New York County Clerk's Index No. 106569/08

# Court of Appeals

**STATE OF NEW YORK**

DEBRA H.,

*Petitioner-Appellant,*

—against—

JANICE R.,

*Respondent-Respondent.*

**BRIEF OF *AMICI CURIAE***
**NEW YORK CITY BAR ASSOCIATION,**
**WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK,**
**NEW YORK COUNTY LAWYERS' ASSOCIATION,**
**AMERICAN ACADEMY OF MATRIMONIAL LAWYERS - NEW YORK CHAPTER,**
**METROPOLITAN BLACK BAR ASSOCIATION,**
**PUERTO RICAN BAR ASSOCIATION, INC.,**
**AND RICHMOND COUNTY BAR ASSOCIATION**
**IN SUPPORT OF PETITIONER-APPELLANT**

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Date Completed: October 29, 2009

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## I. INTRODUCTION

At issue here is whether, consistent with New York's strong public policy of protecting and advancing the best interests of children, the "de facto" mother of a child conceived by the mother's same-sex partner through anonymous donor insemination and raised jointly by the parents in the context of a committed relationship, has standing to seek custody or visitation rights – as well as a duty of financial support – as to that child upon the dissolution of the parents' relationship. Under the Decision and Order of the Appellate Division, First Department, and numerous other cases which rely on this Court's decision in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991), the vast majority of such same-sex de facto parents have for the last eighteen years automatically been denied standing.[1] The direct result of each of these cases has been the extinguishing of an asserted loving, parent-child bond.

Such devastating judicial outcomes can by no means be squared with the legal standard applicable in New York custody and visitation cases, which is the "best interests of the child." Nor can they be harmonized with this Court's well-reasoned decision in the recent landmark case of *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 820 N.Y.S.2d 199 (2006), which clarified the primacy of the "best interests" test in determining the applicability of equitable estoppel doctrine to

[1] *See, e.g., Janis C. v. Christine T.*, 294 A.D.2d 496, 742 N.Y.S.2d 381 (2d Dep't 2002); *C.M. v. C.H.*, 6 Misc. 3d 361, 789 N.Y.S.2d 393 (Sup. Ct. N.Y. Co. 2004); *Speed v. Robins*, 288 A.D.2d 479, 732 N.Y.S.2d 902 (2d Dep't 2001).

parental status determinations. For these reasons and others, set forth more fully below, equitable estoppel should apply equally to grant standing to de facto parents such as Debra H. who have developed longstanding, nurturing bonds with their children.

## II. INTERESTS OF *AMICI*

The New York City Bar Association ("NYCBA") is one of the oldest and largest professional associations in the United States. It was founded in 1870 to improve the administration of justice, promote the rule of law, and elevate the legal profession's standards of integrity, honor, and courtesy. It was among the first bar associations to have a standing committee dealing with lesbian and gay issues. NYCBA has over 23,000 members who serve hundreds of thousands of clients, and who have a vital interest in ensuring that New York grants equal rights to people regardless of sexual orientation and sex. Many of NYCBA's members practice in the area of family law. These and other members represent clients whose very access to the courts may be affected by the resolution of this case. With respect to the particular questions raised here, NYCBA has long taken an active interest in protecting the legal rights of the diverse types of families that compose modern American society.

NYCBA submits this brief to emphasize that the categorical denial of standing to non-biological, non-adoptive parents to seek custody and visitation

with the children they have reared from birth works acute and potentially devastating harms to such parents and, even more importantly, to their children. NYCBA strongly urges the Court, in keeping with its recent precedents relating to parental status determinations and society's evolving understanding of what constitutes a "parent", to reverse the decision of the court below denying standing to Debra H.[2]

The Women's Bar Association of the State of New York ("WBASNY") is a statewide organization of attorneys, comprising eighteen chapters with more than 3,600 members throughout the State of New York. Members include jurists, academics, and practicing attorneys who work in every area of the law including, but not limited to, constitutional and civil rights, children's rights, matrimonial law, and family law.

Since its formation in 1980, WBASNY has been dedicated to the advancement of equal rights and the fair administration of justice for all persons, whether male or female. WBASNY's perspective is derived from the experiences of a membership that spans a broad cross-section of the diverse cultures in this State. WBASNY has consistently supported legislation and lawsuits ensuring the

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[2] This brief, submitted on behalf of NYCBA as a whole, was independently reviewed and is strongly supported by the seven NYCBA committees whose areas of interest and expertise intersect with the issues presented in this case. The reviewing committees were the Committee on Children and the Law, the Council on Children, the Family Court and Family Law Committee, the Matrimonial Law Committee, the Committee on Lesbian, Gay, Bisexual & Transgender Rights, the Sex & Law Committee, and the Civil Rights Committee.

benefits of marriage for same-sex couples. WBASNY joins this brief because of our deep concern that New York law fails to afford same-sex couples and their children the rights and privileges afforded opposite-sex couples and their children.[3]

The American Academy of Matrimonial Lawyers was founded in 1962 to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, with the goal of protecting the welfare of the family and society. Its members are recognized as expert practitioners in the field. The American Academy's New York Chapter ("AAML-NY") has been in existence since 1965 and has approximately 177 members. As a leading New York matrimonial law organization, AAML-NY is deeply concerned that New York law recognize that American families have undergone major changes in structure and type, and that this evolving reality includes, in New York, thousands of same-sex couples.[4]

Founded on July 5, 1984, the Metropolitan Black Bar Association ("MBBA")

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[3] This brief represents the views of the Women's Bar Association of the State of New York. It does not necessarily reflect the views of any judge who is a member of WBASNY. No judges who are members of WBASNY participated in the preparation of this brief or reviewed it prior to its submission.

