SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

DEBRA H.,		
Petitioner-Respondent,	:	N.Y. County Clerk's Index No. 106569/08
- against -	:	
JANICE R.,		
Respondent-Appellant.		

NOTICE OF MOTION OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS' NEW YORK STATE CHAPTER, AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS' NEW YORK CITY CHAPTER FOR PERMISSION TO FILE A BRIEF AS *AMICI CURIAE*

PLEASE TAKE NOTICE that, upon the affirmation of Eve Preminger, dated the 29th of January 2009, and annexed hereto as Exhibit A, the undersigned will move this Court, at the courthouse thereof, located at 27 Madison Avenue, New York, NY 10010 on the 17th of February 2009, or as soon thereafter as counsel may be heard, for an order granting permission to the National Association of Social Workers, the National Association of Social Workers' New York State chapter, and the National Association of Social Workers' New York City chapter to file an *Amici Curiae* brief in the above-referenced matter, and for such other and

further relief as the Court may deem just and proper. A copy of the proposed brief is annexed hereto as Exhibit B; a copy of the Corrected Notice of Appeal, filed November 3, 2008 is annexed hereto as Exhibit C; and a copy of the Judgment of the Supreme Court, County of New York with the attached Decision and Order of the Supreme Court, County of New York, is annexed hereto as Exhibit D.

Respectfully submitted,

KRAMER LEVIN NAFTALIS
& FRANKEL, LLP

Dated: January 29, 2009

By: _____
Eve Preminger

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

DEBRA H.,		
	Petitioner-Respondent,	N.Y. County Clerk's Index No. 106569/08
- against -		
		AFFIRMATION OF EVE PREMINGER
JANICE R.,		
	Respondent-Appellant.	

Eve Preminger, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am Counsel at Kramer Levin Naftalis & Frankel LLP and a member of the Bar of the State of New York. I make this affirmation in support of the application of the National Association of Social Workers ("NASW"), the NASW New York State chapter, and the NASW New York City chapter to file an *amici curiae* brief in the above-referenced appeal. I am authorized by the proposed *amici* to bring this motion and to submit the proposed brief filed together with this motion.

2. The instant appeal is brought by Respondent-Appellant Janice R. from the New York County Supreme Court's granting of a hearing to determine if

Petitioner-Respondent Debra H. has standing to petition for custody and visitation rights with M.R.

3. NASW is the largest association of professional social workers in the world, with 145,000 members. The New York State chapter and the New York City chapter, with 11,000 members and 10,000 members respectively, are two of 56 NASW chapters in the United States and abroad. As part of its mission to improve the quality and effectiveness of social work practice, NASW promulgates professional standards and the NASW Code of Ethics, conducts research, provides continuing education, and advocates for sound public policies (including by filing *amicus curiae* briefs in appropriate cases).

4. NASW seeks to develop and disseminate high standards of social work practice, while strengthening and unifying the profession as a whole by establishing and maintaining professional standards of practice, promulgating sound social policies, and providing services that protect its members and enhance their professional status. In addition to these services, NASW supports and publishes social science research on topics significant to the social work profession, provides continuing education and professional conferences for its members, and enforces its Code of Ethics.

5. Like the social work profession itself, NASW historically has addressed – among many other things – the interaction between people and

their environments with an eye toward understanding how biological, psychological, interpersonal, environmental, and cultural factors shape and influence them. Additionally, social workers have a long tradition of direct work with children in a wide range of practice settings, including hospitals, schools, mental health clinics, shelters, group homes, and private practice.

6. NASW also develops and adopts policy statements to encourage the development of organizational responses to various social issues. NASW's family policy recognizes that gay and lesbian people are a part of existing families and provide important caregiving to children, as well as to other family members. In 1977, NASW adopted its policy on gay, lesbian, and bisexual issues, and subsequently revised and expanded that policy in 1987, 1993, 1996, and 2005. NASW is committed by its policy, as well as its Code of Ethics, to advancing policies and practices that will improve the lives of all children, including those raised in same-sex-parent families.

7. NASW anticipates that Petitioner-Respondent's briefing will fully address the legal reasons why it is in the best interest of New York children like M.R. for New York courts to allow psychological parents to petition for custody and visitation—just as biological or adoptive parents are permitted to do. As *amici curiae*, NASW and its New York State and New York City chapters seek to assist the Court by supplementing Petitioner-Respondent's legal arguments with peer-

reviewed social science research supporting the conclusion that children suffer significant psychological and developmental harm when forcibly separated from adults that have functioned as their parents.

8. Given its preeminent role in the field of social work, NASW is uniquely qualified to demonstrate to the Court that the Supreme Court's grant of a hearing to Debra H. is consistent with sound public policy and supported by a large body of peer-reviewed research regarding same-sex parenting, parent-child attachment bonds, and sibling attachment bonds.

WHEREFORE, I respectfully request this Court to issue an order granting the National Association of Social Workers, the National Association of Social Workers' New York State chapter, and the National Association of Social Workers' New York City chapter permission to file an *amici curiae* brief in the above-referenced matter.

