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Matter of Brooke S.B. v Elizabeth A.C.C.

Court of Appeals of New York

June 2, 2016, Argued; August 30, 2016, Decided

No. 91, No. 92

Reporter

28 N.Y.3d 1 *; 61 N.E.3d 488 **; 39 N.Y.S.3d 89 ***; 2016 N.Y. LEXIS 2668 ****; 2016 NY Slip Op 05903

[1] In the Matter of Brooke S.B., Respondent, v Elizabeth A.C.C., Respondent. R. Thomas Rankin, Esq., Attorney for the Child, Appellant. In the Matter of Estrellita A., Respondent, v Jennifer L.D., Appellant.

Disposition: Order reversed, without costs, and matter remitted to Family Court, Chautauqua County, for further proceedings in accordance with the opinion herein (For Case No. 91). Order affirmed, without costs (For Case No. 92).

Prior History: Appeal, in the first above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 19, 2015. The Appellate Division affirmed an order of the Family Court of Chautauqua County (Judith S. Claire, J.), which had dismissed a petition for custody and visitation in a Family Court Act article 6 proceeding.

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 24, 2014. The Appellate Division affirmed an order of the Family Court of Suffolk County (Theresa Whelan, J.), which had, insofar as appealed from, granted a petition to the extent of awarding petitioner visitation in a Family Court Act article 6 proceeding. The appeal to the Appellate Division brought up for review the denial, by that Family Court (op 40 Misc 3d 219, 963 NYS2d 843 [2013]), of respondent's motion to dismiss the petition for lack of standing.

Matter of Estrellita A. v Jennifer L.D., 123 AD3d 1023, 999 NYS2d 504, 2014 N.Y. App. Div. LEXIS 8893 (N.Y. App. Div. 2d Dep't, 2014), affirmed.
Matter of Brooke S.B. v Elizabeth A.C.C., 129 AD3d 1578, 10 NYS3d 380, 2015 N.Y. App. Div. LEXIS 5226 (2015), reversed.

Core Terms

couple, custody, biological, same-sex, estoppel, married, marriage, artificial, equitable, insemination, unmarried, conceive, non-biological, heterosexual, facto, non-adoptive, concurrence, convincing, nonparent, parentage, domestic, estopped, jointly, regular, spouse, birth

Case Summary

Overview

HOLDINGS: [1]-The high court reversed Matter of Alison D. v Virginia M. and held that where a partner showed by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner had standing to seek visitation and custody under Domestic Relations Law § 70; therefore, if petitioner one proved by clear and convincing evidence her allegation that a pre-conception agreement existed, the order affirming the dismissal of her action would be reversed; [2]-Petitioner two was properly found to have standing to seek visitation as a "parent" under § 70(a) based on judicial estoppel, as respondent had obtained an order compelling petitioner to pay child support based on her

claim that petitioner was a parent to the child and was thus estopped from arguing that petitioner was not a parent for purposes of visitation.

Outcome
The order in case one was reversed and the order in case two was affirmed.

LexisNexis® Headnotes

Evidence > Burdens of Proof > Clear & Convincing Proof

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > Child Custody > Custody Awards > Nonparents

HN1[] **Burdens of Proof, Clear & Convincing Proof**

In light of more recently delineated legal principles, the definition of "parent" established by the Court of Appeals of New York in *Matter of Alison D. v Virginia M., 572 NE2d 27 (N.Y. 1991)*, has become unworkable when applied to increasingly varied familial relationships. Accordingly, it overrules Alison D. and holds that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under *Domestic Relations Law § 70*.

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Family Law > Child Custody > Custody Awards

Family Law > Child Custody > Child Custody Procedures

HN2[] **Standards, Best Interests of Child**

See *Domestic Relations Law § 70(a)*.

Family Law > Child Custody

Family Law > Parental Duties & Rights

HN3[] **Family Law, Child Custody**

Only a "parent" may petition for custody or visitation under *Domestic Relations Law § 70*, yet *§ 70* does not define that critical term, leaving it to be defined by the courts.

Governments > Courts > Judicial Precedent

HN4[] **Courts, Judicial Precedent**

Under stare decisis, a court's decision on an issue of law should generally bind the court in future cases that present the same issue. The doctrine promotes predictability in the law, engenders reliance on our decisions, encourages judicial restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of the Court of Appeals of New York. But in the rarest of cases, the Court of Appeals may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of its prior decision.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Evidence > Burdens of Proof > Clear & Convincing Proof

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > Child Custody > Custody Awards > Nonparents

Family Law > Child Custody > Visitation

HN5[] **Justiciability, Standing**

Where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of a child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child.

Headnotes/Summary

Headnotes

Parent, Child and Family — Custody — Standing of Non-Biological, Non-Adoptive Parent

1. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])*, which held that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not the child's "parent" for purposes of standing to seek custody or visitation under the statute, notwithstanding their established relationship with the child, is overruled. In light of more recently delineated legal principles, including conferring parental standing based on equity in the context of adoption and support proceedings and the enactment of same-sex marriage in New York, the narrow definition of "parent" established in *Alison D.* had become unworkable when applied to increasingly varied familial relationships.

Parent, Child and Family — Custody — Standing of Non-Biological, Non-Adoptive Parent

2. Where, in an unmarried couple, a partner without a biological or adoptive relation to a child proves by clear and convincing evidence that he or she agreed with the biological parent of the child to conceive and raise the child as co-parents, the non-biological, non-adoptive partner has standing to seek visitation and custody as the child's "parent" under *Domestic Relations Law § 70 (a)*. Accordingly, in separate *Family Court Act article 6* proceedings where each petitioner—the non-biological, non-adoptive partner—alleged that she entered into a pre-conception agreement with the respondent biological parent to conceive and raise a child as co-parents, the allegations, if proved by clear and convincing evidence, were sufficient to establish petitioners' standing to seek custody and visitation under the statute. Because both cases were necessarily decided based on the facts presented, it would be premature to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Additionally, the ultimate determination of whether the custody or visitation rights sought by the non-biological, non-adoptive parent should be granted rested in the sound discretion of the court, which determines the best interests of the child.

Parent, Child and Family — Custody — Standing of Non-Biological, Non-Adoptive Parent

3. In a *Family Court Act article 6* proceeding brought by the partner in an unmarried couple without a biological or adoptive relation to the other partner's biological child, the Appellate Division order affirming Family Court's dismissal of the petition on constraint of *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* was reversed and the matter remitted to Family Court for further proceedings, as that decision has been overruled and no longer prevents the courts below from determining standing. Where, in an unmarried couple, a partner without a biological or adoptive relation to a child proves by clear and convincing evidence that he or she agreed with the biological parent of the child to conceive and raise the child as co-parents, the non-biological, non-adoptive partner has standing to seek visitation and custody as the child's "parent" under *Domestic Relations Law § 70 (a)*. Accordingly, *Alison D.* no longer poses any obstacle to the consideration by the courts below of standing by equitable estoppel if petitioner proves by clear and convincing evidence her allegation that a pre-conception agreement existed.

Parent, Child and Family — Custody — Standing of Non-Biological, Non-Adoptive Parent

4. In a *Family Court Act article 6* proceeding brought by the partner in an unmarried couple who did not have a biological or adoptive relation to the other partner's biological child but had been ordered to pay child support, the courts below correctly resolved the question of standing by recognizing petitioner's standing to seek visitation as a "parent" under *Domestic Relations Law § 70 (a)* based on judicial estoppel. Respondent had obtained an order in the child support proceeding between the parties based on her successful argument that petitioner was a parent to the child, and was therefore estopped from taking the inconsistent position that petitioner was not, in fact, a parent to the child for purposes of visitation.

Counsel: [**1]** *Warshaw Burstein, LLP*, New York City (*Eric I. Wrubel, Linda Genero Sklaren* and *Alex R. Goldberg* of counsel), and *Goodell & Rankin*, Jamestown (*R. Thomas Rankin* of counsel), for appellant in the first above-entitled proceeding. I. Parentage by estoppel—rejected by *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* and *Debra H. v Janice R. (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010])*—has been used by New York courts for more than half a century to hold that non-adoptive, non-biological men are parents as a matter of law. (*Matter of Commissioner of Social Servs. v Julio J., 20 NY3d 995, 985 NE2d 127, 961 NYS2d 363*; *Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199*; *Matter of Sharon GG. v Duane HH., 63 NY2d 859, 472 NE2d 46, 482 NYS2d 270*; *Matter of Luis Hugo O. v Paola O., 129 AD3d 976, 12 NYS3d 183*; *Matter of Angelo A.R. v Tenisha N.W., 108 AD3d 561, 969 NYS2d 109*; *Matter of Starla D. v Jeremy E., 95 AD3d 1605, 945 NYS2d 779*; *Matter of Antonio H. v Angelic W., 51 AD3d 1022, 859 NYS2d 670*; *Matter of Greg S. v Keri C., 38 AD3d 905, 832 NYS2d 652*; *Matter of Bruce W.L. v Carol A.P., 46 AD3d 1471, 848 NYS2d 493*; *Matter of Diana E. v Angel M., 20 AD3d 370, 799 NYS2d 484*.) II. Equitable estoppel should be extended to custody and visitation proceedings for purposes of establishing standing for parents unrelated to children by biology or adoption. (*Matter of Ettore I. v Angela D., 127 AD2d 6, 513 NYS2d 733*; *Matter of Sharon GG. v Duane HH., 95 AD2d 466, 467 NYS2d 941*; *State of New York ex rel. H. v P., 90 AD2d 434, 457 NYS2d 488*; *Hill v Hill, 20 AD2d 923, 249 NYS2d 751*; *Brite v Brite, 61 Misc 2d 10, 305 NYS2d 65*; *Matter of Anonymous, 50 AD2d 890, 377 NYS2d 530*; *Matter of Tropea v Tropea, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575*; *Matter of Lincoln v Lincoln, 24 NY2d 270, 247 NE2d 659, 299 NYS2d 842*; *Matter of Juan R. v Necta V., 55 AD2d 33, 389 NYS2d 126*; *Kramer v Griffith, 119 AD3d 655, 990 NYS2d 69*.) III. The Marriage Equality Act and the decision of the United States Supreme Court in *Obergefell v Hodges (576 US —, 135 S Ct 2584, 192 L Ed 2d 609 [2015])* obviated the bright-line rule of *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* and *Debra H. v Janice R. (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010])*, which tied parenthood solely to biology or adoption. (*Hernandez v Robles, 7 NY3d 338, 855 NE2d 1, 821 NYS2d 770*; *Langan v St. Vincent's Hosp. of N.Y., 25 AD3d 90, 802 NYS2d 476*; *Gonzalez v Green, 14 Misc 3d 641, 831 NYS2d 856*.) IV. Stare decisis is not a bar to overruling the obsolete, unjust precedent of *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])*. (*People v Bing, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474*; *Gallagher v St. Raymond's R. C. Church, 21 NY2d 554, 236 NE2d 632, 289 NYS2d 401*; *Silver v Great Am. Ins. Co., 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398*; *Gelbman v Gelbman, 23 NY2d 434, 245 NE2d 192, 297 NYS2d 529*; *People v Rudolph, 21 NY3d 497, 997 NE2d 457, 974 NYS2d 885*; *People v Epton, 19 NY2d 496, 227 NE2d 829, 281 NYS2d 9*; *Matter of Lewis, 25 NY3d 456, 13 NYS3d 323, 34 NE3d 833*; *People v Taylor, 9 NY3d 129, 878 NE2d 969, 848 NYS2d 554*; *People v Saunders, 85 NY2d 339, 648 NE2d 1331, 624 NYS2d 568*; *Grace Plaza of Great Neck v Elbaum, 82 NY2d 10, 623 NE2d 513, 603 NYS2d 386*.) V. Petitioner has made out a prima facia case of parentage by estoppel, giving her standing to bring a petition for custody and visitation with the child. (*Cron v Hargro Fabrics, 91 NY2d 362, 694 NE2d 56, 670 NYS2d 973*; *Sanders v Winship, 57 NY2d 391, 442 NE2d 1231, 456 NYS2d 720*; *Morone v Morone, 50 NY2d 481, 413 NE2d 1154, 429 NYS2d 592*; *Underpinning & Found. Constructors v Chase Manhattan Bank, N.A., 46 NY2d 459, 386 NE2d 1319, 414 NYS2d 298*; *Westhill Exports v Pope, 12 NY2d 491, 191 NE2d 447, 240 NYS2d 961*.)