[4] This brief represents the views of the New York Chapter of the American Academy of Matrimonial Lawyers. It does not necessarily reflect the views of the American Academy of Matrimonial Lawyers. This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission. The New York Chapter of the American Academy of Matrimonial Lawyers does not represent a party in this matter, is receiving no compensation for acting as an *amicus*, and has done so *pro bono publico*.

was created upon the merger of two of the nation's oldest black bar organizations, the Harlem Lawyers Association (founded in 1921) and the Bedford Stuyvesant Lawyers Association (founded in 1933). For over seventy-five years, MBBA has continued to provide a voice for people of African ancestry in the legal profession and their communities.

Additionally, MBBA is an organization committed to the human rights of all individuals, regardless of their race, religion, ethnic background or sexual orientation. As stated in the organization's motto, from the late Dr. King, "[i]njustice anywhere is a threat to justice everywhere." MBBA joins this brief in keeping with our historical commitment to achieving for all people equal protection under the law.

The New York County Lawyers' Association ("NYCLA") is a not-for-profit membership organization of approximately 10,000 attorneys practicing primarily in New York County, founded and operating specifically for charitable and educational purposes. NYCLA's certificate of incorporation specifically provides that it is to do what it deems in the public interest and for the public good, and to seek reform in the law. Founded in 1908, NYCLA was the first major bar association in the country that admitted members without regard to race, ethnicity, religion or gender and has since played a leading role in the fight against discrimination both in the profession and under local, state and federal law.

NYCLA's bedrock principles have been the inclusion of all who wish to join and the active pursuit of legal system reform. Consistent with its founding and sustaining principles of non-discrimination and inclusion, NYCLA joins in this brief based on its longstanding belief that all families in New York, including families of same-sex couples and non-traditional families formed by non-biological, non-adoptive parents, should enjoy the same rights and protections under the law.

The Puerto Rican Bar Association ("PRBA") is a professional organization composed of members of the bar and law students of Latino ancestry, as well as other interested persons. PRBA was founded in 1957 in New York to provide a forum for Latino and other lawyers who are interested in promoting the social, economic, professional and educational advancement of Latino attorneys, the Latino Community and the administration of justice. As an advocate for the best interests of children, PBRA strongly supports the legal rights of diverse types of families.

The Richmond County Bar Association ("RCBA") was founded in 1909 for "the cultivation of the science of jurisprudence; the promotion of reforms in the law; the facilitation of the administration of justice; and the elevation of the standards of integrity, honor and courtesy in the legal profession." It is in pursuit of promoting reforms in the law that the 700-member RCBA joins this brief.

## III. ARGUMENT

### A. *Alison D.* Has Been Superseded by *Shondel* and Should Now Be Reconsidered in the Interests of Consistency and Basic Fairness

Since 1991, this Court's decision in *Alison D.* has generally been construed by courts as precluding the application of equitable estoppel to confer standing on a non-biological, non-adoptive mother to seek custody of or visitation with her child, notwithstanding the closely bonded, nurturing relationship she and the child – with the active support of the de facto mother's same-sex partner, the child's biological mother – have shared from the child's birth. In an apparent sharp departure from *Alison D.*, however, in 2006 the Court held in *Shondel* that a non-biological, non-adoptive parent who had held himself out as the child's father was equitably estopped from denying his paternity and his corresponding child support obligation notwithstanding DNA evidence that he was not the child's biological father. 7 N.Y.3d at 327, 820 N.Y.S.2d at 203. In so holding, the Court explained,

> Cutting off that support, *whether emotional or financial*, may leave the child in a worse position than if that support had never been given. Situations vary, and the question whether extinguishing the relationship and its attendant obligations will disserve the child is one for [the court] based on the facts in each case. Here, Family Court found it to be in the best interests of the child that Mark be declared her father and the Appellate Division properly affirmed.

*Id.* at 330, 820 N.Y.S.2d at 204-05 (emphasis added).[5] Whether equitable estoppel confers parental duties and rights in a given case, the Court held, "*turns exclusively on the best interests of the child.*" *Id.* (emphasis added).

It is apparent that under the "best interests" rule enunciated in *Shondel*, were a female de facto parent like Debra H. in the instant case to deny her maternity in a support proceeding on the basis that she and her child were biologically unrelated, she, like Mark D. in *Shondel*, would be equitably estopped from doing so.[6] For a

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[5] This Court's emphasis in *Shondel* on preserving both the financial and the legal ties between de facto parents and their children accords with *Matter of Jacob and Dana*, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995), where the Court recognized "second parent" adoption rights for same-sex partners. The advantages of such adoptions for children, the Court observed in *Jacob and Dana*, include "Social Security and life insurance benefits in the event of a parent's death or disability, the right to sue for the wrongful death of a parent and the right to inherit under rules of intestacy." *Id.* at 658, 636 N.Y.S.2d at 78. "Even more important, however, is the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody, and the children's relationship with their parents . . . will continue should the coparents separate . . . . *[V]iewed from the children's perspective, permitting the adoptions allows the children to achieve a measure of permanency with both parent figures.*" *Id.* (Emphasis added.)

