to have two or more *de facto* or psychological parents. Paul Hymowitz, "Child Custody Disputes in Adoption Cases," in K. Hushion, S. Sherman and D. Siskind (eds.), *Understanding Adoption: Clinical Work with Adults, Children and Parents*, 202 (Jason Aronson 2006); *see also* Samis and Saposek, *supra*, at 25. Once attachment bonds have formed between children and the parents

[4] The social science literature as well as courts in other jurisdictions have used different terms ("psychological parent," "parent by estoppel" or a person who stands "in loco parentis") to describe such individuals.

raising them, continuity of these relationships is vital to the children's healthy development. *See* Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 Fam. & Conciliation Cts. Rev. 297 (2000); *see also* Am. Acad. of Pediatrics, *supra*, at 1145-46 ("Interruptions in the continuity of a child's caregiver are often detrimental.").

When such relationships with a parent figure are forcibly interrupted, children suffer "emotionally destructive effects." Samis and Saposnek, *supra*, at 25; *see, e.g.*, Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 Va. J. Soc. Pol'y & L. 98, 111-13 (2002); *see also generally* Kelly & Lamb, *supra*, at 304. Indeed, studies of children of divorced parents confirm the psychological harm that can result from separation from a parent to whom the child is attached. *See, e.g.*, Judith S. Wallerstein & Sandra Blakeslee, *Second Chances* 10-15 (1989) (children who do not maintain contact with parents suffer a continuing sense of loss and sadness that is detrimental to their health and well-being); E. Mavis Hetherington et al., *What Matters? What Does Not?: Five Perspectives on the Association Between Marital Transitions and Children's Adjustment*, 53 Am. Psychologist 167, 172-73 (1998) (same); Joan B. Kelly, *Current Research on Children's Postdivorce Adjustment: No Simple Answers*, 31 Fam. & Conciliation Cts. Rev. 29 (1993) (review of

studies of impact of divorce on children); Hymowitz, *supra*, at 201-02 ("[I]ndeed, studies have indicated that children benefit from the active involvement of two parents.").

That a parent might lack a biological or adoptive link to his or her child in no way alters the above analysis concerning the importance of children's attachments to their caregivers and the deleterious effects of their disruption. Studies show that children of lesbian and gay parents, who are not connected to their parents by biology or adoption, have the same need for continuity in their family relationships as any other child. *See* Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 Am. J. Orthopsychiatry 545, 549-51 (1981) (finding that when lesbian couples separate, the children mourn for the absent parent just as they would for an absent heterosexual parent after separation). Children raised in lesbian households may experience "extreme distress" if they are not allowed visitation with their non-legal parents after separation. *See* Fiona Tasker & Susan Golombok, *Growing Up in a Lesbian Family: Effects on Child Development* 12 (1997) (a twenty-year longitudinal study in the United Kingdom of twenty-five children growing up in lesbian-mother families, examining the social and psychological effects of growing up in a same-sex household).

Given the ever-increasing number of children residing in non-traditional families, it is critical that the courts protect a child's ability to continue his relationship with his *de facto* parent. *See, e.g.*, Adam P. Romero et al., Williams Institute, *Census Snapshot: New York* 1 (2008), http://www.law.ucla.edu/williamsinstitute/publications/NewYorkCensusSnapshot.pdf at 2 (noting that, as of 2005, an estimated 18,335 of New York's children were living in households headed by same-sex couples).

B. Respondent Cannot Support Her Contention That Severing Relationships Between Children And Their *De Facto* Parents Does Not Harm Children Such As M.R.

In the face of a consensus among researchers that *de facto* parents develop the same bond with children as that of biological and adoptive parents, the countervailing research is scant and not compelling. It is therefore unsurprising that in her filings to this Court to date, Respondent has failed to provide any significant social science research in support of her claim that denying standing to *de facto* parents would not harm children.