Dated: January 29, 2009

Eve Preminger

EXHIBIT B

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

New York Supreme Court

Appellate Division — First Department

DEBRA H.

Petitioner-Respondent,

—against—

JANICE R.,

Respondent-Appellant.

BRIEF OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS' NEW YORK STATE CHAPTER, AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS' NEW YORK CITY CHAPTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-RESPONDENT

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INTEREST OF *AMICI CURIAE*

Founded in 1955 as a non-profit professional association, the National Association of Social Workers ("NASW") is the largest association of professional social workers in the world, with 145,000 members and 56 chapters throughout the United States and abroad (including the New York State and New York City chapters, which have 11,000 members and 10,000 members, respectively). As part of its mission to improve the quality and effectiveness of social work practice, NASW promulgates professional standards and the NASW Code of Ethics, conducts research, provides continuing education, and advocates for sound public policies (including by filing *amicus curiae* briefs in appropriate cases).

NASW seeks to develop and disseminate high standards of social work practice, while strengthening and unifying the profession as a whole by establishing and maintaining professional standards of practice, promulgating sound social policies, and providing services that protect its members and enhance their professional status. In addition to these services, NASW supports and publishes social science research on topics significant to the social work profession, provides continuing education and professional conferences for its members, and enforces its Code of Ethics.

Like the social work profession itself, NASW historically has addressed – among many other things – the interaction between people and their environments with an eye toward understanding how biological, psychological, interpersonal, environmental, and cultural factors shape and influence them. Additionally, social workers have a long tradition of direct work with children in a wide range of practice settings, including hospitals, schools, mental health clinics, shelters, group homes, and private practice.

NASW also develops and adopts policy statements to encourage the development of organizational responses to various social issues. NASW's family policy recognizes that gay and lesbian people are a part of existing families and provide important caregiving to children, as well as to other family members. In 1977, NASW adopted its policy on gay, lesbian, and bisexual issues, and subsequently revised and expanded that policy in 1987, 1993, 1996, and 2005. NASW is committed by its policy, as well as its Code of Ethics, to advancing policies and practices that will improve the lives of all children, including those raised in same-sex-parent families.

For these reasons, NASW, along with its New York State and New York City chapters, supports Petitioner-Respondent Debra H.'s standing to obtain a hearing to determine whether she should be awarded custody and visitation of M.R. A determination whether Debra H. stands *in loco parentis* to M.R. is in

M.R.'s best interests. NASW files this brief in support of M.R.'s development and well-being—and in support of the development, well-being, and best interests of all similarly situated children in the State of New York.

INTRODUCTION AND SUMMARY OF ARGUMENT

Families with same-sex parents are an increasingly common type of modern family. In many such families, children have a biological parent and a "psychological" or "de facto" parent—*i.e.*, a person who is not a biological or adoptive parent of the child but who nonetheless has a genuine, fully-developed parental relationship with the child and functions as the child's parent in every respect. As with all loving parents, when same-sex parents who have raised their children together separate, it is critical to their children's well-being and development that their attachment bonds with their children not be severed.

The facts of this case as set forth by Debra H. ("Debra") indicate that she and Janice R. ("Janice") had formed such a family before they separated. According to Debra, Janice gave birth to their child, M.R., at least one year after the two of them moved in together. *Debra H. v. Janice R.*, No. 106569/08, Slip. Op. at 1-2 (Sup. Ct. N.Y. Cty. Oct. 2, 2008). Debra's young adult daughter from a previous marriage had a room in their apartment where she stayed when she came home from college, and later, from law school. *Id.* at 2.

Debra alleges that she was M.R.'s psychological parent because she, among other things, provided critical emotional, physical, and financial support

to M.R. *Id.* at 5-6. While Janice contends that Debra significantly overstates her relationship with M.R., *id.* at 6-9, the hearing directed by the trial court is the only way to resolve the factual dispute. Without a hearing, it is impossible to determine (or serve) M.R.'s best interests.

As observed by Justice Beeler in his Decision, the paramount concern of New York's child custody and visitation laws is the best interests of the child, as well as the child's welfare and happiness. *Id.* at 11. Courts can most thoughtfully weigh a child's best interests only if the right of psychological parents to petition for custody and visitation is recognized. Where, as here, reasonable allegations that an adult has been a child's psychological parent are disputed, a court should determine whether the adult has indeed functioned as a parental figure. If so, that parent should be permitted to petition for custody or visitation of the child like any other parent. To do otherwise could result in the dissolution of a critical parent-child attachment bond, and could be devastating to the child's development, happiness, and well-being. Justice Beeler's decision to convene a hearing to determine whether Debra is a parent who may petition for custody and visitation of M.R. is in M.R.'s best interests and consistent with New York legal principles. As the Court of Appeals recently articulated in *Shondel J. v. Mark D.*, "[t]he potential damage to a child's psyche caused by suddenly ending established parental support need only be

stated to be appreciated. Cutting off that support, whether emotional or financial, may leave the child in a worse position than if that support had never been given." 7 N.Y.3d 320, 330, 820 N.Y.S.2d 199, 204-05 (2006).

