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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

DEBRA H.,

Petitioner-Respondent,

-against-

JANICE R.,

Respondent-Appellant.

Motion for Leave to Appeal from the Supreme Court, Appellate Division
First Department

PROPOSED *AMICI CURIAE* BRIEF OF THE NEW YORK CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS

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INTRODUCTION

The main issue in this case is whether New York State courts should shut the courthouse doors in the face of a woman requesting a factual hearing to prove that she has established a close and loving parental relationship with a child and that she should be permitted to seek visitation and custody of her child following the termination of her relationship with the child's biological mother, her ex-partner. This issue is of profound importance to New York families headed by lesbian and gay couples, as well as other nontraditional families, in which only one of the parents is the biological parent. These families often consist of a parent who may not be held to fall under the definition of "parent" provided in Section 70 of the Domestic Relations Law, but who has nevertheless formed a constitutionally protected parent-child relationship with the child. Yet under this Court's April 9, 2009 decision and order, which relied upon the Court of Appeals' decision in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991), such "*de facto*" or "equitable" parents lack standing and are irrebutably foreclosed from pursuing visitation or custody of their children.

Since the Court of Appeals issued its *Alison D.* decision nearly two decades ago, however, many other states' appellate courts, with the endorsement of legal scholars, have protected the best interests of the child by applying statutory constructions and equitable principles which recognize the *de facto* or equitable

parents and their opportunity to seek custody and/or visitation orders. Moreover, different New York courts within the Appellate Division of the State and at the trial level have applied *Alison D.* more flexibly and invoked equitable principles in certain cases to recognize the custodial and visitation claims by adults that do not fall within the definition of Section 70. Most notably the Court of Appeals recently affirmed the importance of applying equitable principles in order to protect the best interests of the child by recognizing a nonbiological father in *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 820 N.Y.S.2d 199 (2006). This recent decision, combined with a trend in many other states' appellate courts moving away from *Alison D.*'s approach, demonstrate that that the strict adherence to *Alison D.* is outmoded and that the Court of Appeals' position on recognizing *de facto* or equitable parents has evolved since 1991. Granting leave to appeal in this case affords the Court of Appeals the opportunity to clarify whether New York has moved in the same direction as the law in most other states, thereby preventing an infringement on a *de facto* parent's constitutionally protected relationship with her child. Granting leave will also allow the Court to address the confusion in the lower courts regarding when application of equitable principles is permissible in this context.

In addition, this case presents a novel issue of substantial importance for many New York families, namely the impact of a couple's Vermont civil union on legal

protections afforded in New York for the parent-child relationship. Court of Appeals consideration of this issue will assist these families, who currently lack developed legal guidance on the matter.

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States, and has more than 500,000 members. The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the ACLU and is a nonprofit, nonpartisan organization with approximately 50,000 members. Both organizations are deeply devoted to the protection and enhancement of fundamental liberties, which include the right of familial association and the right of a parent to a child to maintain that parent-child relationship, and to recognize parental rights created by relationships entered into outside of this State. *Amici* take the position that because this Court's April 9, 2009 decision and order directly implicate these important rights that impact many New York families, the Court of Appeals should review this case and lead this State law in the same direction as the other states, which have recognized *de facto* or equitable parents.

STATEMENT OF FACTS

Amici hereby adopt the Statement of Facts contained in the "Statement of the Case" in Debra's memorandum of law in support of her motion for leave dated May 15, 2009. *See* Pet.-Resp. Mem. of Law in Supp. of Motion for Leave at 5-9.

STANDARD FOR GRANTING MOTION

This Court should grant a motion for leave to appeal to the Court of Appeals to resolve questions of law that are "novel or of public importance, or involve a conflict with prior decisions of th[e] Court [of Appeals], or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4). A motion for leave should be granted in order to "address important legal issues" and, *inter alia*, to: (1) address a split in authority among Departments of the Appellate Division; (2) develop emerging areas of common law; (3) reevaluate outmoded precedent; and/or (4) correct error below by correcting incorrect statements of law in a writing by Appellate Division or to cure substantial injustice. *See* Stuart M. Cohen, *et al.*, *The New York Court of Appeals Civil Jurisdiction and Practice Outline* § III(C), http://www.nycourts.gov/ctapps/forms/civilpractice_05.htm (Sep. 2007), last visited May 20, 2009.