The single article that Respondent cites in her opposition for leave to appeal for the proposition that biological and adoptive parents have stronger ties to their children than *de facto* parents does more to undermine her claim than to support it. *See* Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents, in Reconceiving the Family* 90, 117-18) (Robin Fretwell Wilson ed., 2006) (the "Wilson

Article"). In fact, neither the Wilson Article nor the studies on which it relies question the ability of parents to form deep attached relationships in the absence of a biological or adoptive link or the importance of maintaining such relationships once they are formed. *See* Wilson at 117-19. Rather, Ms. Wilson argues, and Amici agree, that (i) courts analyzing whether a non-biological or non-adoptive *de facto* parent should be granted standing to seek time with a child after the adult relationship has failed should look to whether a psychological parent-child bond exists, and (ii) when such a psychological parent-child bond has been created, such relationships "should be preserved and continued." *Id.* at 118. Respondent has not and cannot point to a single study that supports her contention that children in general (and M.R. in particular) would not be harmed if their relationships with attached and loving *de facto* parents were severed.

Respondent's alternative argument, raised in her opposition for leave to appeal, that granting standing to *de facto* parents would harm children because it would expose them to the "real" harm of contentious custody disputes, is similarly without merit. Neither article cited by Respondent in support of this proposition suggests that it would be better to sever a parental relationship entirely than to expose a child to a legal custody dispute.[5] In

[5] Larry Biolotta, author of *The Psychological Effects of Divorce on Children*, http://www.marriage-success-secrets.com/psychological-effects-of-divorce-on-

fact, one of the studies cited by Respondent goes so far as to conclude that despite the "destructive potential of the [custody] dispute process . . . certain aspects of the experience may actually contribute to the children's development of adaptive coping strategies." Richard Wolman, Ph.D. and Keith Taylor, Ph.D., *The Psychological Effects of Custody Disputes on Children*, Behavioral Sciences and the Law, Vol. 9, 413-15 (finding that a child's "ability to maintain a positive view of self and family may be preserved or even enhanced" by the custody dispute process).

The fact that a child's parents have separated, and no longer want to interact with each other, does not diminish the importance to the child of maintaining his relationships with both parents. For this reason, family courts routinely order visitation even though it may be difficult for the parents to cooperate on a visitation plan after an acrimonious separation. *See* Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L.J. 459, 542 (1990) ("Courts do not preserve the bonds of parenthood when a family dissolves because it is easy

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children.html, cited by Respondent in her Opposition to Motion for Leave to Appeal, is not a clinical psychologist or a certified counselor. *See* Resp. Br. at 9. Without a basis in professional opinion or proven research methods, this publication should be afforded no weight.

for parents . . . [but] because courts consider it critical to a child's well-being to protect the child from the traumatic and painful loss of a parent").

II. THE COURT SHOULD USE ITS EQUITABLE POWER TO PROTECT THE BEST INTERESTS OF CHILDREN SUCH AS M.R.

New York courts have broad equitable powers to protect the best interests of children. *Rich v. Kaminsky*, 254 A.D. 6, 9 (1938) ("Aside from any statute, the Supreme Court, as a court of equity, has broad, inherent powers concerning the custody of children. The statutes concerning habeas corpus do not limit these powers."). The exercise of this equitable power is entirely consistent with New York Domestic Relations Law Section 70, which was never intended to be the exclusive source of the New York courts' authority in custody cases. In recognition of this fact, New York courts have used their equitable powers in a variety of paternity contexts so as to further children's best interests. Similarly, in a closely analogous case involving a heterosexual couple that chose to conceive a child together using an anonymous sperm donor, the Third Department invoked its equitable powers to deem the non-biological parent to be the legal father notwithstanding his failure to satisfy the statutory requirements of New York Domestic Relations Law Section 73. *See Laura WW. v. Peter WW.*, 51 A.D.3d 211 (3d Dep't 2008). Children such as M.R. who are born to same-

sex couples deserve the same protection, and this Court has the power to provide such protection.

A. New York Courts Have Often Used Their Equitable Powers To Promote The Best Interests Of Children In The Context Of Child-Support, Paternity And Custody And Visitation Cases

In paternity and child-support cases, New York courts have long applied the doctrine of equitable estoppel "'to protect the status interests of a child in an already recognized and operative parent-child relationship.'" *Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326 (2006); *id.* at 327 (*quoting In re Baby Boy C.*, 84 N.Y.2d 91, 102 n. (1994)). This doctrine is applied even when the parent in question does not have a biological or adoptive connection to the child. *Id.* (applying equitable estoppel to prevent non-biological non-adoptive parent from denying paternity); *see also Bruce W.L. v. Carol A.P.*, 46 A.D.3d 1471, 1472 (4th Dep't 2007); *Sarah S. v. James T.*, 299 A.D.2d 785, 785 (3d Dep't 2002); *Karin T. v. Michael T.*, 127 Misc. 2d 14, 19, 484 N.Y.S.2d 780, 784 (Fam. Ct. 1985) (applying the dictionary definition of "parent" as "one who procreates, begets, or brings forth offspring" to determine through contract and equity that the female transsexual partner of a woman who bore children through alternative insemination was a parent).