[6] *H.M. v. E.T.*, 865 A.D.3d 119, 127, 81 N.Y.S.2d 113, 118-19 (2d Dep't 2009), in which a divided panel of the Appellate Division, Second Department, recently held that Family Court lacked jurisdiction under the Uniform Interstate Family Support Act ("UIFSA") to determine whether a de facto mother should be estopped from denying her parentage in the context of an inter-jurisdictional support enforcement proceeding, is inapplicable here, as Debra H.'s parentage claim does not arise under or rely upon UIFSA. Notably, the court emphasized in *H.M.* that its decision "[did] not leave [H.M.] bereft of a forum for the adjudication," as the dissenting justices had asserted, because Family Court could transfer the proceeding "to the Supreme Court – *a court competent to entertain H.M.'s application.*" *Id.* at 119 (emphasis added). Because the present case originated not in Family Court – a court of limited jurisdiction – but rather in Supreme Court – "a court of general jurisdiction in law and equity," *id.* at 116 (citing N.Y. Const., Art. 6, § 7) – the holding in *H.M.* does not preclude the application of equitable estoppel to adjudicate Debra H.'s status as a legal parent. Indeed, with its observation that Supreme Court would have jurisdiction to establish the de facto mother's parentage in *H.M.*, the Appellate Division, Second Department, implicitly *endorsed* Debra H.'s position here.

court to hold otherwise – to conclude that equitable estoppel applied only to *male* or *heterosexual* de facto parents – would raise grave constitutional concerns, whether the classification at issue were construed as based on the parent's gender or sexual orientation. Under both the State and Federal Constitutions,[7] equal protection requires that gender-based classifications be subjected to "heightened scrutiny." *People v. Liberta*, 64 N.Y.2d 152, 485 N.Y.S.2d 207 (1984); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725-726, 102 S. Ct. 3331, 3336-37 (1982); *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451 (1976 ). That is, they must serve "important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264 (1996) (citation omitted); *People v. Liberta*, 64 N.Y.2d at 168, 485 N.Y.S.2d at 216. Even under the most deferential level of review for constitutionality (the "rational basis" test), which this Court has previously applied to classifications

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*H.M.* is also distinguishable in that, unlike in *Debra H.*, the petitioner in *H.M.* was found to have failed both to preserve her constitutional arguments for appellate review and to provide the requisite notice to the Attorney General. On the basis of these perceived failures, the Appellate Division declined in *H.M.* to consider the equal protection concerns expressed by the two dissenting justices in the case. *Id.* at 119, 81 N.Y.S.2d at 113. Here, where the constitutional issues were briefed below and the Attorney General was properly notified (*see, e.g.*, Reply Affirmation of Bonnie E. Rabin in Further Support of Emergency Motion for Custody and Parental Access, July 3, 2008, at 22-26), the constitutional issues are properly before the Court.

[7] The Equal Protection Clause of the New York Constitution affords protection "as broad as" that afforded by the Fourteenth Amendment. *Brown v. State*, 89 N.Y.2d 172, 190, 652 N.Y.S.2d 223 (1996).

based on sexual orientation, *see Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770 (1996), there must be "a rational relationship between the classification adopted and the societal interest it purports to promote." *People v. Greenleaf*, 5 Misc. 3d 337, 339, 780 N.Y.S. 2d 899, 900 (Just. Ct. Ulster Co. 2004). To determine the applicability of equitable estoppel based on a de facto parent's gender or sexual orientation would be both manifestly irrational and contrary to the child's best economic and emotional interests. It would not further any governmental objective, let alone an "important" one.[8]

It would likewise be irrational – and it would offend basic principles of due process – to hold that a de facto mother, although obligated to pay child support and meet other parental *responsibilities*, enjoyed no corresponding parental *rights*. *See, e.g., Town of Orangetown v. Magee*, 88 N.Y.2d 41, 53, 643 N.Y.S.2d 21, 28 (1996) (due process requires that government denial of a right not be arbitrary or capricious). In *Shondel*, this Court explicitly recognized the necessary and commonsensical symmetry between parental duties and parental rights, applying equitable estoppel to ensure that the de facto parent's support, "whether emotional or financial," would not be cut off. 7 N.Y.3d at 330, 820 N.Y.S.2d at 204-05.

Even before *Shondel*, post-*Alison D.* cases repeatedly recognized that a de

[8] Equal protection concerns recently led the Oregon Court of Appeals, in a unanimous decision, to confer legal parentage on a lesbian de facto mother under a statute which, by its express terms, established parentage only in husbands whose wives, with their husbands' consent, conceived children through in vitro fertilization. *Shineovich v. Kemp*, No. 070363564, 2009 WL 2032113 (Or. App. July 15, 2009).

facto parent's support obligations are accompanied by parental rights. In *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 287, 676 N.Y.S.2d 677, 681 (2d Dep't 1998), for example, the Appellate Division, Second Department, applied equitable estoppel to extend visitation rights to a de facto parent. *Jean Maby H.* involved a married opposite-sex couple with two children, one of whom was born prior to the marriage and was not biologically related to the de facto father. The court held in *Jean Maby H.* that the de facto father could invoke equitable estoppel to continue his relationship with the child, emphasizing the equal applicability of equitable estoppel to child support and parental status determinations and noting that it would be "*inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid supporting the child, but preclude a nonbiological father from invoking the doctrine against the biological mother in order to continue a long-standing relationship with the child.*" (Emphasis added.) Likewise, in *Christopher S. v. Ann Marie S.*, 173 Misc. 2d 824, 829, 662 N.Y.S.2d 200, 203 (Fam. Ct. Suffolk Co. 1997), which involved facts similar to those in *Jean Maby H.*, the court perceived "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" (emphasis added); *see also Gilbert A. v. Laura A.*, 261 A.D.2d 886, 887, 68 N.Y.S.2d 810, 811 (4th Dep't 1999) (holding that a de facto father

was entitled to present proof on the issue of whether equitable estoppel could confer standing on him to seek visitation rights with his child, even though it was apparent to the court that the de facto father was not the child's biological parent); *L.S.K. v. H.A.N.*, 813 A.2d 872, 877-78 (Pa. Super. 2002) (recognizing that support obligations and custody rights go hand in hand, since parents are responsible for both the "emotional *and* financial needs" of children) (emphasis added).