ARGUMENT

I. THIS CASE PRESENTS AN ISSUE OF PROFOUND IMPORTANCE TO THE MANY FAMILIES IN THIS STATE HEADED BY LESBIAN AND GAY COUPLES.

For numerous families throughout the state that are headed by lesbian and gay couples, whether New York courts may recognize custodial and visitation claims by "*de facto*" or "equitable" parents who remain unprotected by *Alison D.*'s[1] narrow interpretation of "parent" in Section 70 of the Domestic Relations Law is unquestionably an issue of profound importance, warranting review by the Court of Appeals. *See, e.g.*, 22 N.Y.C.R.R. § 500.22(b)(4). Rejecting an irrebuttable presumption against recognizing a *de facto* parent is an approach that wisely avoids an unconstitutional infringement on the rights protecting the parent-child relationship. *See Stanley v. Illinois*, 405 U.S. 645, 656-67 (1972) ("Procedure by presumption is always cheaper and easier than individualized determination. But when . . . the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.").[2]

As Debra states in the memorandum of law supporting her motion for leave,

[1] *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991).

this state is home to an estimated 18,335 children under age of 18 being raised by same-sex parents, and many of these families use reproductive technology such as anonymous sperm donation to have children, they often have only one known biological parent. *See* Pet.-Resp. Mem. of Law in Supp. of Motion for Leave at 10-11 (citing, *inter alia*, Adam P. Romero, *et al.*, Williams Institute, *Census Snapshot: New York* (Apr. 2008), http://www.law.ucla.edu/williamsinstitute/publications/NewYorkCensusSnapshot.pdf at 2. Yet, these same-sex couples raising children, on average, have 29% less annual income than their married, heterosexual counterparts. *See* Romero, *Census Snapshot*, *supra*, at 3. Thus, affording a costly second-parent adoption is not as easily an option for same-sex couples as it would be for opposite-sex couples, who already enjoy the presumption of parentage that flows from a marital relationship. *See* Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents & the Story of Alison D. v. Virginia M.*, 17 Colum. J. Gender & L. 307, 340 (2008) ("[T]he [second-parent adoption] process can be expensive for couples who, in many cases, need to hire not only a lawyer but also a social worker to do an in-home evaluation."). Therefore, this case presents an issue of great importance to thousands of children and their families currently living in New York, whose

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[2] *See also Amicus Curiae* Brief of ACLU and NYCLU at 15-27, *Debra H. v. Janice R.*, 877 N.Y.S.2d 259, 61 A.D.3d 460 (1st Dep't 2009) (arguing that many other states' appellate courts, as well as legal scholars, have disagreed with the approach taken in *Alison D.*).

everyday lives and constitutional rights are stake.

II. THIS CASE PRESENTS THE OPPORTUNITY FOR THE COURT OF APPEALS TO AVOID CONFUSION IN THE LOWER COURTS BY ESTABLISHING WHEN TO APPLY EQUITABLE PRINCIPLES IN RECOGNITION OF THE COMPELLING CLAIMS OF *DE FACTO* PARENTS AND THE BEST INTERESTS OF THE CHILD.

The Court of Appeals itself recently applied equitable principles in order to protect the best interests of the child in *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326, , 820 N.Y.S.2d 199, 202 (2006), stating: "New York courts have long applied the doctrine of estoppel in paternity and support proceedings. Our reason has been and continues to be the best interests of the child." The citation at the end of the quoted text is to the Second Department's decision in *Jean Maby H v. Joseph H.*, 676 N.Y.S.2d 677, 246 A.D.2d 282 (2d Dep't 1998). In that case, the Second Department recognized a *de facto* or equitable father seeking visitation against the wishes of the child's biological mother. The Second Department squarely addressed *Alison D.*'s insufficient consideration of equitable principles, noting that in *Alison D.*, the parent seeking visitation did no more than "merely brush[] upon" equitable estoppel claims. *Jean Maby H.*, 676 N.Y.S.2d at 681 (citation omitted). Likewise, other Appellate Division and New York State trial courts have diverged from strict adherence to *Alison D.* *See, e.g.*, *Matter of Charles v. Charles*, 745 N.Y.S.2d 572, 296 A.D.2d 547 (2d Dep't 2002); *see also Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 508-09 (Sup. Ct. N.Y. County 2008)

(relying on, *Shondel* and *Jean Maby H.* to recognize a *de facto* parent's standing to pursue visitation and custody).