Susan L. Sommer, Lambda Legal Defense and Education Fund, Inc., New York City, *Blank Rome LLP*, New York City (*Margaret Canby* and *Caroline Krauss-Browne* of counsel), and *Brett M. Figlewski, The LGBT Bar Association of Greater New York*, New York City, for Brooke S.B., respondent in the first above-entitled proceeding. I. This Court should not adhere to outmoded and unworkable precedents that unjustly deny standing to parents like Brooke S.B. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586*; *Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263*; *Lawrence v Texas, 539 US 558, 123 S Ct 2472, 156 L Ed 2d 508*; *Bowers v Hardwick, 478 US 186, 106 S Ct 2841, 92 L Ed 2d 140*; *People v Peque, 22 NY3d 168, 980 NYS2d 280, 3 NE3d 617*; *Bing v Thunig, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3*; *People v Bing, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474*; *People v Hobson, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419*; *Silver v Great Am. Ins. Co., 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398*; *Gelbman v Gelbman, 23 NY2d 434, 245 NE2d 192, 297*

NYS2d 529.) II. Brooke S.B. is entitled to standing as a parent under both Domestic Relations Law § 70's express terms and common law. (Eschbach v Eschbach, 56 NY2d 167, 436 NE2d 1260, 451 NYS2d 658; Braschi v Stahl Assoc. Co., 74 NY2d 201, 543 NE2d 49, 544 NYS2d 784; Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Matter of Village of Chestnut Ridge v Howard, 92 NY2d 718, 708 NE2d 988, 685 NYS2d 915; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; Perry-Rogers v Fasano, 276 AD2d 67, 715 NYS2d 19; Counihan v Bishop, 111 AD3d 594, 974 NYS2d 137; Laura WW. v Peter WW., 51 AD3d 211, 856 NYS2d 258; Matter of H.M. v E.T., 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285; Yonaty v Mincolla, 97 AD3d 141, 945 NYS2d 774.) III. This Court's rulings recognizing the parental status of a non-biological parent like Brooke S.B. for purposes of child support but not for purposes of custody and visitation are irreconcilable and disserve a child's compelling interest in the emotional support of a second parent. (Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; Matter of Juanita A. v Kenneth Mark N., 15 NY3d 1, 930 NE2d 214, 904 NYS2d 293; Mahoney-Buntzman v Buntzman, 12 NY3d 415, 909 NE2d 62, 881 NYS2d 369; Matter of Sharon GG. v Duane HH., 95 AD2d 466, 467 NYS2d 941; Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677; *Hiross v Hiross, 224 AD2d 662, 639 NYS2d 70*; *Matter of Gilbert A. v Laura A., 261 AD2d 886, 689 NYS2d 810*; Matter of Lorie F. v Raymond F., 239 AD2d 659, 657 NYS2d 235; Matter of Boyles v Boyles, 95 AD2d 95, 466 NYS2d 762; Matter of Christopher S. v Ann Marie S., 173 Misc 2d 824, 662 NYS2d 200.) IV. Inaction by the legislature calls for the courts to address, not ignore, the needs of this child. (Windsor v United States, 699 F3d 169; Bourquin v Cuomo, 85 NY2d 781, 652 NE2d 171, 628 NYS2d 618; Clark v Cuomo, 66 NY2d 185, 486 NE2d 794, 495 NYS2d 936; Matter of Mashnouk v Miles, 55 NY2d 80, 432 NE2d 761, 447 NYS2d 889.) V. This Court should adopt standards, as many other states' courts have, recognizing the parental status of a person who, with the consent of a child's biological or adoptive parent, functions as the child's intended second parent. (Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; Matter of Juanita A. v Kenneth Mark N., 15 NY3d 1, 930 NE2d 214, 904 NYS2d 293; Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238.) VI. Recognizing the standing of bonded intended parents would enhance, not diminish, certainty and stability for children and their parents. (Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Matter of Tropea v Tropea, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575; Matter of Bonfiglio v Bonfiglio, 134 AD2d 426, 521 NYS2d 49; Stanley v Illinois, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551.) VII. Neither the availability of marriage and civil union, nor of second-parent adoption, cures the injustice of refusing standing to Brooke S.B. (Zablocki v Redhail, 434 US 374, 98 S Ct 673, 54 L Ed 2d 618; Godfrey v Spano, 13 NY3d 358, 920 NE2d 328, 892 NYS2d 272; M. L. B. v S. L. J., 519 US 102, 117 S Ct 555, 136 L Ed 2d 473; Matter of Sebastian, 25 Misc 3d 567, 879 NYS2d 677; Plyler v Doe, 457 US 202, 102 S Ct 2382, 72 L Ed 2d 786; Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; Matter of Behrens v Rimland, 32 AD3d 929, 822 NYS2d 285; Matter of Janis C. v Christine T., 294 AD2d 496, 742 NYS2d 381; Beth R. v Donna M., 19 Misc 3d 724, 853 NYS2d 501.) VIII. Denying M.B. and Brooke S.B. the right to enforce their parent-child relationship violates the New York and U.S. Constitutions. (Planned Parenthood of Central Mo. v Danforth, 428 US 52, 96 S Ct 2831, 49 L Ed 2d 788; Smith v Organization of Foster Families For Equality & Reform, 431 US 816, 97 S Ct 2094, 53 L Ed 2d 14; Lehr v Robertson, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; Michael H. v Gerald D., 491 US 110, 109 S Ct 2333, 105 L Ed 2d 91; Prince v Massachusetts, 321 US 158, 64 S Ct 438, 88 L Ed 645; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; Matter of E.S. v P.D., 8 NY3d 150, 863 NE2d 100, 831 NYS2d 96; Gomez v Perez, 409 US 535, 93 S Ct 872, 35 L Ed 2d 56; Weber v Aetna Casualty & Surety Co., 406 US 164, 92 S Ct 1400, 31 L Ed 2d 768; Levy v Louisiana, 391 US 68, 88 S Ct 1509, 20 L Ed 2d 436.)

Sherry A. Bjork, Frewsburg, for Elizabeth A.C.C., respondent in the first above-entitled proceeding. I. The argument for equitable estoppel is not applicable to this case and should not be extended to putative parents in custody and visitation proceedings concerning children with whom they lack a biological or adoptive relation. (Matter of A.F. v K.H., 121 AD3d 683, 993 NYS2d 370; Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, 436 NE2d 1265, 451 NYS2d 663; *Matter of Palmatier v Dane, 97 AD3d 864, 948 NYS2d 181*; Matter of Behrens v Rimland, 32 AD3d 929, 822 NYS2d 285; Matter of Janis C. v Christine T., 294 AD2d 496, 742 NYS2d 381; Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238.) II. The definition of "parent" set forth in Matter of

Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]), is not obsolete in light of the Marriage Equality Act, Domestic Relations Law § 10-a, and the decision of the United States Supreme Court in Obergefell v Hodges (576 US —, 135 S Ct 2584, 192 L Ed 2d 609 [2015]), which implicitly recognizes that biology and adoption are no longer the sole means to establish parentage. III. Constitutional due process and equal protection guarantees do not require courts to grant standing to a putative parent to bring a custody and visitation proceeding concerning a child with whom the putative parent lacks a biological or adoptive relation, where the biological or adoptive parent has consented to the formation of a parent-child relationship between the putative parent and the child, and the putative parent has assumed the full panoply of parental functions. IV. Constitutional due process and equal protection guarantees do not give a child the right to maintain a relationship with a person unrelated to the child through biology or adoption, who, with the consent of the child's biological or adoptive parent, has developed a parent-child relationship with the child and who has assumed the full panoply of parental functions. V. A partner of an unmarried parent can be denied standing to seek custody and visitation even where the unmarried parent has consented to the establishment of a parental relationship between the parent's partner and child; and the partner assumed the obligations of parenthood, resulting in formation of a bonded parental relationship with the child. (People ex rel. Kropp v Shepsky, 305 NY 465, 113 NE2d 801; Matter of Bennett v Jeffreys, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821.) VI. Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]), approved in dicta in Debra H. v Janice R. (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]), should be not be overruled by the Court. (Wendy G-M. v Erin G-M., 45 Misc 3d 574, 985 NYS2d 845.)