The present case affords the Court a critical opportunity and indeed an obligation, in the wake of *Alison D.* and its progeny cases, to confirm that the child-centered principles so eloquently articulated in *Shondel* apply neutrally and without regard to a parent's gender or sexual orientation. Such a ruling would ensure fundamental fairness and avoid fundamental constitutional concerns. It would also – by conferring standing on same-sex de facto parents to pursue both the rights and the concomitant duties of parenthood – properly refocus the judicial inquiry in parental status determinations on the person with the most at stake: the child.

### B. Consistent with New York's Child-Centered Public Policy and the Historical Applications of Equitable Estoppel Doctrine, Standing Should be Conferred Evenhandedly to *De Facto* Parents in Custody and Visitation Proceedings

#### *1. Denying Application of Equitable Estoppel in Same-Sex De Facto Parent Cases Violates Public Policy*

The practice of denying custody and visitation rights to same-sex de facto

parents cannot be squared with New York's strong public policy of protecting and advancing the best interests of children. Both the Domestic Relations Law ("DRL") and the Family Court Act ("FCA") contain language expressly incorporating this critical, child-focused policy. *See* DRL § 70 ("*[T]he 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.") (emphasis added); FCA § 418 (court may refuse to order a DNA test "upon a written finding by the court that [such a test] *is not in the best interests of the child*") (emphasis added); *see also Shondel*, 7 N.Y.3d at 331, 820 N.Y.S.2d at 205 (in determining whether estoppel confers parental status, "the only interest for the court is how the interests of the child are best served").

Citing the severely restrictive definition of "parent" propounded by *Alison D.*, however, numerous courts have, often with great reluctance, refrained from applying equitable estoppel to protect the relationships between de facto parents and their children. In *Alison D.*, this Court held that a non-biological, non-adoptive mother whose long-term female partner had conceived a child during their relationship using artificial insemination lacked standing to seek visitation, notwithstanding her full involvement in the decision to have the child, her continued emotional and financial support of the child, and the parents' use of her surname as the child's middle name. 77 N.Y.2d at 655, 569 N.Y.S.2d at 587.

Despite these and numerous similar facts, the Court held that under DRL § 70 the de facto mother was, in effect, a legal stranger to the child.

For nearly two decades, *Alison D.* has clashed with New York's child-centered public policy in the context of judicial parentage determinations. For example, in *Janis C. v. Christine T.*, 294 A.D.2d 496, 742 N.Y.S.2d 381 (2d Dep't 2002), the Appellate Division, Second Department, cited *Alison D.* in declining to extend legal recognition to the relationship between a de facto mother and her two children. In light of *Alison D.*, the Appellate Division concluded that it was immaterial, among other things, that the de facto mother and the biological mother in *Janis C.* had committed themselves as life partners in a formal ceremony; that they had lived in the same household with their children since their births; that they had jointly made the decision to conceive children through artificial insemination; that the children had formed psychological bonds of attachment to the de facto mother; and that the de facto mother had been fully involved in all decisions regarding the rearing of the children. 294 A.D.2d at 496-97, 742 N.Y.S.2d at 382-83. The court held that equitable estoppel, though a basis for conferring standing on opposite-sex de facto parents, did not apply to *same-sex* couples, stating that "[a]ny extension of visitation rights to a same-sex domestic partner who claims to be a 'parent by estoppel,' 'de facto parent,' or 'psychological parent' must come from [the Legislature] or the Court of Appeals." *Id.*

In *C.M. v. C.H.*, 6 Misc. 3d 361, 369, 789 N.Y.S.2d 393, 401 (Sup. Ct. N.Y. Co. 2004), the Supreme Court, New York County, likewise concluded that *stare decisis* prevented it from applying equitable estoppel to confer standing on a non-biological, non-adoptive mother to seek custody or visitation. A consequence of *C.M. v. C.H.* was that the parties' later born daughter, who had not yet been formally adopted by the de facto mother, was held to be in a legally distinct category from her brother, whom petitioner had formally adopted. *Id.* at 362-63, 789 N.Y.S.2d at 396-97. Despite both parents' involvement in the decisions to conceive each of the children, the family's cohabitation for more than eight years, and the fact that a formal adoption had been completed for one of the children, the Supreme Court concluded that under *Alison D.* it had no choice but to deny recognition to the relationship between the de facto mother and daughter. *Id.*; *see also Anonymous v. Anonymous*, 20 A.D.3d 333, 334, 797 N.Y.S.2d 754, 754 (1st Dep't 2005) (holding that non-biological, non-adoptive parent lacked standing to seek visitation notwithstanding parent's "longstanding, loving and nurturing relationship with the child"); *Denise B. v. Beatrice R.*, 9/19/2005 N.Y.L.J. 21, col. 1 (Fam. Ct. N.Y. Co. 2005) (relying on *Alison D.* and denying standing to de facto mother to seek visitation rights, despite child's "close and loving relationship with [her] since infancy").