New York courts have frequently held in the context of paternity and child support suits that disrupting established parent-child relationships threatens the best interests of the child. *See, e.g.*, *Shondel J.*, 7 N.Y.3d at 330 ("The potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated."); *Glenn T. v. Donna U.*, 226 A.D.2d 803, 803 (3d Dep't 1996) (upholding the Family Court's refusal to order a paternity test because "[t]he child's best interest would not be served by permitting, at this late juncture, a disruption of the family relationships which he has come to know and rely on for long a time."); *Ettore I. v. Angela D.*, 127 A.D.2d 6, 15 (2d Dep't 1987) (holding that the doctrine of estoppel applies to a putative father who seeks to establish paternity, regardless of his biological connection to the child, stating: "When we reflect upon the emotional fragility of a child of such tender age, and the child's need for continuity, we would be remiss if we failed to note that the inevitable effect of destroying the child's image of her family would be catastrophic and fraught with lasting trauma."). This Court has found that continuity of parental financial support can be in a child's best interest even when the parent has no biological, adoptive or even emotional ties to the child. *See Shondel J.*, 7 N.Y.3d at 330 (recognizing the importance of a non-biological parent's continuing financial support even when a parent had, subsequent to learning that he was not the biological

father, severed all emotional ties with his child in an effort to avoid a finding of paternity and accompanying child support). This Court has noted that abruptly terminating parental support, "*whether emotional or financial*, may leave the child in a worse position than if that support had never been given." *Shondel J.*, 7 N.Y.3d at 330 (emphasis added).

New York courts have also applied the equitable estoppel doctrine in custody and visitation proceedings, to maintain a parental relationship between a man and a child when it is in the best interest of the child, even absent a biological or adoptive relationship. *See, e.g.*, *Kristin D. v. Stephen D.*, 280 A.D.2d 717, 719 (3d Dep't 2001) (affirming the Family Court's award of joint legal custody to the child's mother and the man who was held out to be her father, despite his not being biologically related to the child, because of the "nature, extent and duration of [the man's] relationship with the child."). In *Lorie F. v. Raymond F.*, 239 A.D.2d 659, 661 (3d Dep't 1997), the court declined to order DNA testing when so doing might "definitively establish that the only father the child has known throughout her entire life is not in fact her father." The court reasoned that when the mother held out a man to be the child's parent and "created an opportunity for and effectively encouraged development of the parent-child relationship," and he relied upon her representation that he was the child's parent, it would both work a grave injustice and be detrimental to the child

to allow the mother to claim that the man was not, in fact the child's parent. Similarly, in *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 289 (2d Dep't 1998), the court held that the doctrine of equitable estoppel may apply to preclude a biological parent from cutting off custody or visitation with a man who has been held out to be the child's parent, even when he is not related to the child by biology or adoption.

Although the courts have repeatedly used the doctrine of equitable estoppel to prevent a woman from cutting off contact between a child and a man who she has held out to be her child's parent, following *Alison D.*, the courts have failed to apply the same reasoning to cases involving same-sex couples. *Behrens v. Rimland*, 32 A.D.3d 929, 930-31 (2d Dep't 2006); *Janis C. v. Christine T.*, 294 A.D.2d 496, 497 (2d Dep't 2002); *Speed v. Robins*, 288 A.D.2d 479, 479 (2d Dep't 2001); *Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, 27 (4th Dep't 1998); *C.M. v. C.H.*, 6 Misc. 3d 361, 369 (Sup. Ct. N.Y. County 2004); *Gulbin v. Moss-Gulbin*, 45 A.D.3d 1230 (3d Dep't 2007). *But see Beth R. v. Donna M.*, 19 Misc. 3d 724, 733-34 (Sup. Ct. N.Y. County 2008).

This distinction is difficult to reconcile given that the best interests of the child should be the court's primary concern. As one Appellate Division judge noted,

> [There is] no logical reason for allowing the doctrine of equitable estoppel to be used to advance the best interests of the child in a paternity case and to disallow application of that doctrine in the context of a custody case, not involving issues of paternity. In each situation, the fundamental rights sought to be protected and the reasons advanced for protecting those rights are identical – the best interests of the child involved.