Quatela, Hargraves & Chimeri, PLLC, Hauppauge (*Christopher J. Chimeri* and *Margaret Schaefler* of counsel), for appellant in the second above-entitled proceeding. A hearing court may not grant visitation to non-parents absent the fit biological parent's consent and respondent lacked standing absent statutory criteria. (Perry-Rogers v Fasano, 276 AD2d 67, 715 NYS2d 19; Meyer v Nebraska, 262 US 390, 43 S Ct 625, 67 L Ed 1042; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; Matter of Darlene T., 28 NY2d 391, 271 NE2d 215, 322 NYS2d 231; Matter of Bennett v Jeffreys, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821; Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238; *Matter of Palmatier v Dane, 97 AD3d 864, 948 NYS2d 181*; Matter of A.F. v K.H., 121 AD3d 683, 993 NYS2d 370.)

Kramer Levin Naftalis & Frankel LLP, New York City (*Andrew J. Estes* and *Jeffrey S. Trachtman* of counsel), and *Gervase & Mintz P.C.*, Garden City (*Susan G. Mintz* of counsel), for respondent in the second above-entitled proceeding. I. Estrellita A. has standing to seek visitation because she was adjudicated a parent in the support matter at Jennifer L.D.'s request. (Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Matter of H.M. v E.T., 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285; Perry-Rogers v Fasano, 276 AD2d 67, 715 NYS2d 19; Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; Counihan v Bishop, 111 AD3d 594, 974 NYS2d 137; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; Meyer v Nebraska, 262 US 390, 43 S Ct 625, 67 L Ed 1042; Matter of Tropea v Tropea, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575; Weiss v Weiss, 52 NY2d 170, 418 NE2d 377, 436 NYS2d 862.) II. The Family Court and the Appellate Division properly applied judicial estoppel to prevent Jennifer L.D. from challenging Estrellita A.'s status as a legal parent. (Anonymous v Anonymous, 137 AD2d 739, 524 NYS2d 823; Ford Motor Credit Co. v Colonial Funding Corp., 215 AD2d 435, 626 NYS2d 527; Matter of Mukuralinda v Kingombe, 100 AD3d 1431, 954 NYS2d 316; Mahoney-Buntzman v Buntzman, 12 NY3d 415, 909 NE2d 62, 881 NYS2d 369; *Crespo v Crespo, 309 AD2d 727, 765 NYS2d 59*; Perkins v Perkins, 226 AD2d 610, 641 NYS2d 396; Matter of A.F. v K.H., 121 AD3d 683, 993 NYS2d 370; Gabrelian v Gabrelian, 108 AD2d 445, 489 NYS2d 914; CDR Créances S.A.S. v Cohen, 23 NY3d 307, 991 NYS2d 519, 15 NE3d 274; Alvarez v Snyder, 264 AD2d 27, 702 NYS2d 5.) III. Even if, arguendo, the Family Court decision was inconsistent with Debra H. v Janice R. (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]) or Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]), this Court should modify, abrogate, or overrule those decisions to recognize standing here. (Matter of Bennett v Jeffreys, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821; *Matter of Gilbert A. v Laura A., 261 AD2d 886, 689 NYS2d 810*; Telaro v Telaro, 25 NY2d 433, 255 NE2d 158, 306 NYS2d 920; Matter of

Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *People v Peque, 22 NY3d 168, 980 NYS2d 280, 3 NE3d 617*; *People v Bing, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474*; *Matter of Angelo A.R. v Tenisha N.W., 108 AD3d 561, 969 NYS2d 109*; *Matter of Bruce W.L. v Carol A.P., 46 AD3d 1471, 848 NYS2d 493*; *Matter of Enrique G. v Lisbet E., 2 AD3d 288, 769 NYS2d 533*; *Matter of Lorie F. v Raymond F., 239 AD2d 659, 657 NYS2d 235*.)

Legal Aid Society of Suffolk County, Inc., Central Islip (*John B. Belmonte* and *Robert C. Mitchell* of counsel), Attorney for the Child, in the second above-entitled proceeding. I. Applying the principle of estoppel against inconsistent positions to determine respondent had standing as a parent to seek custody of or visitation with H.E.A.-D. does not violate the precedents of this honorable Court. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586*; *Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199*; *Matter of H.M. v E.T., 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285*; *Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263*; *Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238*; *Anonymous v Anonymous, 137 AD2d 739, 524 NYS2d 823*; *New Hampshire v Maine, 532 US 742, 121 S Ct 1808, 149 L Ed 2d 968*.) II. If this Court determines that applying the principle of estoppel against inconsistent positions to determine respondent has standing as a parent to seek custody of or visitation with H.E.A.-D. violates the rule of law in *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* and *Debra H. v Janice R. (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010])*, then this Court should overrule those cases because they deny the rights of the child without due process of law. (*Matter of Bennett v Jeffreys, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821*.)

Suzanne B. Goldberg, Columbia Law School, New York City, for Richard J. Adago and others, amici curiae in the first above-entitled proceeding. I. Family law academics overwhelmingly endorse a functional approach to recognizing the legal family. II. Adoption of a functional approach to recognizing parent-child relationships in jurisdictions across the country, including New York, confirms the approach's viability and simplicity. (*People v Damiano, 87 NY2d 477, 663 NE2d 607, 640 NYS2d 451*; *People v Taylor, 9 NY3d 129, 878 NE2d 969, 848 NYS2d 554*; *People v Hobson, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419*; *People v Bing, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474*; *Burnet v Coronado Oil & Gas Co., 285 US 393, 52 S Ct 443, 76 L Ed 815, 1932 CB 265, 1932-1 CB 265*; *Bing v Thunig, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3*; *Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199*; *Matter of Bennett v Jeffreys, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821*; *Finlay v Finlay, 240 NY 429, 148 NE 624*; *Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263*.)

Cleary Gottlieb Steen & Hamilton LLP, New York City (*Carmine D. Boccuzzi* and *Daniel D. Queen* of counsel), for National Association of Social Workers and others, amici curiae in the first and second above-entitled proceedings. I. Parent-child attachment relationships are critical to a child's healthy development. II. The absence of a biological or adoptive connection between Brooke S.B. and Estrellita A. and the children did not affect the development of attachment relationships. III. Terminating the children's attachment relationships with Brooke S.B. and Estrellita A. would result in emotional harm to the children. IV. The children's health and welfare are best served by nurturing and maintaining their relationships with Brooke S.B. and Estrellita A. as well as their biological mothers.

Ropes & Gray LLP, New York City (*Christopher Thomas Brown* and *Michael Y. Jo* of counsel), *Ropes & Gray LLP*, Boston, Massachusetts (*Kathryn E. Wilhelm* and *Joshua D. Rovenger* of counsel), *National Center for Lesbian Rights*, San Francisco, California, *American Civil Liberties Union*, New York City, *New York Civil Liberties Union*, New York City, and *New York City Gay and Lesbian Anti-Violence Project*, New York City, for National Center for Lesbian Rights and others, amici curiae in the first above-entitled proceeding. I. New York lags behind other states by denying unmarried non-biological parents standing to protect their relationships with their children. (*Laura WW. v Peter WW., 51 AD3d 211, 856 NYS2d 258*.) II. Recognizing the standing of unmarried non-biological parents to seek custody or visitation rights would not violate the constitutional rights of biological parents. III. Granting unmarried non-biological parents the right to seek custody and visitation is necessary to protect the rights of such

parents and their children under the United States Constitution. (Lehr v Robertson, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; Matter of Robert O. v Russell K., 80 NY2d 254, 604 NE2d 99, 590 NYS2d 37; Smith v Organization of Foster Families For Equality & Reform, 431 US 816, 97 S Ct 2094, 53 L Ed 2d 14; Michael H. v Gerald D., 491 US 110, 109 S Ct 2333, 105 L Ed 2d 91; M. L. B. v S. L. J., 519 US 102, 117 S Ct 555, 136 L Ed 2d 473; Zablocki v Redhail, 434 US 374, 98 S Ct 673, 54 L Ed 2d 618; Shapiro v Thompson, 394 US 618, 89 S Ct 1322, 22 L Ed 2d 600; Little v Streater, 452 US 1, 101 S Ct 2202, 68 L Ed 2d 627; Stanley v Illinois, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551; Planned Parenthood of Central Mo. v Danforth, 428 US 52, 96 S Ct 2831, 49 L Ed 2d 788.)

Ropes & Gray LLP, New York City (*Christopher Thomas Brown* and *Michael Y. Jo* of counsel), *Ropes & Gray LLP*, Boston, Massachusetts (*Kathryn E. Wilhelm* and *Joshua D. Rovenger* of counsel), *National Center for Lesbian Rights,* San Francisco, California, *American Civil Liberties Union*, New York City, and *New York City Gay and Lesbian Anti-Violence Project*, New York City, for National Center for Lesbian Rights and others, amici curiae in the second above-entitled proceeding. In this case, both the Family Court and the Second Department correctly found that Estrellita A. is a parent to her child and is therefore responsible for child support and entitled to visitation. (Matter of H.M. v E.T., 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285.)

Latham & Watkins LLP, New York City (*Virginia F. Tent*, *Grant F. Wahlquist* and *Katelyn M. Beaudette* of counsel), for Association of the Bar of the City of New York and others, amici curiae in the first above-entitled proceeding. I. The current interpretation of Domestic Relations Law § 70 under Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) and its progeny harms parents like Brooke S.B. and children like M.B. (People ex rel. Glendening v Glendening, 259 App Div 384, 19 NYS2d 693; Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; People ex rel. Spreckels v deRuyter, 150 Misc 323, 269 NYS 100; Ullman v Ullman, 151 App Div 419, 135 NYS 1080; Linda R. v Richard E., 162 AD2d 48, 561 NYS2d 29; People ex rel. Watts v Watts, 77 Misc 2d 178, 350 NYS2d 285; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49.) II. Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) and its progeny violate the constitutional rights of LGBT parents and their children. (Stanley v Illinois, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551; Meyer v Nebraska, 262 US 390, 43 S Ct 625, 67 L Ed 1042; Planned Parenthood of Central Mo. v Danforth, 428 US 52, 96 S Ct 2831, 49 L Ed 2d 788; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; Smith v Organization of Foster Families For Equality & Reform, 431 US 816, 97 S Ct 2094, 53 L Ed 2d 14; Lehr v Robertson, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; Windsor v United States, 699 F3d 169; Matter of C.M. v C.H., 6 Misc 3d 361, 789 NYS2d 393; Matter of Gilbert A. v Laura A., 261 AD2d 886, 689 NYS2d 810; Matter of Christopher S. v Ann Marie S., 173 Misc 2d 824, 662 NYS2d 200.) III. Equity demands that Brooke S.B., and those like her, be recognized as parents. (Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, 436 NE2d 1265, 451 NYS2d 663; Metropolitan Life Ins. Co. v Childs Co., 230 NY 285, 130 NE 295; Triple Cities Constr. Co. v Maryland Cas. Co., 4 NY2d 443, 151 NE2d 856, 176 NYS2d 292; Romano v Metropolitan Life Ins. Co., 271 NY 288, 2 NE2d 661; Rothschild v Title Guar. & Trust Co., 204 NY 458, 97 NE 879; White v La Due & Fitch, Inc., 303 NY 122, 100 NE2d 167; Matter of Sandfort v Sandfort, 278 App Div 331, 105 NYS2d 343; Finlay v Finlay, 240 NY 429, 148 NE 624; Matter of Rich v Kaminsky, 254 App Div 6, 3 NYS2d 689; Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199.) IV. The In re Custody of H.S.H.-K. (193 Wis 2d 649, 533 NW2d 419 [1995]) test provides a model for assessing the claims of parents like Brooke S.B. (Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; Kujek v Goldman, 150 NY 176, 44 NE 773, 4 NY Ann Cas 11; Matter of Molinari v Tuthill, 59 AD3d 722, 875 NYS2d 495; Matter of Shreve v Shreve, 229 AD2d 1005, 645 NYS2d 198.)