We respectfully submit that, consistent with New York's child-centered

custody policies, this Court should now revisit *Alison D.* and extend to same-sex de facto parents standing to pursue their parentage claims. By doing so, the Court would at last give full and even-handed effect to the "best interests of the child" test which is mandated to govern custody cases. The applicability of the best interests standard must no longer be permitted to turn on whether a child's parents are gay or straight, married or unmarried.[9] That standard, and the public policy it reflects, should apply universally to the children of this State.[10]

### 2. *The Principle of Fairness Animating the Common Law Doctrine of Equitable Estoppel Compels the Doctrine's Application Here*

Since the eighteenth century, courts have utilized common law doctrines such as equitable estoppel to craft fair and just outcomes for parties who lack adequate remedies at law. *See, e.g.*, Robert Megarry & P.V. Baker, *Snell's Principles of Equity* 561-62 (27th ed. 1973). The application of equitable estoppel to protect the rights of de facto parents such as Debra H. and their children accords with this

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[9] The number of families potentially impacted by the resolution of this case has almost quadrupled since *Alison D.* was decided in 1991. New York census data reflect that the number of same sex-couple households in New York increased by 238% from 13,748 in 1990 to 46,490 in 2000, and increased to 50,854 by 2005. As of 2005, at least 18,335 (and up to 31,000) children in New York lived in households headed by same-sex couples. http://www.law.ucla.edu/WilliamsInstitute/publications/NewYorkCensusSnapshot.pdf, last visited on 7/17/09.

[10] The neutral application of the best interests standard sought by Debra H. is fully supported by other areas of New York family law in which sexual orientation has been deemed an impermissible consideration. *See, e.g.*, 18 NYCRR § 421.16(h)(2) (single lesbian and gay individuals may adopt children); *Guinan v. Guinan*, 102 A.D.2d 963, 477 N.Y.S.2d 830 (3d Dep't 1984) (whether a mother has a sexual relationship with another woman is not determinative in a custody dispute).

historically-rooted jurisprudential emphasis on fairness and equity. Equitable estoppel has traditionally been "imposed by law in the interest of fairness to prevent the enforcement of rights which would work a fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought." *Syracuse Orthopedic Specialists, P.C. v. Hootnick*, 42 A.D.3d 890, 893, 839 N.Y.S.2d 897, 900 (4th Dep't 2007) (citation omitted).

Courts have rightly identified equitable estoppel as one of the "most useful tools" at their disposal when, as here, "the facts cry out for relief." *Huntington TV Cable Corp. v. State of N.Y. Comm'n on Cable Television*, 94 A.D.2d 816, 819, 463 N.Y.S.2d 314, 317 (3d Dep't 1983); *aff'd,* 61 N.Y.2d 926, 414 N.Y.S.2d 718 (1984). In a myriad of situations other than the specific context of parent-child relationships, courts have long applied equitable estoppel to promote fundamental fairness between parties. *See, e.g., Montefiori v. Montefiori*, 96 Eng. Rep. 203 (K.B.) (1762) (reasoning that equity required the enforcement of a promissory note given without consideration because a marriage had been consummated in reliance on it); *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio 154, 157-58 (Sup. Ct. N.Y. Co. 1848) (estopping insurer from challenging the validity of an insurance policy on the basis of misrepresentations by the insured, where the insurer had already

benefited from and collected premiums on the policy); *Horn v. Cole*, 51 N.H. 287, 1868 WL 2290, at *13 (N.H. 1868) (estopping owner of goods from asserting ownership where he had previously falsely denied ownership in an effort to avoid attachment by a creditor); *Empire Fin. Servs., Inc. v. Bellantoni*, 53 A.D.3d 1095, 1096, 861 N.Y.S.2d 898, 900 (4th Dep't 2008) (estopping plaintiffs from enforcing non-solicitation covenants against former employees, where plaintiffs had actually encouraged the former employees to obtain competing employment). The diversity of these historical applications of equitable estoppel underscores the appropriateness of its employment on behalf of de facto parents like Debra H.

Nor does the absence of express statutory authority to employ equitable estoppel preclude its application. *Indeed, New York courts have repeatedly invoked equitable estoppel to prevent an injustice which would result from overly strict application of a statute.* In *Reynolds v. Oster*, 192 A.D.2d 794, 795, 596 N.Y.S.2d 545, 546 (3rd Dep't 1993), for example, the Appellate Division, Third Department, directed that the abatement of a father's child support obligation be made retroactive to the date of the child's legal emancipation rather than the later date of the father's motion, as prescribed by Family Court Act § 451. Observing that the mother had intentionally withheld from the father the fact that the child was no longer living with her, and that the mother had thus received child support payments to which she was not entitled, the court concluded that "this is one of the

rare circumstances where an overstrict application of this statute would result in 'grievous injustice' to a parent and a form of equitable estoppel should operate"). In *River Seafoods, Inc. v. JPMorgan Chase Bank*, 19 A.D.3d 120, 122, 796 N.Y.S.2d 71, 73-74 (1st Dep't 2005), similarly, the respondent bank was equitably estopped from denying the effectiveness of the petitioner creditor's restraining notice pursuant to CPLR 5222(b). The court recognized in *River Seafoods, Inc.* that a "literal interpretation" of the statute supported the bank's argument that the notice at issue was ineffective because at the time of its service there were no funds in the account that the petitioner had sought to restrain. *Id.* Noting that Chase had twice represented to the petitioner that the bank had placed a hold on the account notwithstanding the ineffectiveness of the restraining notice, the court observed, "Chase can hardly be heard to argue fairly that the restraining notice was ineffective. Indeed, it would be inequitable on these facts to allow Chase 'to enforce what would have been [its] rights under other circumstances.'" *Id.* at 121, 123, 796 N.Y.S.2d at 73-74 (citation omitted). Consistent with these and many other similar precedents, it would be inequitable on the facts presented here to permit Janice R. to rely on an overly strict interpretation of DRL § 70 to exclude Debra H. from their daughter's life simply because she now wishes to do so.