Jean Maby H., 246 A.D.2d at 287 (*quoting Christopher S. v. Ann Marie S.*, 173 Misc. 2d 824, 829 (Fam. Ct. Dutchess County 1997)); *see also Charles v. Charles*, 296 A.D.2d 547, 549 (2002) (stating that "[e]quitable estoppel . . . can be used offensively to enforce rights created by words or conduct"); *Beth R. v. Donna M.*, 19 Misc. 3d 724, 734 (N.Y. Sup. Ct., N.Y. County. 2008) (allowing putative non-biological parent to attempt to establish parenthood in light of equitable arguments). A child's interest in continuity of parental relationships is, if anything, more critical to healthy development than the child's interest in having continued access to the financial resources of a *de facto* parent and should be afforded no less protection under the law.

B. New York Courts Have Used Their Equitable Powers To Protect Children Of Heterosexual Couples Conceived Using Assisted Reproductive Technology

Children born to married couples who conceive through anonymous donor insemination are generally afforded the legal protection of both their biological and non-biological parent from the moment they are born. *See*

New York Domestic Relations Law Section 73 ("section 73") ("Any child born to a married woman by means of artificial insemination . . . with the consent in writing of the woman and her husband, shall be deemed the legitimate birth child of the husband and his wife for all purposes."). In *Laura WW. v. Peter WW.*, the Third Department invoked its equitable powers and found that even in situations where not all of the requirements of section 73 were met because the non-biological father had not signed the requisite consent forms, a child born to a married couple through the use of an anonymous sperm donor was still entitled to have his relationship with both parents protected by the Court. 51 A.D. 3d 211 (3d Dep't 2008) (finding that the non-biological father was the legal parent of the child and as such responsible for child support and stating that "equity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child"). Children born to same-sex couples who conceive using anonymous sperm donation should be afforded a similar level of protection and the Court should use its equitable powers as necessary to accomplish this end.[6]

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[6] As discussed more fully in Section I.D. *infra*, second parent adoption does not adequately or equitably protect children such as M.R. because non-biological parents like Debra are required to wait months before pursuing adoption. As a result, an entire class of children are prevented from having their relationships with their non-biological parents protected from birth.

C. New York Domestic Relation Law Section 70 Not Only Does Not Limit But Actually Compels The Court's Use Of Its Equitable Powers In The Instant Case

New York Domestic Relation Law Section 70 ("section 70") was never intended to be the exclusive source of the New York courts' authority in custody cases. From the date of its original enactment, courts recognized the statute did not cover the entire field of custody and visitation matters, and that the equitable powers of the court could be invoked to determine custody in situations not covered by statute. Consolidated Laws of NY, Annotated, DRL Section 70, p. 188 ("However, this section is not exclusive, or the only authority for the exercise of the power of the court over the custody and possession of minor children in whose proper training and education the state, as parens patriae, has an interest") (citing *In re Stewart*, 77 Misc. 524 (Sup. Ct. 1912)).

Moreover, the New York courts' use of its equitable authority to protect a child's relationship with his *de facto* parent is consistent with the legislative purpose behind section 70. The legislative history of section 70 demonstrates that the best interests of the child has always the "paramount consideration" of the statute. Consolidated Laws of NY, Annotated, Domestic Relations Law Section 70, p. 184. Commentaries to section 70 have noted the extensive precedent of New York courts determining custody primarily on the basis of the child's physical, moral, mental and financial

well-being. *Id.* Further, in the 1923 amendments to section 70, the Legislature acted to make it clear that section 70 was intended to protect the interests of children, by adding language to ensure that

> "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 for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly."

Id.; Senate No. 238, An Act to amend the domestic relations law, in relation to habeas corpus for child detained by parent, Jan 23, 1923. Accordingly, the Court's use of its equitable powers in the instant case, without which it cannot even consider the best interests of M.R. and children similarly situated, is entirely consistent with the legislative purpose of section 70.