Latham & Watkins LLP, New York City (*Virginia F. Tent*, *Grant F. Wahlquist* and *Katelyn M. Beaudette* of counsel), for Association of the Bar of the City of New York and others, amici curiae in the second above-entitled proceeding. I. Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) adopted an unconstitutional and unnecessarily restrictive definition of "parent." (People ex rel. Glendening v Glendening, 259 App Div 384, 19 NYS2d 693; People ex rel. Spreckels v deRuyter, 150 Misc 323, 269 NYS 100; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49.) II. Equity demands that Estrellita

A. be recognized as a parent. (*White v La Due & Fitch, Inc., 303 NY 122, 100 NE2d 167*; *Matter of Sandfort v Sandfort, 278 App Div 331, 105 NYS2d 343*; *Finlay v Finlay, 240 NY 429, 148 NE 624*; *Matter of Rich v Kaminsky, 254 App Div 6, 3 NYS2d 689*; *Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199*; *Anonymous v Anonymous, 137 AD2d 739, 524 NYS2d 823*; *Davis v Citibank, N.A., 116 AD3d 819, 984 NYS2d 388*; *Matter of Mukuralinda v Kingombe, 100 AD3d 1431, 954 NYS2d 316*; *Mahoney-Buntzman v Buntzman, 12 NY3d 415, 909 NE2d 62, 881 NYS2d 369*; *Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263*.) III. The *In re Custody of H.S.H.-K. (193 Wis 2d 649, 533 NW2d 419 [1995])* test provides a model for assessing the claims of parents like Estrellita A.

David P. Miranda, New York State Bar Association, Albany, and *Paul, Weiss, Rifkind, Wharton & Garrison, LLP*, New York City (*Roberta A. Kaplan* and *Nila M. Merola* of counsel), for New York State Bar Association, amicus curiae in the first above-entitled proceeding. I. The Court is not bound by past precedent that is manifestly unjust. (*Silver v Great Am. Ins. Co., 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398*; *Bing v Thunig, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3*; *Payne v Tennessee, 501 US 808, 111 S Ct 2597, 115 L Ed 2d 720*; *Helvering v Hallock, 309 US 106, 60 S Ct 444, 84 L Ed 604, 1940-1 CB 223*; *People v Hobson, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419*; *Moragne v States Marine Lines, Inc., 398 US 375, 90 S Ct 1772, 26 L Ed 2d 339*; *People v Rudolph, 21 NY3d 497, 997 NE2d 457, 974 NYS2d 885*; *People v Epton, 19 NY2d 496, 227 NE2d 829, 281 NYS2d 9*; *Woods v Lancet, 303 NY 349, 102 NE2d 691*; *Funk v United States, 290 US 371, 54 S Ct 212, 78 L Ed 369*.) II. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* is outmoded and should be overturned. (*Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49*; *Braschi v Stahl Assoc. Co., 74 NY2d 201, 543 NE2d 49, 544 NYS2d 784*; *Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716*; *Counihan v Bishop, 111 AD3d 594, 974 NYS2d 137*; *Wendy G-M. v Erin G-M., 45 Misc 3d 574, 985 NYS2d 845*; *Matter of Leora F. v Sofia D., 167 Misc 2d 840, 635 NYS2d 418*; *Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754*; *Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238*; *Beth R. v Donna M., 19 Misc 3d 724, 853 NYS2d 501*; *Matter of C.M. v C.H., 6 Misc 3d 361, 789 NYS2d 393*.) III. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* "bright-line rule" creates more uncertainty and has been rejected by other states. (*Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263*.) IV. Application of *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* is increasingly untenable and illogical. (*Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199*; *Matter of H.M. v E.T., 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285*; *Kalechman v Drew Auto Rental, 33 NY2d 397, 308 NE2d 886, 353 NYS2d 414*; *Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754*; *Matter of Janis C. v Christine T., 294 AD2d 496, 742 NYS2d 381*; *Matter of Cindy P. v Danny P., 206 AD2d 615, 614 NYS2d 479*; *Matter of Gilbert A. v Laura A., 261 AD2d 886, 689 NYS2d 810*; *Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677*; *Matter of Christopher S. v Ann Marie S., 173 Misc 2d 824, 662 NYS2d 200*; *Moragne v States Marine Lines, Inc., 398 US 375, 90 S Ct 1772, 26 L Ed 2d 339*.)

Loeb & Loeb, LLP, New York City (*Eugene R. Licker* of counsel), for American Academy of Adoption Attorneys and others, amici curiae in the first above-entitled proceeding. I. This Court's decisions regarding standing under *Domestic Relations Law § 70* affect significant numbers of couples conceiving children through assisted reproductive technology. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586*.) II. A child's emotional bond to their "parent" is not dependent on whether they are genetically related to that person. (*Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716*.) III. Adoption is not a proper litmus test for parenthood for purposes of *Domestic Relations Law § 70*. (*Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716*; *T.V. v New York State Dept. of Health, 88 AD3d 290, 929 NYS2d 139*; *Matter of Sebastian, 25 Misc 3d 567, 879 NYS2d 677*; *Matter of J.J., 44 Misc 3d 297, 984 NYS2d 841*; *Itskov v New York Fertility Inst., Inc., 11 Misc 3d 68, 813 NYS2d 844*.) IV. This Court should apply a facts and circumstances test to determine parenthood. (*Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263*; *Matter of Suarez v Williams, 26 NY3d 440, 23 NYS3d 617, 44 NE3d 915*; *Matter of Granger v Misercola, 21 NY3d 86, 990 NE2d 110, 967 NYS2d 872*; *Matter of Tropea v Tropea, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575*; *Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199*; *Matter of Chaya S. v Frederick Herbert L., 90 NY2d 389, 683 NE2d 746, 660 NYS2d 840*; *People ex rel. Sibley v Sheppard, 54 NY2d 320, 429 NE2d 1049, 445 NYS2d 420*; *Matter of Corey L v*

Martin L, 45 NY2d 383, 380 NE2d 266, 408 NYS2d 439; Matter of Boden v Boden, 42 NY2d 210, 366 NE2d 791, 397 NYS2d 701; Matter of Stuart, 280 NY 245, 20 NE2d 741.)

Cahill Gordon & Reindel LLP, New York City (*S. Penny Windle, Kerry Burns, Cindy Hong* and *Rebecca Salk* of counsel), for Sanctuary for Families and others, amici curiae in the first above-entitled proceeding. I. Applying a functional standard to determine parental standing would have unintended negative consequences for parents and children. (Prince v Massachusetts, 321 US 158, 64 S Ct 438, 88 L Ed 645; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; Stanley v Illinois, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551; Pierce v Society of Sisters, 268 US 510, 45 S Ct 571, 69 L Ed 1070; Meyer v Nebraska, 262 US 390, 43 S Ct 625, 67 L Ed 1042; Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Matter of Fountain v Fountain, 83 AD2d 694, 442 NYS2d 604; Caban v Mohammed, 441 US 380, 99 S Ct 1760, 60 L Ed 2d 297.) II. The Court should recognize the parental rights of Brooke S.B. without adopting a dangerous functional standard to determine parental standing in New York. (Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; Matter of Bennett v Jeffreys, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821; Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677; Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199.)

Fried, Frank, Harris, Shriver & Jacobson LLP, New York City (*Jennifer L. Colyer, Justin J. Santolli* and *Naz E. Wehrli* of counsel), for Lawyers for Children and another, amici curiae in the first and second above-entitled proceedings. I. The continuity of the parent-child attachment bond is critical to a child's development and well-being and should be preserved in the child's best interest. (Matter of Tropea v Tropea, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575.) II. Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) has imposed unjustifiable hardships on children and should be overturned. (Matter of C.M. v C.H., 6 Misc 3d 361, 789 NYS2d 393; Beth R. v Donna M., 19 Misc 3d 724, 853 NYS2d 501; Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754; Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238.) III. New York courts have the necessary competence to adjudicate claims of non-biological, intended parenthood. (Matter of Juanita A. v Kenneth Mark N., 15 NY3d 1, 930 NE2d 214, 904 NYS2d 293; Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; Matter of Baby Boy C., 84 NY2d 91, 638 NE2d 963, 615 NYS2d 318; Matter of H.M. v E.T., 76 AD3d 528, 906 NYS2d 85, 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285; Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677; Matter of Christopher S. v Ann Marie S., 173 Misc 2d 824, 662 NYS2d 200; *Matter of Christian N. v Shante Jovan B., 132 AD3d 470, 18 NYS3d 368*.) IV. The availability of second-parent adoption or the right for same-sex couples to marry does not adequately protect children. (Debra H. v Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263.)

Judges: Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey took no part (For Case No. 91). Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey took no part **[****2]** (For Case No. 92).

Opinion by: ABDUS-SALAAM

Opinion

[*91] [**490] [*13]** Abdus-Salaam, J.

These two cases call upon us to assess the continued vitality of the rule promulgated in Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])—namely that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not that child's "parent" for purposes of standing to seek custody or visitation under Domestic Relations Law § 70 (a), notwithstanding their "established relationship with the child" **[*14]** (77 NY2d at 655). Petitioners in these cases, who similarly lack any biological or adoptive connection to the subject children, argue that they should have standing to seek custody

and visitation pursuant to Domestic Relations Law § 70 (a). We agree that, HN1[] in light of more recently delineated legal principles, the definition of "parent" established by this Court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships. Accordingly, today, we overrule Alison D. and hold that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70.

I.

Matter of Brooke S.B. v Elizabeth A.C.C.