The refusal by courts since *Alison D.* to apply equitable estoppel as a basis for conferring standing on same-sex de facto parents has been strikingly inconsistent

with the doctrine's historical emphasis on fairness and equity. It is fundamentally unjust and irrational for courts routinely to apply equitable estoppel to correct injustices in a broad array of commercial and business contexts while refusing to employ it in cases such as this, where the stakes – *here, the very survival of an established parent-child relationship* – are so high. The repeated denial of standing to de facto parents like Debra H., and the resulting preclusion of any consideration by courts of the best interests of the children involved, have created a condition in New York family law which, without a doubt, "cr[ies] out for relief." Thus, consistent with equitable estoppel's diverse uses at common law – and its historical purpose of ensuring equitable outcomes where no adequate remedy is available at law – this Court should now confirm the doctrine's applicability here, where a parent-child relationship hangs in the balance.

### C. *Alison D.* is Outmoded, and Strict Application of the Decision Ignores the Needs and Rights of Many New York Families

Properly understood, *Alison D.* did not, in construing DRL § 70, divest courts of their centuries-old powers at common law to fashion equitable remedies from doctrines like equitable estoppel. Thus, as Debra H. urges here, courts may and should, consistent with the holding of *Alison D.*, exercise their common law equitable powers to confer standing on same-sex de facto parents in cases such as this. We respectfully submit, nevertheless, that *Alison D.* should be revisited and overruled. The restrictive interpretation of the statutory term "parent" enunciated

in *Alison D.* simply cannot be reconciled with the complex and variegated reality of New York families today. *Alison D.* should be overruled so that the best interests of all New York children are fully secured – both under DRL § 70 and at common law – irrespective of the gender, sexual orientation, or other characteristics of their parents.[11]

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[11] Over the last two decades, New York law has steadily evolved toward greater recognition of the rights of lesbian and gay individuals and their families. For example, under an unbroken line of recent decisions, New York courts have held that lawful out-of-state same-sex marriages are entitled to formal recognition. *See, e.g., Martinez v. County of Monroe*, 50 A.D.3d 189, 192-93, 850 N.Y.S.2d 740, 743 (4th Dep't 2008) (holding that employer unlawfully discriminated against employee by refusing to recognize employee's valid Canadian same-sex marriage); *Beth R. v. Donna M.*, 19 Misc. 3d 724, 730, 853 N.Y.S.2d 501, 506 (Sup. Ct. N.Y. Co. 2008) (denying defendant's motion to dismiss divorce action and holding that the parties' Canadian marriage is valid under New York law). The Governor's Counsel in 2008 cited *Martinez* in directing executive agencies to extend recognition to out-of-state same-sex marriages. Under the directive, *inter alia*, insurers in New York must now extend spousal benefits to same-sex and opposite-sex spouses on an equal basis, *see* N.Y. State Ins. Dep't, Policy Bulletin No. 99-12, General Admin. Manual § 0212 (2008); banks are required to treat same- and opposite-sex spouses equally in the investment, lending and borrowing contexts, *see* N.Y. State Banking Dep't, *Industry Letters: Definition of "Spouse" for Purposes of the Banking Law* (2009); and same-sex spouses are entitled to the same priority in surrogate decision making as opposite-sex spouses, *see* E-mail from Tom Fisher, Director, New York State Surrogate Decision Making Commission, to Staff and Coordinators (June 27, 2008).

Same-sex "domestic partners" have also been granted rights to hospital visitation, N.Y. Public Health Law § 2805-q (McKinney 2004), and to direct the disposition of their partners' remains, N.Y. Public Health Law § 4201 (McKinney 2006). Similarly, same-sex domestic partners of 9/11 survivors were eligible for awards from the 9/11 Victim Compensation Fund. *See* Kenneth R. Feinberg, *Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001*, Vol. I, 48-49; N.Y. Work. Comp. Law § 4 (McKinney 2002) (retroactive to September 10, 2001). Public universities have likewise extended health benefits to the same-sex domestic partners of employees and retirees. *See, e.g.,* City University of New York, Information Packet for CUNY Employees and Retirees Who Have Entered into a Domestic Partnership, Same-Sex Marriage, or Civil Union (Fall 2008) (explaining how to register a same-sex partner for New York City health benefits).

### 1. *Courts in New York and Elsewhere Have Consistently Disagreed With* Alison D.

New York's lower courts have rightly criticized *Alison D.* for producing harsh and inequitable results contrary to the best interests of children, lamenting, for example:

- "Given the frequency with which children today are being raised by and bonding with long-term heterosexual stepparents . . . and non-marital homosexual partners, perhaps the time has come for the Court of Appeals to revisit its ruling in *Alison D.*" *Denise B. v. Beatrice R.*, 9/19/2005 N.Y.L.J. 21, col. 1 (Fam. Ct. N.Y. Co. 2005).
- "[A] recurring theme throughout all of these standing cases is the injustice they work upon children." *C.M. v. C.H.*, 6 Misc. 3d 361, 370, 789 N.Y.S.2d 393, 402 (Sup. Ct. N.Y. Co. 2004).
- "[I]n recognizing the primacy of the rights of the biological parent, the Court of Appeals has defined a rigid construct which concomitantly ignores the reality of the relationships that nurture and develop a child." *Anonymous v. Anonymous*, 20 A.D.3d 333, 334, 797 N.Y.S.2d 754, 755 (1st Dep't 2005) (Sweeny, J., concurring).
- "If in custody and visitation disputes, common sense, reason and an overriding concern for the welfare of a child are to prevail over narrow selfish proclamations of biological primacy, the assertion of equitable estoppel by a non-biological or non-adoptive parent must be given credence by the courts." *Multari v. Sorrell*, 287 A.D.2d 764, 771, 731 N.Y.S.2d 238, 244 (3d Dep't 2001) (Peters, J., concurring).