III. THIS COURT IS CAPABLE OF FASHIONING A TEST THAT APPROPRIATELY PROTECTS AND BALANCES THE RIGHTS OF THE BIOLOGICAL OR ADOPTIVE PARENT, THE *DE FACTO* PARENT, AND THE CHILD

This Court has the capacity to fashion a test that appropriately balances all interests at stake when determining who should be allowed to seek custody or visitation. Courts in many states have already recognized the existence and importance of parental relationships between a child and a non-biological, non-adoptive parent and have developed tests that balance the interests involved. *See H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1995) (enumerating a four-factor test to find parent-like relationship, including

having "established with the child a bonded, dependent relationship parental in nature"); *see also, e.g.*, *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891, 893 (Mass. 1999) (upholding judicial recognition of *de facto* parents as an appropriate extension of the court's equitable powers to protect the best interests of the child where the legislature has not determined what the best interests require in a particular situation and stressing the importance of the child's interest in "maintaining her relationship with the child's de facto parent"); *V.C. v. M.J.B.*, 748 A.2d 539, 550-53 (N.J. 2000) (recognizing the "strong interest" children have in "maintaining the ties that connect them to adults who love and provide for them" and adopting Wisconsin's four-factor test); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 969 (Vt. 2006) (declining to interpret statute's use of "natural parent" as legislative intent to limit parental status to biological parents); *In re L.B.*, 122 P.3d 161, 173-77 (Wash. 2005) (adopting the Wisconsin test for determining who is a *de facto* parent, including the formation of a "bonded, dependent relationship, parental in nature").

For example, Wisconsin recognizes its equitable power to grant standing to putative *de facto* parents but requires such individuals to demonstrate at the outset that: (i) "the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child," (ii) "the petitioner and the child

lived together in the same household," (iii) "the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care" and (iv) "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." *H.S.H.-K.*, 533 N.W.2d at 435-36; *accord V.C. v. M.J.B.*, 748 A.2d at 550-53 (adopting Wisconsin's four-part test and stating that the test "addresses the main fears and concerns both legislatures and courts have advanced when addressing the notion of psychological parenthood"); *In re L.B.*, 122 P.3d at 173-77 (adopting Wisconsin's four-part test). If the putative *de facto* parent cannot meet these requirements, he or she cannot sue for custody or visitation. *H.S.H.-K.*, 533 N.W.2d at 435.

The four-part test adopted by Wisconsin, New Jersey and Washington protects not only the best interests of the child but also the liberty interests of the biological/adoptive parent by denying standing to putative *de facto* parents unless they can show that the biological/adoptive parent consented to and fostered the parent-like relationship. This requirement alone provides courts with the authority to exclude persons who may inadvertently have become significant to a child contrary to the intentions of his/her parent. The remaining factors are similarly calibrated to foreclose abuse of the petition process. Moreover, the four-part test is only the initial inquiry; after a *de facto* parent is granted standing, the trial court must still determine,

based on the individual facts before it, whether it is in fact in the child's best interest to grant custody or visitation to the *de facto* parent. *H.S.H.-K.*, 533 N.W.2d at 436.

The adoption of a Wisconsin-style test would present little difficulty for New York courts. Section 72 of the New York Domestic Relations Law already creates a process whereby a child's grandparents can pursue visitation rights, according to which New York courts already make an initial factual inquiry into a petitioner's relationship with a child. *See, e.g.*, *E.S. v. P.D.*, 8 N.Y.3d 150, 157 (2007) (discussing application of section 72(1)) ("First, [the court] must find standing based on death or equitable circumstances; and [i]f [the court] concludes that the grandparents have established the right to be heard, then it must determine if visitation is in the best interest of the grandchild.") (alteration in original) (internal quotation marks omitted). Applying a *de facto* parent test for standing at most may require a limited hearing, based on a clear set of factors, in a process that would be similar in scope to discretionary determinations already made by the courts.

While Amici believe the Wisconsin approach is particularly effective at balancing the needs of all interested parties, the goal of protecting children who have a parent who is not related to them by biology or adoption is more important than the means. After the dissolution of an adult relationship,

biological parents' judgments may be colored by their feelings toward their ex-partners, causing them to lose sight of the best interests of their children. It is the responsibility of the courts to maintain a focus on and protect the best interests of children – regardless of any animosity that may exist between the parents. For other families where the second parent is legally recognized, the child's interest in an ongoing relationship with that parent is protected, preventing the other parent's worst instincts from prevailing. *See also Weiss v. Weiss*, 52 N.Y.2d 170, 175 (1981) (stating that "visitation is a joint right of the noncustodial parent *and* of the child") (emphasis added). Children born to families such as M.R.'s deserve, at a minimum, an opportunity for a hearing on the merits so that the Court can consider whether a continued relationship with and support from the second parent would be in the child's best interests.