Petitioner and respondent entered into a relationship in 2006 and, one **[****3]** year later, announced their engagement.[1] At the time, however, this was a purely symbolic gesture; same-sex couples could not legally marry in New York. Petitioner and respondent lacked the resources to travel to another jurisdiction to enter into a legal arrangement comparable to marriage, and it was then unclear whether New York would recognize an out-of-state same-sex union.

[*92] [**491]** Shortly thereafter, the couple jointly decided to have a child and agreed that respondent would carry the child. In 2008, respondent became pregnant through artificial insemination. During respondent's pregnancy, petitioner regularly attended prenatal doctor's appointments, remained involved in respondent's care, and joined respondent in the emergency **[3]** room when she had a complication during the pregnancy. Respondent went into labor in June 2009. Petitioner stayed by her side and, when the subject child, a baby boy, was born, petitioner cut the umbilical cord. The couple gave the **[****4]** child petitioner's last name.

The parties continued to live together with the child and raised him jointly, sharing in all major parental responsibilities. Petitioner stayed at home with the child for a year while respondent returned to work. The child referred to petitioner as "Mama B."

[*15] In 2010, the parties ended their relationship. Initially, respondent permitted petitioner regular visits with the child. In late 2012, however, petitioner's relationship with respondent deteriorated and, in or about July 2013, respondent effectively terminated petitioner's contact with the child.

Subsequently, petitioner commenced this proceeding seeking joint custody of the child and regular visitation. Family Court appointed an attorney for the child. That attorney determined that the child's best interests would be served by allowing regular visitation with petitioner.

Respondent moved to dismiss the petition, asserting that petitioner lacked standing to seek visitation or custody under Domestic Relations Law § 70 as interpreted in *Alison D.* because, in the absence of a biological or adoptive connection to the child, petitioner was not a "parent" within the meaning of the statute. Petitioner and the attorney for the child opposed **[****5]** the motion, contending that, in light of the legislature's enactment of the Marriage Equality Act (*see* L 2011, ch 95; Domestic Relations Law § 10-a) and other changes in the law, *Alison D.* should no longer be followed. They further argued that petitioner's long-standing parental relationship with the child conferred standing to seek custody and visitation under principles of equitable estoppel.

After hearing argument on the motion, Family Court dismissed the petition. While commenting on the "heartbreaking" nature of the case, Family Court noted that petitioner did not adopt the child and therefore granted respondent's motion to dismiss on constraint of *Alison D.* The attorney for the child appealed.[2]

The Appellate Division unanimously affirmed (*see* 129 AD3d 1578, 1578-1579, 10 NYS3d 380 [4th Dept 2015]). The Court concluded that, because petitioner had not married respondent, had not adopted the child, and had no biological relationship to the child, *Alison D.* prohibited Family Court from ruling that petitioner had standing to seek custody or visitation (*see* id. at 1579). We granted the attorney for the child leave to appeal (*see 26 NY3d 901, 17 NYS3d 81, 38 NE3d 827 [2015]).*

[4] *Matter of Estrellita A. v Jennifer* ***[****6]*** *L.D.*

Petitioner and respondent entered into a relationship in 2003 and moved in together later that year. In 2007, petitioner and **[*16]** respondent registered as domestic partners, and thereafter, they agreed to have a **[**492]**

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[1] The parties in both cases before us dispute the relevant facts. Given the procedural posture of these cases, our summary of the facts is derived from petitioners' allegations in court filings and relevant decisions of the courts below.

[2] Petitioner appealed but, citing her financial condition, proceeded without an attorney. Her appeal was subsequently dismissed.

[*93]** child. The couple jointly decided that respondent would bear the child and that the donor should share petitioner's ethnicity. In February 2008, respondent became pregnant through artificial insemination. During the pregnancy, petitioner attended medical appointments with respondent. In November 2008, respondent gave birth to a baby girl. Petitioner cut the umbilical cord. The couple agreed that the child should call respondent "Mommy" and petitioner "Mama."

The child resided with the couple in their home and, over the next three years, the parties shared a complete range of parental responsibilities. However, in May 2012, petitioner and respondent ended their relationship, and petitioner moved out in September 2012. Afterward, petitioner continued to have contact with the child.

In October 2012, respondent commenced a proceeding in Family Court seeking child support from petitioner. Petitioner denied liability. While the support case was pending, petitioner filed a petition in **[****7]** Family Court that, as later amended, sought visitation with the child. The court appointed an attorney for the child.

After a hearing, Family Court granted respondent's child support petition and remanded the matter to a support magistrate to determine petitioner's support obligation. The court held that "the uncontroverted facts establish[ed]" that petitioner was "a parent" to the child and, as such, "chargeable with the support of the child." Petitioner then amended her visitation petition to indicate that she "ha[d] been adjudicated the parent" of the child and therefore was a legal parent for visitation purposes.

Thereafter, respondent moved to dismiss the visitation petition on the ground that petitioner did not have standing to seek custody or visitation under Domestic Relations Law § 70 as interpreted in *Alison D.* The attorney for the child supported visitation and opposed respondent's motion to dismiss. Petitioner also opposed respondent's motion to dismiss, asserting that *Alison D.* and our decision in Debra H. v Janice R. (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]) did not foreclose a finding of standing based on judicial estoppel, as the prior judgment in the support proceeding determined that petitioner was a legal parent to the subject child. Respondent contended that the prerequisites **[****8]** for judicial estoppel had not been met.

[*17] Family Court denied respondent's motion to dismiss the visitation petition (*see* 40 Misc 3d 219, 219-225, 963 NYS2d 843 [Fam Ct, Suffolk County 2013]). Citing *Alison D.* and *Debra H.*, the court acknowledged that petitioner did not have standing to petition for visitation based on equitable estoppel or her general status as a de facto parent (*see* id. at 225). However, given respondent's successful support petition, the court concluded that the doctrine of judicial estoppel conferred standing on petitioner to request visitation with the child (*see* id. at 225). The court distinguished **[5]** *Alison D.* and *Debra H.*, reasoning that, in those cases, the Court "did not address the situation . . . where one party has asserted inconsistent positions" (*id.*). Here, in light of respondent's initial claim that petitioner was the child's legal parent in the support proceeding, the court "ma[de] a finding that respondent [wa]s judicially estopped from asserting that petitioner [wa]s not a parent based upon her sworn petition and testimony in a prior court proceeding where she took a different position because her interest in that case was different" (*id.*). Respondent filed an interlocutory appeal, **[**493]** **[***94]** which was dismissed by the Appellate Division.

Subsequently, Family Court **[****9]** held a hearing on the petition. The court found that petitioner's regular visitation and consultation on matters of import with respect to the child would serve the child's best interests. Respondent appealed.

Family Court's order was unanimously affirmed (*see 123 AD3d 1023, 1023-1027, 999 NYS2d 504 [2d Dept 2014]*). The Appellate Division determined that, while Domestic Relations Law § 70, as interpreted in *Alison D.*, confers standing to seek custody or visitation only on a biological or adoptive parent, *Alison D.* does not preclude recognition of standing based upon the doctrine of judicial estoppel. Under that doctrine, the Court found, "a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed" (*id. at 1026* [internal quotation marks and citations omitted]). The Appellate Division agreed with Family Court that the requirements of judicial estoppel had been met: respondent's position in the support proceeding was inconsistent with her position in the visitation proceeding; respondent had won a favorable judgment based on her earlier position; and allowing respondent to maintain an inconsistent position in the visitation **[****10]** proceeding would prejudice petitioner (*see id. at 1026*). Accordingly, the **[*18]** Appellate Division concluded that respondent was judicially estopped from denying petitioner's

standing as a "parent" of the child within the meaning of Domestic Relations Law § 70 (*see id. at 1026-1027*). We granted respondent leave to appeal (*see 26 NY3d 901, 17 NYS3d 81, 38 NE3d 827 [2015]*).

II.

Domestic Relations Law § 70 provides:

> HN2[] "Where a minor child is residing within this state, *either parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the *best interest of the child, and what will best promote its welfare and happiness*, and make award accordingly" (Domestic Relations Law § 70 [a] [emphases added]).

HN3[] Only a "parent" may petition for custody or visitation under Domestic Relations Law § 70, yet the statute does not define that critical term, leaving it to be defined **[****11]** by the courts.[3]

In Alison D. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586), we supplied a definition. In that case, Alison D. and Virginia M. were in a long-term relationship and decided to have a child (*see* Alison D., 77 NY2d at 655). They agreed that Virginia M. would carry the baby and that they would jointly raise the child, sharing parenting responsibilities (*see id.*). After the **[**494]** **[***95]** child was born, Alison D. acted as a parent in all major respects, providing financial, emotional and practical support (*see id.*). Even after the couple ended their relationship and moved out of their shared home, Alison D. continued to regularly visit the child until he was about six years old, at which point Virginia M. terminated contact between them (*see id.*).

[*19] Alison D. petitioned for visitation pursuant to Domestic Relations Law § 70 (*see* id. at 656). In support of the petition, Alison D. argued that, although Virginia M. was concededly a fit parent, Alison D. nonetheless had standing to seek visitation with the child (*see id.*). The lower courts dismissed Alison D.'s petition for lack of standing, ruling that only a biological parent—and not a de facto parent—is a **[****12]** legal "parent" with standing to seek visitation under Domestic Relations Law § 70 (*see id.*; *see also* Matter of Alison D. v Virginia M., 155 AD2d 11, 13-16, 552 NYS2d 321 [2d Dept 1990]).

We affirmed the lower courts' dismissal of Alison D.'s petition for lack of standing (*see* Alison D., 77 NY2d at 655, 657). We decided that the word "parent" in Domestic Relations Law § 70 should be interpreted to preclude standing for a de facto parent who, under a theory of equitable estoppel, might otherwise be recognized as the child's parent for visitation purposes (*see* id. at 656-657). Specifically, we held that "a biological stranger to a child who is properly in the custody of his biological mother" has no "standing to seek visitation with the child under Domestic Relations Law § 70" (id. at 654-655).

We rested our determination principally on the need to preserve the rights of biological parents (*see* id. at 656-657). Specifically, we reasoned that, "[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child" (id. at 656). We therefore determined that the statute should not be read to permit a de facto parent to seek visitation of a child in a manner that "would necessarily impair the parents' right to custody and control" (id. at 656-657).