*Alison D.* is also increasingly at odds with a growing body of decisional law across the country. High courts in other states have repeatedly eschewed *Alison D.*'s restrictive approach to statutory construction, and its stringent application of equitable and common law doctrines, in favor of an approach which allows non-adoptive, non-biological parents, whether in same-sex or opposite-sex relationships,

to maintain claims for child custody. For example, in *T.B. v. L.R.M.*, a case with striking factual similarities to *Debra H.*, the Supreme Court of Pennsylvania held that a non-biological mother had standing to seek custody and visitation rights, because prior to the dissolution of her relationship with the child's biological mother she had "assumed a parental status and discharged parental duties with the consent of the [biological mother]." *T.B. v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001). The Court remarked in *T.B.* that:

> the nature of the relationship between Appellant and Appellee has no legal significance to the determination of whether Appellee stands *in loco parentis* to A.M. The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties.

*Id.* at 918-19.

Likewise, in *In re Parentage of L.B.*, the Supreme Court of Washington granted standing to a non-biological, non-adoptive parent and noted that "[n]umerous other jurisdictions have recognized common law rights on behalf of de facto parents." *In re Parentage of L.B.*, 122 P.3d 161, 174-75 (Wash. 2005). *See also, e.g., In re Parentage of A.B.*, 837 N.E.2d 965, 967 (Ind. 2005) (conferring standing on a non-adoptive, non-biological parent); *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (holding that a non-biological parent had standing to seek custody, since "[o]nce the parent-child bond is forged, the rights and duties of the parties should be crafted to reflect that reality").

In a recent unanimous Oregon Court of Appeals decision, a lesbian de facto mother whose partner had conceived their child via artificial insemination successfully challenged, on equal protection grounds, a statute which by its express terms extended legal parentage only to men whose wives, with their husbands' consent, conceived children via artificial insemination. *Shineovich v. Kemp*, No. 070363564, 2009 WL 2032113 (Or. App. July 15, 2009). The court observed in *Shineovich* that the privilege enjoyed by husbands – legal parentage without having to adopt, and without regard to whether the husband and child were biologically related – was not available to unmarried parents. *Id.* at *5. Because same-sex couples cannot marry in Oregon, the court pointed out, the privilege afforded to husbands under the relevant statute was not available to such couples. *Id.* at *9. The court rightly concluded in *Shineovich* that there could be "no justification for denying that privilege on the basis of sexual orientation." *Id.* Rather than striking the provision down as unconstitutional on equal protection grounds, the court construed it as applying equally to husbands and to de facto mothers in same-sex relationships. The court explained that construing the law in such a way would not only enable it to withstand constitutional scrutiny, but would also advance an important legislative objective – by "providing the same protection for a greater number of children." *Id.*

Underlying the decisions above and cases like them from other

jurisdictions[12] is an overriding policy of ensuring that, in the context of parental status disputes, children's best interests are fully protected. With the instant case, this Court can bring that important policy to fruition in New York.

### 2. *Legal Scholars Have Strenuously Criticized* Alison D. *and Identified a Need for Reform*

Legal commentators also have taken strong exception to *Alison D.* as reflecting an outmoded and overly restrictive view of the family. *See, e.g.*, Leonard G. Florescue, *'Just Plain Wrong' Not to Secure Both Partners' Futures?*, 236 N.Y.L.J. 3 (2006) (arguing that *Alison D.* should be revisited because it clashes with *Shondel*, applying the same underlying equitable principles but reaching opposite results); Andrew Schepard, *Revisiting 'Alison D.': Child Visitation Rights for Domestic Partners*, 227 N.Y.L.J. 3 (2002) (arguing that courts should protect meaningful adult-child relationships regardless of formal marital status or sexual orientation); Joseph G. Arsenault, Comment, *"Family" But Not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of*

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12 *See, e.g., SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007) (recognizing that the state "has a compelling interest in promoting relationships among those in recognized family units (for example, the relationship between a child and someone in loco parentis to that child) in order to protect the welfare of children"); *see also C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149-51 (Me. 2004) (recognizing that the "best interest of the child standard . . . stands as the cornerstone of the parens patriae doctrine" and that "to determine a child's best interest and award parental rights and responsibilities, it may, in limited circumstances, entertain an award of parental rights and responsibilities to a de facto parent"); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890 (Mass. 1999) (recognizing that the court's duty as *parens patriae* "necessitates that its equitable powers extend to protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a situation"); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435 (Wis. 1995) (noting that "the public policy of the state directs the court to . . . serve the best interest of the child").

*Appeals*, 58 Alb. L. Rev. 813 (1995) (criticizing *Alison D.* and contrasting it to the landmark decision in *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784 (1989)); Kimberly P. Carr, Comment, *'Alison D. v. Virginia M.': Neglecting the Best Interests of the Child in a Nontraditional Family*, 58 Brook. L. Rev. 1021 (1992) (arguing that *Alison D.* was "tragic" and wrongly decided).