IV. THE AVAILABILITY OF SECOND PARENT ADOPTION DOES NOT ADEQUATELY PROTECT CHILDREN SUCH AS M.R.

The availability of second parent adoption does not adequately protect M.R. and children similarly situated. Whether *de facto* parents pursue adoption may turn on any number of factors that have no bearing on the quality and nature of their relationships with their children. As a result, failure on the part of a *de facto* parent to pursue adoption says nothing about whether maintaining the *de facto* parent relationship is in the child's best

interests. For example, (i) time and expense may prevent parents from seeking to adopt; (ii) unsophisticated parties may not realize that second parent adoption is an option; (iii) couples may end the relationship prior to completing the adoption process (at which point a biological parent may then withhold consent); and (iv) the biological parent may, as was alleged by Debra in this case, mislead the *de facto* parent about the need for adoption. Furthermore, even if the *de facto* parent intends to seek an adoption, New York law requires that there be a waiting period before a court rules on the adoption petition. New York Domestic Relations Law Section 116. During this period, a child's relationship with his *de facto* parent is left unprotected.

The presence or absence of an adoptive link in no way alters the quality or importance of a child's relationship with his *de facto* parent. *See, e.g.*, Adria E. Schwartz, *Thoughts on the Constructions of Maternal Representations*, 10 Psychoanalytic Psychology 331, 332 (1993); *see also* Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics 1145, 1146 (2000). Turning away parents such as Debra, who have failed to secure an adoption, penalizes not only the *de facto* parent, but notably the child, who does not have the ability to secure an adoption on his own behalf. This state of affairs represents an improper abdication of the courts' *parens patriae* responsibilities and undermines what should be the paramount concern in New York Family Court cases:

the best interest of the child. *See Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 289 (2d Dep't 1998). This Court must rectify this injustice on behalf of M.R. and children similarly situated.

V. THIS COURT SHOULD NOT WAIT FOR THE NEW YORK LEGISLATURE TO PROTECT M.R. AND CHILDREN SIMILARLY SITUATED

There is no reason for this Court to defer to the New York Legislature to comment on or consider whether *de facto* parents should have standing to seek custody or visitation. Rather, several factors point to the appropriateness of immediate judicial action so that the best interests of New York's children are not left unprotected.

First, the ultimate and specific contours of standing are often a matter for judicial determination, as illustrated by many state courts that have adopted tests in this regard. *H.S.H.-K.*, 533 N.W.2d at 435-36; *accord V.C. v. M.J.B.*, 748 A.2d at 550-53; *E.N.O.*, 711 N.E.2d at 891 (Mass. 1999).

Second, courts of this state frequently act to supplement or clarify statutes, pursuant to either principles of statutory interpretation or their equitable and common law powers. Section 70 is itself an obvious example of this. Section 70 was twice reinterpreted by the courts and then reconfigured by the Legislature in response. For example, as previously noted, even before it was made explicit in the 1923 amendments to Section 70, courts had for years acted to protect the best interests of the child. *See*

supra § III(A)(1). The 1923 amendments made the statutory language consistent with law already applied by the courts. In addition, in 1964, the Legislature further amended section 70 to remove standing requirements with which the New York courts had disagreed. *Alison D.*, 77 N.Y.2d at 659-60 (Kaye, J., dissenting). *See* REPORT OF JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS (1964) (Legislative Document No. 6).

Third, there is no factual basis to support Respondent's contention that Legislative action in this area is imminent. Even though many courts and legal commentators have acknowledged the need for reform,[7] during the almost twenty years since the Court's *Alison D.* ruling, the New York Legislature has not amended section 70. Indeed, no relevant bill was even introduced in the Legislature until 2007. That bill, A.9422, and bill A02220 which eventually replaced it, have simply lingered. Indeed, in the nearly twenty years since *Alison D.*, the Legislature has not only failed to enact a bill, they have not even held committee hearings on either bill that has been