In contrast, in this and other cases, courts have refused to apply equitable estoppel principles *See, e.g.*, *Anonymous v. Anonymous*, 797 N.Y.S.2d 754, 20 A.D.3d 333 (1st Dep't 2005). There is a clear conflict among New York courts regarding when equitable principles may be applied to protect the best interests of the child by recognizing *de facto* parents. Court of Appeals review is needed to resolve this conflict and confusion.

III. THIS CASE PRESENTS THE OPPORTUNITY FOR THE COURT OF APPEALS TO LEAD NEW YORK'S LAW IN THE SAME DIRECTION FOLLOWED BY OTHER STATES' APPELLATE COURTS AND ENCOURAGED BY LEGAL SCHOLARS.

In the nearly two decades that have elapsed since the Court of Appeals denied a nonbiological parent standing to pursue visitation or custody of her child in *Alison D.*, numerous other state appellate courts, with the endorsement of legal scholars, have recognized "*de facto*" or "equitable" parents, thus departing from the Court of Appeals' 1991 approach. For example, in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 436 (Wis. 1995), the Supreme Court of Wisconsin held that a lesbian *de facto* parent had standing to pursue visitation with the child with whom she had developed a "parent-like relationship," even though the state's visitation statute did not include a definition of parent that would have allowed the *de facto* mother

standing. In reaching this conclusion, the Supreme Court of Wisconsin recognized *Alison D.*, but noted "a judicial trend toward considering or allowing visitation to nonparents who have a parent-like relationship with the child if visitation would be in the best interest of the child." *Id.* at 435 n.37.[3] Similarly, in *In re Parentage of L.B.*, 122 P.3d 161, 175 (Wash. 2005), the Supreme Court of Washington also recognized, under common law principles, a *de facto* parent's standing to pursue parental rights, noting: "Numerous other jurisdictions have recognized common law rights on behalf of *de facto* parents."[4] *See also Amici Curiae* Brief of ACLU and NYCLU at 15-27, *Debra H. v. Janice R.*, 877 N.Y.S.2d 259, 61 A.D.3d 460 (1st Dep't 2009) (arguing that most other states' appellate courts, as well as legal scholars, have disagreed with the approach taken in *Alison D.*).

In recognizing *de facto* or equitable parents, these courts have focused on protecting the best interests of the child by applying equitable principles to grant

[3] The following decisions support the conclusion of a trend toward allowing *de facto* parents to seek visitation or custody in the pursuit of protecting the "best interests of the child." *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *In re Clifford K.*, 619 S.E.2d 138 (W.Va. 2005); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass.), *cert. denied*, 528 U.S. 1005 (1999); *Laspina-Williams v. Laspina-Williams*, 742 A.2d 840 (Conn. Super. Ct. 1999); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008); *Middleton v. Johnson*, 633 S.E.2d 162 (S.C. Ct. App. 2006); *In the Interest of E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004); *Robinson v. Ford-Robinson*, 196 S.W. 3d 503 (Ark. Ct. App. 2004); *Riepe v. Riepe*, 91 P.3d 312 (Ariz. Ct. App. 2004); *Barnae v. Barnae*, 943 P.2d 1036 (N.M. Ct. App. 1997).