Additionally, we suggested that, because the legislature expressly allowed certain **[6]** non-parents—namely, grandparents and siblings—to seek custody **[****13]** or visitation (*see* Domestic Relations Law §§ 71-72), it must have intended to exclude de facto parents or parents by estoppel (*see* Alison D., 77 NY2d at 657). And so, because Alison D. had no biological or adoptive connection to the subject child, she had no standing to seek visitation and "no right to petition the court to displace the choice made by this fit parent in deciding what is in the child's best interests" (*id.*).

Judge Kaye dissented on the ground that a person who "stands in loco parentis" should have standing to seek visitation under Domestic Relations Law § 70 (*see* id. at 657-662 **[*20]** [Kaye, J., dissenting]). Observing that the Court's decision would "fall[ ] hardest" on the millions of children raised in nontraditional families—including

[3] We note that by the use of the term "either," the plain language of Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time.

families headed by same-sex couples, unmarried opposite-sex couples, and stepparents—the dissent argued that the majority had "turn[ed] its back on a tradition of reading section 70 so as to promote the welfare of the children" (id. at 658-660). The dissent asserted that, because Domestic Relations Law § 70 did not define "parent" **[**495]** —and **[***96]** because the statute made express reference to the "best interest of the child"—the Court was free to craft a definition that accommodated the welfare of the child (*id.*). According to the dissent, well-established principles of equity—namely, "Supreme Court's **[****14]** equitable powers that complement" Domestic Relations Law § 70—supplied jurisdiction to act out of "concern for the welfare of the child" (id. at 660; *see* Matter of Bachman v Mejias, 1 NY2d 575, 581, 136 NE2d 866, 154 NYS2d 903 [1956]; Finlay v Finlay, 240 NY 429, 433-434, 148 NE 624 [1925]; Langerman v Langerman, 303 NY 465, 471, 104 NE2d 857 [1952]).

At the same time, Judge Kaye in her dissent recognized that

> "there must be some limitation on who can petition for visitation. Domestic Relations Law § 70 specifies that the person must be the child's 'parent,' and the law additionally recognizes certain rights of biological and legal parents. . . .
>
> "It should be required that the relationship with the child came into being with the consent of the biological or legal parent" (Alison D., 77 NY2d at 661-662 [Kaye, J., dissenting] [citations omitted]).

The dissent also noted that a properly constituted test should likely include other factors as well, to ensure that all relevant interests are protected (*see* id. at 661-662 [Kaye, J., dissenting]). Judge Kaye further stated in the dissent that she would have remanded *Alison D.* so that the lower court could engage in a two-part inquiry: first, to determine whether Alison D. stood "in loco parentis" under whatever test the Court devised; and then, "if so, whether it is in the child's best interest to allow her the visitation rights she claims" (id. at 662).

In 1991, same-sex partners could not marry in this state. Nor could a biological parent's **[****15]** unmarried partner adopt the child. As a result, a partner in a same-sex relationship not biologically related to a child was entirely precluded from obtaining standing to seek custody or visitation of that child under our definition of "parent" supplied in *Alison D.*

[*21] Four years later, in Matter of Jacob (86 NY2d 651, 660 NE2d 397, 636 NYS2d 716 [1995]), we had occasion to decide whether "the unmarried partner of a child's biological mother, whether heterosexual or **[7]** homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption" (id. at 656). We held that the adoptions sought in *Matter of Jacob*—"one by an unmarried heterosexual couple, the other by the lesbian partner of the child's mother"—were "fully consistent with the adoption statute" (*id.*). We reasoned that, while the adoption statute "must be strictly construed," our "primary loyalty must be to the statute's legislative purpose—the child's best interest" (id. at 657-658). The outcome in *Matter of Jacob* was to confer standing to seek custody or visitation upon unmarried, non-biological partners—including a partner in a same-sex relationship—who adopted the child, even under our restrictive definition of "parent" set forth in *Alison D.* (id. at 659). **[****16]**

Thereafter, in Matter of Shondel J. v Mark D. (7 NY3d 320, 853 NE2d 610, 820 NYS2d 199 [2006]), we applied a similar analysis, holding that a "man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, **[**496]** **[***97]** when the child justifiably relied on the man's representation of paternity, to the child's detriment" (id. at 324). We based our decision on "the best interests of the child," emphasizing "[t]he potential damage to a child's psyche caused by suddenly ending established parental support" (id. at 324, 330).[4]

Despite these intervening decisions that sought a means to take into account the best interests of the child in adoption and support proceedings, we declined to revisit *Alison D.* when confronted with a nearly identical situation almost 20 years later. *Debra H.*, as did *Alison D.*, involved an unmarried same-sex couple. Petitioner alleged that they agreed to have a child, and to that end, Janice R. was artificially inseminated **[****17]** and bore the child. Debra H. never adopted the child. After the

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[4] Furthermore, in Matter of H.M. v E.T. (14 NY3d 521, 930 NE2d 206, 904 NYS2d 285 [2010]), for purposes of child support proceedings, we construed Family Ct Act § 413 (1) (a) in a manner consistent with principles of equitable estoppel by interpreting the term "parents" to include a biological parent's former same-sex partner, notwithstanding the lack of a biological or adoptive connection to the child (H.M., 14 NY3d at 526-527).

couple ended their relationship, Debra H. petitioned for custody and visitation (Debra H., 14 NY3d at 586-588). We declined to expand the definition of "parent" for purposes of Domestic Relations Law § 70, **[*22]** noting that "*Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups" (id. at 593).

Nonetheless, in Debra H., we arrived at a different result than in *Alison D.* Ultimately, we invoked the common-law doctrine of comity to rule that, because the couple had entered into a civil union in Vermont prior to the child's birth—and because the union afforded Debra H. parental status under Vermont law—her parental status should be recognized under **[8]** New York law as well (*see* id. at 598-601). Seeing no obstacle in New York's public policy or comity doctrine to the recognition of the non-biological mother's standing, we declared that "New York will recognize parentage created by a civil union in Vermont," thereby granting standing to Debra H. to petition for custody and visitation of the subject child (id. at 600-601).

In a separate discussion, we also "reaffirm[ed] our holding in *Alison D.*" (id. at 589). We acknowledged the apparent tension in our decision to **[****18]** authorize parentage by estoppel in the support context (*see* Shondel J., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199) and yet deny it in the visitation and custody context (*see* Alison D., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586), but we decided that this incongruity did not fatally undermine *Alison D.* (*see* Debra H., 14 NY3d at 592-593).

Chief Judge Lippman and Judge Ciparick concurred in the result, agreeing with the majority's comity analysis but asserting that *Alison D.* should be overruled (*see* id. at 606-609 [Ciparick, J., concurring]). This concurrence asserted that *Alison D.* had indeed caused the widespread harm to children predicted by Judge Kaye's dissent (*see* id. at 606-607). Noting the inconsistency between *Alison D.* and the Court's ruling in *Shondel J.*, the concurrence concluded that "[s]upport obligations flow from parental rights; the duty to support and the rights **[**497]** **[***98]** of parentage go hand in hand and it is nonsensical to treat the two things as severable" (id. at 607). According to the concurrence, Supreme Court had "inherent equity powers and authority pursuant to Domestic Relations Law § 70 to determine who is a parent and what will serve the child's best interests" (id. at 609). Echoing the dissent in *Alison D.*, and "taking into consideration the social changes" that occurred since that decision, the concurrence called for a "flexible, multi-factored" approach to determine whether **[****19]** a parental relationship had been established (id. at 608).

A separate concurrence by Judge Smith in that case acknowledged the same social changes and proposed that, in the interest **[*23]** of insuring that "each child begins life with two parents," an appropriate test would focus on whether "a child is conceived through [artificial insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other" (id. at 611-612). Judge Smith observed that "[e]ach of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced" (id. at 611).

III.

We must now decide whether, as respondents claim, the doctrine of stare decisis warrants retention of the rule established in *Alison D.* **HN4**[] Under stare decisis, a court's decision on an issue of law should generally bind the court in future cases that present the same issue (*see* People v Rodriguez, 25 NY3d 238, 243, 10 NYS3d 495, 32 NE3d 930 [2015]; People v Taylor, 9 NY3d 129, 148-149, 878 NE2d 969, 848 NYS2d 554 [2007]). The doctrine "promotes predictability in the law, engenders reliance on our decisions, encourages judicial restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of this Court" (**[9]** **[****20]** People v Peque, 22 NY3d 168, 194, 980 NYS2d 280, 3 NE3d 617 [2013]). But in the rarest of cases, we may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of our prior decision (*see* People v Rudolph, 21 NY3d 497, 500-503, 997 NE2d 457, 974 NYS2d 885 [2013]; *see* id. at 505-507 [Graffeo, J., concurring]; People v Reome, 15 NY3d 188, 191-195, 933 NE2d 186, 906 NYS2d 788 [2010]; People v Feingold, 7 NY3d 288, 291-296, 852 NE2d 1163, 819 NYS2d 691 [2006]).

Long before our decision in *Alison D.*, New York courts invoked their equitable powers to ensure that matters of custody, visitation and support were resolved in a manner that served the best interests of the child (*see* Finlay, 240 NY at 433; Wilcox v Wilcox, 14 NY 575, 578-579 [1856]; *see generally* Guardian Loan Co. v Early, 47 NY2d 515, 520, 392 NE2d 1240, 419 NYS2d 56 [1979]; People ex rel. Lemon v Supreme Ct. of State of N.Y., 245 NY 24, 28, 156 NE 84 [1927]; De Coppet v Cone,

199 NY 56, 63, 92 NE 411 [1910]). Consistent with these broad equitable powers, our courts have historically exercised their "inherent equity powers and authority" in order to determine "who is a parent and what will serve a child's best interests" (Debra H., 14 NY3d at 609 [Ciparick, J., concurring]; *see also* NY Const, art VI, § 7 [a]).

Domestic Relations Law § 70 evolved in harmony with these equitable practices. **[**498]** **[***99]** The statute expanded in scope from a law narrowly conferring standing in custody and visitation matters **[*24]** upon a legally separated, resident "husband and wife" pair (L 1909, ch 19) to a broader measure granting standing to "either parent" without regard to separation (L 1964, ch 564). The legislature made many of these changes to conform to the courts' preexisting equitable practices (*see* L 1964, ch 564, § 1; Mem of Joint Legis **[****21]** Comm on Matrimonial and Family Laws, Bill Jacket, L 1964, ch 564 at 6). Tellingly, the statute has never mentioned, much less purported to limit, the court's equitable powers, and even after its original enactment, courts continued to employ principles of equity to grant custody, visitation or related extra-statutory relief (*see* People ex rel. Meredith v Meredith, 272 App Div 79, 82-90, 69 NYS2d 462 [2d Dept 1947], *affd* 297 NY 692, 77 NE2d 8 [1947]; Matter of Rich v Kaminsky, 254 App Div 6, 7-9, 3 NYS2d 689 [1st Dept 1938]; *cf.* Langerman, 303 NY at 471-472; Finlay, 240 NY at 430-434).