Other scholars, while not specifically singling out *Alison D.*, have taken issue with the narrow understanding of family that it embodies, arguing instead for a legal framework which recognizes the rights of same-sex de facto parents and the changing nature of the modern-day family. *See, e.g.*, Stefan H. Black, *A Step Forward: Lesbian Parentage After Elisa B. v. Superior Court*, 17 Geo. Mason U. Civ. Rts. L. J. 237, 255-56 (2006) (arguing against unjustly distinguishing between separated biological fathers and non-biological lesbian mothers); Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 Mich. J. Gender & L. 261, 311-12 (2003) (faulting courts for tying legal constructions of motherhood to traditional constructions of the family – a practice seen as increasingly burdensome given "new reproductive scenarios and imaginatively different family constellations emerg[ing] in today's society"); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 Buff. L. Rev. 341, 343, 350, 375 (2002) (criticizing courts' failure to "preserve the integrity of a

relationship between a lesbian co-parent and her child," and arguing that instead of treating lesbian co-parents as "other than" or "less than," courts should confer upon them the same rights and privileges as those enjoyed by other parents); Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 Willamette L. Rev. 769, 773 (1999) (noting that the unwillingness of courts to expand the definition of parenthood beyond the adoptive or biological relationship has led to decisions that fail to recognize the best interests of children and the complexities of modern life).

Together, the large body of legal scholarship critical of *Alison D*'s underpinnings, and courts' increasing reluctance to follow it as precedent, constitute a compelling basis for revisiting the case now.

*3. The Availability of Second-Parent Adoption Does Not Obviate the Need to Extend to De Facto Parents Standing to Pursue the Rights and Duties of Legal Parentage*

Respondent-Respondent argued in earlier proceedings in this case that non-biologically related parents already have a legal mechanism for asserting their parental rights – second-parent adoption – and that same-sex partners who fail to pursue adoption should not be permitted a "second bite at the apple" via a petition for custody or visitation filed after the couple separates. Although in 1995 this Court held in *Matter of Jacob and Dana* that non-biologically related second parents – including same-sex parents – may secure parent-child bonds through

adoption, 86 N.Y.2d at 656, 636 N.Y.S.2d at 717, for a variety of reasons adoption may be an unavailable or, at the very least, an unattractive option for non-biological parents.

Foremost, the adoption process is expensive, with legal fees, court fees and other associated costs generally running into the thousands of dollars. Many would-be adoptive parents cannot afford such sums, and thus cannot secure legal protection of their parental status through adoption. Potential adoptive parents also may lack the legal sophistication necessary to understand fully the significance of the right to second-parent adoption, or even to know that it exists as a mechanism to secure protection for their relationships with their children. In many cases, de facto parents realize only after the relationship with their partner has deteriorated unexpectedly that they could have pursued a second-parent adoption. By then, of course, it is generally too late for them to do so. In such cases, children should not be made to suffer economic deprivation and potentially searing emotional injury simply because of their parents' lack of prescience and inadequate legal planning.

Moreover, because the private-placement adoption process typically takes between six and twelve months, prospective second parents confront the significant risk that intervening events will prevent the finalization of their adoptions.[13] If, for

[13] There are multiple statutory requirements and administrative reasons why adoptions may take many months to complete. For example, New York courts typically require a six-month waiting period as part of the private-placement adoption process. *See* DRL § 116(1). Notably,

example, a couple separates and the biological parent subsequently rescinds her consent for an adoption, or if the biological mother dies before the adoption decree is signed, under the *Alison D.* progeny cases discussed above, the non-biological parent would be left with no basis for asserting her parental rights.

The very existence of this case and numerous others like it in New York demonstrates that the right to second-parent adoption established in *Matter of Jacob and Dana* has not been – and never will be – a cure-all for non-biological parents faced with the rule of *Alison D. See, e.g., Behrens v. Rimland*, 32 A.D.3d 929, 822 N.Y.S.2d 285 (2d Dep't 2006); *Janis C. v. Christine T.*, 294 A.D.2d 496, 742 N.Y.S.2d 381 (2d Dep't 2002); *Speed v. Robins*, 288 A.D.2d 479, 732 N.Y.S.2d 902 (2d Dep't 2001); *Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, 673 N.Y.S.2d 989 (4th Dep't 1998). The availability of second-parent adoption does not justify categorically denying standing to the de facto parent who, after the dissolution of her relationship with the child's biological mother, seeks to preserve her relationship with the child.

Nor should the availability of second-parent adoption obscure the

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this period begins to run upon the filing of the adoption petition, not when the child is first placed with the adoptive parent. After the waiting period has expired and all required documentation has been filed, courts will also order an investigation of the proposed adoptive family. *See* DRL § 116(2). The investigator has thirty days to file a report after the investigation is completed. *See* DRL § 116(3). Additionally, courts often hold a final hearing on the adoption, which may not be held until months after the completion of all required filings and investigations and the expiration of the waiting period. Finally, scheduling delays, filing problems, and other administrative hold-ups must be taken into account.

fundamental question in cases such as this: What is in the best interests of the child? Where, as here, a de facto parent and child have a nurturing and supportive relationship, courts must have the ability – irrespective of whether adoption proceedings were ever commenced – to determine whether it is in the child's best interests for that relationship to continue.

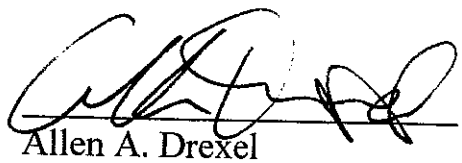
## IV. CONCLUSION

For the reasons set forth above, NYCBA, WBASNY, AAML-NY, MBBA, NYCLA, PRBA, and RCBA respectfully urge this Court to confer standing on a de facto parent to seek a determination of her legal parentage, and to authorize her, upon such determination, to pursue the right to custody, the duty of financial support, and all of the other incidents of parentage under New York law.

October 30, 2009

Respectfully submitted,

HOGAN & HARTSON LLP



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