[4] See also *id.* at 176 n.24 ("In addition, the American Law Institute's recent recommendation supports the modern common law trend of recognizing the status of *de facto* parents.").

the nonbiological parents standing to pursue visitation or custody, and to provide financial and emotional support for their child. *See In re Parentage of L.B.*, 122 P.3d at 176 (stating that when a statutory system does not speak to a specific situation, like a lesbian couple's co-parentage of a child, strict adherence to the statutory definition of parent "would be antagonistic to the clear legislative intent that permeates this field of law-to effectuate the best interests of the child in the face of differing notions of family and to provide certain and needed economical and *psychological support and nurturing* to the children of our state.") (emphasis added).[5]

This Court's decision approving Respondent-Appellant's attempt to completely shut out Debra from M.R.'s life by erecting an irrebuttable presumption against Debra's capacity to seek visitation or custody is thus inconsistent with the decisions of the high courts of many other states, and is inconsistent with sound reason. The recent decisions in other states have followed the trend toward

[5] Moreover, legal scholars also have endorsed the trend developed in most state courts favoring the recognition of *de facto* or equitable parents. For example, the American Law Institute's (ALI) most recent Principles of the Law of Family Dissolution: Analysis and Recommendations (Principles) contain provisions that reflect the national trend in favor of recognizing the role of *de facto* or equitable parents who should be allowed standing in order to protect the children's best interests. *See* ALI, Principles of the Law of Family Dissolution, § 2.03 (1)(b)(iii) (2002). Likewise, legal scholars have long advocated against the irrebutable presumption approach adopted in *Alison D. See, e.g.*, Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 Md. L. Rev. 358, 382-83 (1994); *see also*, Suzanne B. Goldberg, *Family Law Cases As Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.*, 17 Colum. J. Gender & L. 307, 335-36 (2008) (noting that many courts have differed from the *Alison D.* approach).

recognizing nontraditional families in order to protect the best interests of the child. Doing so takes into account "[t]he demographic changes of the past century[, which] make it difficult to speak of an average American family." *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (O'Connor, J., for plurality). And the injustice resulting from the strict application of *Alison D.* weighs in favor of granting Court of Appeals review in this case. *See* Cohen, *The New York Court of Appeals Civil Jurisdiction and Practical Outline*, § III(C), http://www.nycourts.gov/ctapps/forms/civilpractice_05.htm, last visited May 20, 2009.

Indeed, Respondent-Appellant's position ignores M.R.'s best interests in favor of adherence to a rigidly interpreted statutory definition of "parent." The child's interests include continuing the "psychological support and nurturing" provided by an adult with whom the child had a significant relationship that was every bit in the nature of that of a parent and child. *See, e.g.*, *In re Parentage of L.B.*, 122 P.3d at 176. And the risk of ignoring a child's best interests is not limited to the current case alone: This case presents a story that could be true for New York's many other families with lesbian and gay parents, whose children should not suffer based on antiquated notions of who is a "parent." This Court, thus, should grant Debra's motion for leave and allow the Court of Appeals to shift New York law in a direction that takes into account the best interests of the child.

IV. THIS CASE PRESENTS A NOVEL ISSUE REGARDING THE EXTENT TO WHICH A VERMONT CIVIL UNION IMPACTS PARENTAL RIGHTS IN NEW YORK STATE.

Finally, review is appropriate because this case involves a novel legal issue regarding the weight that a Vermont civil union should have on a *de facto* parent's right to seek visitation or custody of her child.

The parties to this action were civilly united in Vermont in November 2003. Under Vermont law, Debra would be recognized as M.R.'s legal parent. *See* Vt. Stat. Ann. tit. 15 § 1204; *see also Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) ("Many factors are present here that support a conclusion that Janet is a parent, including, first and foremost, that Janet and Lisa were in a valid legal union at the time of the child's birth."), *cert. denied*, 550 U.S. 918 (2007). Yet in New York, Debra is being shut out of M.R.'s life by operation of an "irrebutable presumption" that turns upon a rigid reading of Section 70 of the Domestic Relations Law. Despite the emerging availability of marriage for lesbian and gay couples in different jurisdictions throughout this country, the fact remains that many couples entered into Vermont civil unions before marriage in the United States was ever possible for them. The Court of Appeals should be given the opportunity to consider the extent to which the couple's civil union affects Debra's parental rights.

CONCLUSION

For the foregoing reasons, this Court should grant Debra's motion for leave to appeal to the Court of Appeals from this Court's April 9, 2009 decision and order.

Dated: May 22, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing along with a copy of the Notice of Motion for Permission to File the Proposed *Amici Curiae* Brief and Affirmation in support thereof was sent United States Express Mail, postage pre-paid, on May 22, 2009 to:

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