Departing from this tradition of invoking equity, in *Alison D.*, we narrowly defined the term "parent," thereby foreclosing "all inquiry into the child's best interest" in custody and visitation cases involving parental figures who lacked biological or adoptive ties to the child (Alison D., 77 NY2d at 659 [Kaye, J., dissenting]). And, in the years that followed, lower courts applying *Alison D.* were "forced to . . . permanently sever strongly formed bonds between children and adults with whom they have parental relationships" (Debra H., 14 NY3d at 606 [Ciparick, J., concurring]). By "limiting their opportunity to maintain bonds that may be crucial to their development," the rule of *Alison D.* has "fall[en] hardest on the children" (Alison D., 77 NY2d at 658 [Kaye, J., dissenting]).

As a result, in the 25 years since *Alison D.* was decided, this Court has gone to great lengths to escape the inequitable results dictated by a **[****22]** needlessly narrow interpretation of **[10]** the term "parent." Now, we find ourselves in a legal landscape wherein a non-biological, non-adoptive "parent" may be estopped from disclaiming parentage and made to pay child support in a filiation proceeding (Shondel J., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199), yet denied standing to seek custody or visitation (Alison D., 77 NY2d at 655). By creating a disparity in the support and custody contexts, *Alison D.* has created an inconsistency in the rights and obligations attendant to parenthood. Moreover, *Alison D.*'s foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court's holding in **[*25]** Obergefell v Hodges (576 US __, 135 S Ct 2584, 192 L Ed 2d 609 [2015]), which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.

Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child (*see* Alison D., 77 NY2d at 656). By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners **[****23]** will have standing regardless of marriage or adoption. It is this context that informs the Court's determination of a proper test for standing that ensures **[**499]** **[***100]** equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.

The Supreme Court has emphasized the stigma suffered by the "hundreds of thousands of children [who] are presently being raised by [same-sex] couples" (Obergefell, 576 US at ___, 135 S Ct at 2600-2601). By "fixing biology as the key to visitation rights" (Alison D., 77 NY2d at 657-658 [Kaye, J., dissenting]), the rule of *Alison D.* has inflicted disproportionate hardship on the growing number of nontraditional families across our state. At the time *Alison D.* was decided, estimates suggested that "more than 15.5 million children [did] not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent" (*id.*). Demographic changes in the past 25 years have further transformed the elusive concept of the "average American family" (Troxel v Granville, 530 US 57, 63-64, 120 S Ct 2054, 147 L Ed 2d 49 [2000]); recent census statistics reflect the large number of same-sex couples residing in New York, and that many of New York's same-sex couples are raising children who are related to only one **[****24]** partner by birth or adoption (*see* Gary J. Gates & Abigail M. Cooke, The Williams Institute, *New York Census Snapshot: 2010* at 1-3).

Relatedly, legal commentators have taken issue with *Alison D.* for its negative impact on children. A growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure—such as a de facto parent—regardless of that figure's biological or adoptive ties to the children (*see* Amanda Barfield, Note, *The Intersection of Same-Sex and Stepparent Visitation, 23 JL & Pol'y 257, 259-260 [2014]*; Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right, 16 Duke J Gender L & Pol'y 1, 7* **[*26]** *[2009]*; 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 [2008]; Mary Ellen Gill, Note, *Third Party Visitation in New York: Why the Current Standing Statute Is Failing Our Families*, 56 Syracuse L Rev 481, 488-489 [2006]; Joseph G. Arsenault, Comment, *"Family" but not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 Alb L Rev 813, 834, 836 [1995]; *see also* brief for National Association of Social Workers as amicus curiae at 13-17 [collecting articles]).

We must, however, protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children (*see* Alison D., 77 NY2d at 656-657; Troxel v Granville, 530 US 57, 65, 120 S Ct 2054, 147 L Ed 2d 49 [2000]). For certainly, "the interest of parents in the care, **[****25]** custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests," and any infringement on that right "comes with an obvious cost" (Troxel, 530 US at 64-65). But here we do not consider whether to allow a third party to contest or infringe on those rights; rather, the issue is who qualifies as a "parent" with coequal rights. Nevertheless, the fundamental nature of those rights mandates caution in expanding the definition of that term and makes the element of consent of the biological or adoptive parent critical.

[1] While "parents and families have fundamental liberty interests in preserving" intimate family-like bonds, "so, too, do children have these interests" (Troxel, 530 US at 88-89 [Stevens, J., **[**500]** **[***101]** dissenting]), which must also inform the definition of "parent," a term so central to the life of a child. The "bright-line" rule of *Alison D.* promotes the laudable goals of certainty and predictability in the wake of domestic disruption (Debra H., 14 NY3d at 593-594). But bright lines cast a harsh light on any injustice and, as predicted by Judge Kaye, there is little doubt by whom that injustice has been most finely felt and most finely perceived (*see* Alison D., 77 NY2d at 658 [Kaye, J., dissenting]). We will no longer engage in the "deft legal maneuvering" **[****26]** necessary to read fairness into an overly-restrictive definition of "parent" that sets too high a bar for reaching a child's best interest and does not take into account equitable principles (*see* Debra H., 14 NY3d at 606-608 [Ciparick, J., concurring]). Accordingly, we overrule Alison D.

[*27] IV.

Our holding that Domestic Relations Law § 70 permits a non-biological, non-adoptive parent to achieve standing to petition for custody and visitation requires us to specify the limited circumstances in which such a person has standing as a "parent" under Domestic Relations Law § 70 (*see* Alison D., 77 NY2d at 661 [Kaye, J., dissenting]; Troxel, 530 US at 67). Because of the fundamental rights to which biological and adoptive parents are undeniably entitled, any encroachment on the rights of such parents and, especially, any test to expand who is a parent, must be, as Judge Kaye acknowledged in her dissent in *Alison D.*, appropriately narrow.

Petitioners and some of the amici urge that we endorse a functional test for **[11]** standing, which has been employed in other jurisdictions that recognize parentage by estoppel in the custody and/or visitation context (*see* In re Custody of H.S.H-K., 193 Wis 2d 649, 694-695, 533 NW2d 419, 435-436 [1995] [visitation only]; *see also* Conover v Conover, 448 Md 548, 576-577, 141 A3d 31, 47-48, 2016 Md. LEXIS 433, 2016 WL 3633062, *14 [2016] [collecting cases from other jurisdictions that have adopted the functional test in contexts of custody or visitation]). The functional test **[****27]** considers a variety of factors, many of which relate to the post-birth relationship between the putative parent and the child. Amicus Sanctuary for Families proposes a different test that hinges on whether petitioner can prove, by clear and convincing evidence, that a couple "jointly planned and explicitly agreed to the conception of a child with the intention of raising the child as co-parents" (brief for Sanctuary for Families as amicus curiae at 39).

Although the parties and amici disagree as to what test should be applied, they generally urge us to adopt a test that will apply in determining standing as a parent for all non-biological, non-adoptive, non-marital "parents" who are raising children. We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered.

[2] Petitioners in the two cases before us have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. We hold that these allegations, if proved by clear and convincing evidence, are sufficient to establish standing. Because we necessarily decide these cases based on the facts presented **[****28]** to us, it would be premature for us to consider adopting a test for situations in which a couple **[*28]** did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to **[**501]** **[***102]** the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody.

Inasmuch as the conception test applies here, we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement. We simply conclude that, ***HN5***[ ] where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child. Whether a partner without such an agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon a different record.

Additionally, we stress that this decision addresses only the ability **[****29]** of a person to establish standing as a parent to petition for custody or visitation; the ultimate determination of whether those rights shall be granted rests in the sound discretion of the court, which will determine the best interests of the child.

V.

We conclude that a person who is not a biological or adoptive parent may obtain **[12]** standing to petition for custody or visitation under Domestic Relations Law § 70 (a) in accordance with the test outlined above.

[3] In *Brooke S.B.*, our decision in *Alison D.* prevented the courts below from determining standing because the petitioner was not the biological or adoptive parent of the child. That decision no longer poses any obstacle to those courts' consideration of standing by equitable estoppel here, if Brooke S.B. proves by clear and convincing evidence her allegation that a pre-conception agreement existed. Accordingly, in *Brooke S.B.*, the order of the Appellate Division should be reversed, without costs, and the matter remitted to Family Court for further proceedings in accordance with this opinion.

[4] In *Estrellita A.*, the courts below correctly resolved the question of standing by recognizing petitioner's standing based on judicial estoppel. In the child support proceeding, respondent **[*29]** **[****30]** obtained an order compelling petitioner to pay child support based on her successful argument that petitioner was a parent to the child. Respondent was therefore estopped from taking the inconsistent position that petitioner was not, in fact, a parent to the child for purposes of visitation. Under the circumstances presented here, Family Court properly invoked the doctrine of judicial estoppel to recognize petitioner's standing to seek visitation as a "parent" under Domestic Relations Law § 70 (a). Accordingly, in *Estrellita A.*, the order of the Appellate Division should be affirmed, without costs.

Concur by: PIGOTT

Concur

Pigott, J. (concurring). While I agree with the application of judicial estoppel in *Matter of Estrellita A. v Jennifer L.D.*, and that the Appellate Division's decision in *Matter of Brooke S.B. v Elizabeth A.C.C.* should be reversed and the case remitted to Supreme Court for a hearing, I cannot join the majority's opinion overruling Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]). The definition of "parent" that we applied in that case was consistent with the legislative history of Domestic Relations Law § 70 and the common law, and despite several opportunities to do so, the legislature has never altered our conclusion. Rather than craft a new definition to achieve a result the **[**502]** **[***103]** majority perceives as more just, I would retain the rule that **[****31]** parental status under New York law derives from marriage, biology or adoption and decide *Brooke S.B.* on the basis of extraordinary circumstances. As we have said before, "any change in the meaning of 'parent' under our law should come by way of legislative enactment rather than judicial revamping of precedent" (Debra H. v Janice R., 14 NY3d 576, 596, 930 NE2d 184, 904 NYS2d 263 [2010]).