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[7] *See, e.g.*, *Anonymous v. Anonymous*, 20 A.D.3d 333, 333-34 (1st Dep't 2005) (Sweeney, J., concurring); *Multari v. Sorrell*, 287 A.D.2d 764, 767 (3rd Dep't 2001); Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 Fam. Ct. Rev. 74 (2006); Mary Ellen Gill, *Third Party Visitation in New York: Why the Current Standing Statute is Failing Our Families*, 56 Syr. L. Rev. 481,484-85 (2006).

introduced.[8] Moreover, of the many bills introduced to the New York Legislature few are ever passed.[9]

This Court cannot abandon the important interests of New York children – for which it is the *parens patriae* – to the whim of the legislative process.[10] *See United States v. Mauro*, 436 U.S. 340, 356 n.24 (1978)

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[8] At the same time, legislative inaction on either bill should be not be interpreted as tacit approval of the fact that some courts have failed to exercise their equitable powers following *Alison D. See Flanagan v. Mt. Eden Gen. Hosp.*, 24 N.Y.2d 427, 433 (1969) ("Legislative inaction is a weak reed upon which to lean in determining legislative intent.") (quoting *Berry v. Branner*, 245 Or. 307, 311 (1966)). When a general lack of legislative progress regarding *de facto* parent standing exists alongside keen interest in the issue from particular legislators, it allows for contradictory inferences that urge the court to "decline to draw an inference of legislative intent either way from the failure to act." *Research Group v.* v. *Dep't of Ins.*, 66 N.Y.2d 444, 451 (1985).

[9] In 2002, just 4.1% of the bills introduced into the New York State Legislature were enacted, giving this state the third lowest rate of enactment in the country, and placing it significantly lower than the national average rate of 28%. Jeremy M. Creelan & Laura M. Moulton, Brennan Center for Justice, The New York State Legislative Process: An Evaluation and Blueprint for Reform 36 (2004), *available at* http://www.brennancenter.org/content/resource/the_new_york_state_legislative_process_an_evaluation_and_blueprint_for_refo. By 2008, this rate had improved somewhat, but still stood at only 9%. Andrew Stengel, Lawrence Norden, Laura Seago, Brennan Center for Justice, Still Broken: New York State Legislative Reform, 2008 Update 24, *available at* http://www.brennancenter.org/content/resource/still_broken_new_york_state_legislative_reform_2008_update/.

[10] *In re Seasia* provides an example of how the Legislature should not be relied upon as the sole means of ensuring that the laws adequately protect children. 46 A.D.3d 878 (2d Dep't 2007). For nearly twenty years, it has failed to correct unconstitutional language in a statute dictating those instances where consent is required for adoption. *Id.* at 885 ("Further, we note that the Legislature's failure to amend Domestic Relations Law § 111(1)(e), which was declared unconstitutional 17 years ago, in order to provide statutory criteria in the place of what was supposed to be an interim judicial standard, renders the determination of difficult cases such as this even more difficult. We urge the Legislature to act without further delay.") (internal citation omitted). As of the date of this brief's submission, no law has been passed to remove or amend the unconstitutional language cited in *Seasia*.

("[W]e deem it irrelevant that bills currently pending in Congress [might change the statute under consideration]."); *Davis v. United States*, 569 F. Supp. 2d 91, 98 (D.D.C. 2008) ("proposed bill does not carry the force of law. . . . The pending legislation is therefore irrelevant"); *Rowe v. Hoffman-La Roche, Inc.*, 917 A.2d 767, 776 n.1 (N.J. 2007) ("Because of the uncertain duration and predictability of legislative activity, however, we decline to accede to [the suggestion to withhold ruling in light of pending legislation].").

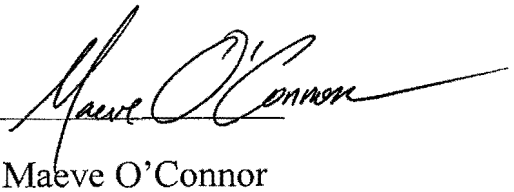
Conclusion

For the foregoing reasons, and in the best interest of M.R. and children similarly situated, we respectfully submit that this Court should reverse the Appellate Division, First Department's decision and order dated April 9, 2009 and remand this case to the trial court so that it can determine (i) whether or not Petitioner in fact had a *de facto* parental relationship with M.R. and, if so, (ii) whether it is in the child's best interest to preserve this relationship, and for such other and further relief as the Court may deem just and proper.

Dated: November 2, 2009

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

By : 

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