It has long been the rule in this State that, absent extraordinary circumstances, only parents have the right

to seek custody or visitation of a minor child (*see* Domestic Relations Law § 70 [a] ["Where a minor child is residing within this state, either parent may apply to the . . . court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court . . . may award the natural guardianship, charge and custody of such child to either parent"]). The legislature has not seen the need to define that term, and in the absence of a statutory definition, our Court has consistently interpreted it in the most obvious and **[13]** colloquial sense to mean a child's natural parents or parents by adoption (*see e.g.* People ex rel. Portnoy v Strasser, 303 NY 539, 542, 104 NE2d 895 [1952] ["No court can, for any but the gravest reasons, transfer a child from its **[*30]** natural parent to any other person"]; People ex rel. Kropp v Shepsky, 305 NY 465, 470, 113 NE2d 801 [1953]; *see also* Domestic Relations Law § 110 [defining adoption as a legal act **[****32]** whereby an adult acquires the rights and responsibilities of a parent with respect to the adoptee]). Thus, in *Matter of Ronald FF. v Cindy GG.*, we held that a man who lacked biological or adoptive ties to a child born out of wedlock could not interfere with a fit biological mother's right to determine who may associate with her child because he was not a "parent" within the meaning of Domestic Relations Law § 70 (70 NY2d 141, 142, 511 NE2d 75, 517 NYS2d 932 [1987]).

We applied the same rule to a same-sex couple in *Matter of Alison D. v Virginia M.*, holding that a biological stranger to a child who neither adopted the child nor married the child's biological mother before the child's birth lacked standing to seek visitation (77 NY2d 651, 656-657, 572 NE2d 27, 569 NYS2d 586 [1991]). The petitioner in that case conceded she was not the child's "parent" within the meaning of Domestic Relations Law § 70 but argued that her relationship with the child, as a *nonparent*, entitled her to seek visitation over the objection of the child's indisputably fit biological mother. Framed in those terms, the answer was easy: the petitioner's concession that she was not a parent of the child, coupled with the statutory language in Domestic Relations Law § 70 "giv[ing] *parents* the right to bring proceedings to ensure their proper exercise of [a child's] care, custody and control," deprived the petitioner of standing to seek visitation **[****33]** (*id.* at 657).

Notwithstanding the fact that it may be "beneficial to a child to have continued contact with a nonparent" in some cases (*id.*), we declined to expand the word "parent" in section 70 to include individuals like the petitioner who were admittedly nonparents but who had developed a close relationship with the child. Our reasoning was that, where the legislature had intended to allow other categories of persons to seek visitation, it had expressly conferred standing on those individuals and given courts the power to determine whether an award of visitation would be in the child's best interest (*see id.*). Specifically, the legislature had previously provided that "[w]here circumstances show that conditions exist which equity would see fit to **[**503]** **[***104]** intervene," a brother, sister or grandparent of a child may petition to have such child brought before the court to "make such directions as the best interest of the child may require, for visitation rights for such brother or sister [or grandparent or grandparents] in respect to such child" **[*31]** (Domestic Relations Law §§ 71, 72 [1]). The legislature had also codified the common-law marital presumption of legitimacy for children conceived by artificial reproduction, so that any **[****34]** child born to a married woman by means of artificial insemination was deemed the legitimate, birth child of both spouses (*see Domestic Relations Law § 73 [1]*). In the absence of further legislative action defining the term "parent" or giving other nonparents the right to petition for visitation, we determined that a non-biological, non-adoptive parent who had not **[14]** married the child's biological mother lacked standing under the law (77 NY2d at 657).

Our Court reaffirmed *Alison D.*'s core holding just six years ago in Debra H. v Janice R. (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]). Confronting many of the same arguments petitioners raise in these appeals, we rejected the impulse to judicially enlarge the term "parent" beyond marriage, biology or adoption. We observed that in the nearly 20 years that had passed since our decision in *Alison D.*, other states had *legislatively* expanded the class of individuals who may seek custody and/or visitation of a child (*see* id. at 596-597, citing Ind Code Ann §§ 31-17-2-8.5, 31-9-2-35.5; *Colo Rev Stat Ann § 14-10-123*; Tex Fam Code Ann § 102.003 [a] [9]; Minn Stat Ann § 257C.08 [4]; DC Code Ann § 16-831.01 [1]; Or Rev Stat Ann § 109.119 [1]; Wyo Stat Ann § 20-7-102 [a]). Our State had not—and has not, to this day. In the face of such legislative silence, we refused to undertake the kind of policy analysis reserved for the elected representatives of this State, who are better positioned to "conduct hearings and solicit comments from interested parties, evaluate the voluminous **[****35]** social science research in this area . . . , weigh the consequences of various proposals, and make the tradeoffs needed to fashion the rules that best serve the population of our state" (id. at 597).

The takeaway from *Debra H.* is that *Alison D.* didn't break any new ground or retreat from a broader understanding of parenthood. It showed respect for the role of the legislature in defining who a parent is, and held, based on the legislative guidance before us, that the term was intended to include a child's biological mother and father, a child's adoptive parents, and, pursuant to a statute enacted in 1974, the spouse of a woman to whom a child was born by artificial insemination. Although many have complained that this standard "is formulaic, or too rigid, or out of step with the times" (*id. at 594*), such criticism is properly directed at the legislature, who **[*32]** in the 107 years since *Domestic Relations Law § 70* was enacted has chosen not to amend that section or define the term "parent" to include persons who establish a loving parental bond with a child, though they lack a biological or adoptive tie.

To be sure, there was a time when our interpretation of "parent" put same-sex couples on unequal footing with their heterosexual counterparts. **[****36]** When *Alison D.* was decided, for example, it was impossible for both members of a same-sex couple to become the legal parents of a child born to one partner by artificial insemination, because same-sex couples were not permitted to marry or adopt. Our Court eventually held that the adoption statute permitted **[***105]** unmarried **[**504]** same-sex partners to obtain second-parent adoptions (*see Matter of Jacob, 86 NY2d 651, 656, 660 NE2d 397, 636 NYS2d 716 [1995]*), but it was not until 2011 that the legislature put an end to all sex-based distinctions in the law (*see Domestic Relations Law § 10-a*).

The legislature's passage of the Marriage Equality Act granted same-sex couples the right to marry and made clear that "[n]o government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage . . . shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex" **[15]** (*Domestic Relations Law § 10-a [2]*). Having mandated gender neutrality with respect to every legal benefit and obligation arising from marriage, and eliminated every sex-based distinction in the law and common law, the legislature has formally declared its intention that "[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, **[****37]** and benefits of civil marriage" (L 2011, ch 95, § 2).

Same-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent-child relationships that the law had previously disallowed. Today, a child born to a married person by means of artificial insemination with the consent of the other spouse is deemed to be the child of both spouses, regardless of the couple's sexual orientation (2-22 NY Civil Practice: Family Court Proceedings § 22.08 [1] [Matthew Bender]; *Laura WW. v Peter WW., 51 AD3d 211, 217-218, 856 NYS2d 258 [3d Dept 2008]* [holding that a child born to a married woman is the legitimate child of both parties and that, absent evidence to the contrary, the spouse of the married woman is presumed **[*33]** to have consented to such status]; *Matter of Kelly S. v Farah M., 139 AD3d 90, 103-104, 28 NYS3d 714 [2d Dept 2016]* [finding that the failure to strictly comply with the requirements of *Domestic Relations Law § 73* did not preclude recognition of a biological mother's former same-sex partner as a parent to the child conceived by artificial insemination during the couple's domestic partnership]; *Wendy G-M. v Erin G-M., 45 Misc 3d 574, 593, 985 NYS2d 845 [Sup Ct, Monroe County 2014]* [applying the marital presumption to a child born of a same-sex couple married in Connecticut]). And if two individuals of the same sex choose not to marry but later conceive a child by artificial insemination, **[****38]** the non-biological parent may now adopt the child through a second-parent adoption.

The Marriage Equality Act and *Matter of Jacob* have erased any obstacles to living within the rights and duties of the Domestic Relations Law. The corollary is, absent further legislative action, an unmarried individual who lacks a biological or adoptive connection to a child conceived after 2011 does not have standing under *Domestic Relations Law § 70*, regardless of gender or sexual orientation. Unlike the majority, I would leave it to the legislature to determine whether a broader category of persons should be permitted to seek custody or visitation under the law. I remain of the view, as I was in *Debra H.*, that we should not "preempt our Legislature by sidestepping *section 70 of the Domestic Relations Law* as presently drafted and interpreted in *Alison D.* to create an additional category of parent . . . through the exercise of our common-law and equitable powers" (*14 NY3d at 597*).

I do agree, however, with the results the majority has reached in these cases. The Marriage Equality Act did not benefit the same-sex couples before us in these appeals, **[***106]** **[**505]** who entered into committed relationships and chose to rear children before they were permitted to exercise what our legislature and the **[****39]** Supreme Court of the United States have

now declared a fundamental human right (*see generally* Obergefell v Hodges, 576 US ___, 135 S Ct 2584, 192 L Ed 2d 609 [2015]). That **[16]** Brooke and Elizabeth did not have the same opportunity to marry one another before they decided to have a family means that the couple (and the child born to them through artificial insemination) did not receive the same legal protection our laws would have provided a child born to a heterosexual couple under similar circumstances. That is, the law did not presume—as it would have for a married heterosexual couple—that any child **[*34]** born to one of the women during their relationship was the legitimate child of both.

In my view, this inequality and the substantial changes in the law that have occurred since our decision in *Debra H.* constitute extraordinary circumstances that give these petitioners standing to seek visitation (*see* Ronald FF., 70 NY2d at 144-145 [barring the State from interfering with a parent's "(fundamental) right . . . to choose those with whom her child associates" unless it "shows some compelling State purpose which furthers the child's best interest"]). Namely, each couple agreed to conceive a child by artificial insemination at a time when they were not allowed to marry in New York and intended to **[****40]** raise the child in the type of relationship the couples would have formalized by marriage had our State permitted them to exercise that fundamental human right. On the basis of these facts, I would remit the matter in *Brooke S.B.* to Supreme Court for a hearing to determine whether it would be in the child's best interest to have regular visitation with petitioner. As the majority correctly concludes, the petitioner in *Estrellita A.* has standing by virtue of judicial estoppel (majority op at 29).

Matter of Brooke S.B. v Elizabeth A.C.C.: Order reversed, without costs, and matter remitted to Family Court, Chautauqua County, for further proceedings in accordance with the opinion herein.

Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey taking no part.

Matter of Estrellita A. v Jennifer L.D.: Order affirmed, without costs.

Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey taking no part.

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