As shown below, Justice Beeler's decision is consistent with a large body of social science research. Children suffer significant and severe harm when forcibly separated from the adults who have functioned as their parents. Studies in developmental psychology consistently show that children form significant attachment bonds to their parents early in life. These bonds form whether the parents are biological, adoptive, or psychological—and whether the parents are same-sex or heterosexual. Empirical findings further establish that continuity of parent-child attachment bonds is critical to children's development, emotional health, and general well-being. Social science confirms that New York courts should recognize the right of gay and lesbian psychological parents to petition for custody and visitation of their children because it would meet their children's best interests.

In addition, relevant research shows that the sudden separation of a child from his or her sibling can also be emotionally disruptive to a child. Studies have revealed that sibling bonds are particularly important to children during periods of family transition, such as the separation or divorce of their parents. Younger siblings' bonds to their older siblings are no exception, in light of the

unique role that older siblings can play in their younger siblings' development. Thus, a proper determination of M.R.'s best interests must consider M.R.'s relationship not only to Debra, but also to Debra's young adult daughter.

ARGUMENT

In granting a hearing to Petitioner-Respondent Debra H., Justice Beeler advanced the best interests of M.R. in numerous respects. Without a hearing, the court would be unable to resolve upon due deliberation whether Debra is M.R.'s psychological parent. Should the court find Debra's allegations to be true and that therefore she has functioned as M.R.'s psychological parent, then depriving her of the right to seek custody or visitation could rupture M.R.'s attachment bonds to her and jeopardize M.R.'s emotional and physical development. This kind of deprivation could also levy a financial toll, as parents who are granted custody and visitation rights often serve as another source of financial support to their children. Moreover, the physical separation of M.R. from Debra's young adult daughter may disrupt the continued development of another healthy attachment bond and may thwart the support that such a bond could provide during a profound family transition and as a life-long resource. Because of the significant emotional, developmental, and potential financial harm that could befall children like M.R. in this context, it is critical that this Court recognize the rights of adults who have functioned as parents to petition for custody and visitation—so that the best interests of children like M.R. can be properly considered.

I. ATTACHMENT BONDS BETWEEN CHILDREN AND THEIR GAY AND LESBIAN PSYCHOLOGICAL PARENTS SHOULD BE PROTECTED AND PRESERVED IN THE CHILDREN'S BEST INTERESTS.

Debra alleges that she has played an instrumental parental role in M.R.'s life not only starting from his birth, but during prenatal care as well. *Debra H. v. Janice R.*, No. 106569/08, Slip. Op. at 3-6 (Sup. Ct. N.Y. Cty. Oct. 2, 2008). Psychologically, parenthood is a relationship not delimited by biology, adoption, or sexual orientation, and severing M.R.'s attachment bond to a parent could exact a deleterious toll on his development and well-being. If Debra's allegations are true, then she has been a psychological parent to M.R. and her attachment bonds with him should be preserved to every extent possible.

A. The Formation of Parent-Child Attachment Bonds Is Critical to a Child's Healthy Development.

Child development research overwhelmingly shows that children form strong bonds of attachment to their parents early in life, and that these bonds grow stronger as children grow older. *See, e.g.*, Melvin Konner, CHILDHOOD 84–87 (1991); *see generally, e.g.*, John Bowlby, ATTACHMENT (2d ed. 1982). An "attachment relationship" is defined as a "reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver" through which a child forms his or her "concepts of self, others, and the world." Beverly James,

HANDBOOK FOR TREATMENT OF ATTACHMENT-TRAUMA PROBLEMS IN CHILDREN 1–2 (1994).

An attachment relationship has profound biological, psychological, and sociological effects on a child's development. Modern developmental psychology and neurology confirm that a child's attachment relationships are the major environmental factor shaping brain development during the period of maximal brain growth. *See* Daniel J. Seigel, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 67–120 (1999). Accordingly, attachment relationships create the central foundation of a child's development. *See id.* Additional research findings illustrate that "what young children learn, how they react to the events and people around them, and what they expect from themselves and others are deeply affected by their relationships with parents." Nat'l Research Council & Inst. of Med., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 226 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000).

Among other things, attachment relationships "shape the development of self-awareness, social competence, conscience, emotional growth and emotion regulation, [and] learning and cognitive growth." *Id.* at 265. As one example, "[t]hrough a history of consistent and sensitive care with the parent, the child

develops a model of self and others as lovable and loving/helpful that may make him/her comparatively more likely to cope with challenge and stress (e.g., by relying on others for support or guidance)." James G. Byrne et al., *Practitioner Review: The Contribution of Attachment Theory to Child Custody Assessments*, 46 J. CHILD PSYCHOL. & PSYCHIATRY 115, 118 (2005). *See id.* (finding that secure attachment relationships provide children with a sense of emotional security, the ability to cope with stress, and protection against harm); *see also* Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1146 (2000) ("Attachment to a primary caregiver is essential to the development of emotional security and social conscience.").

Debra's alleged contributions as one of M.R.'s primary caregivers evince this kind of significant parent-child attachment bond.

B. Attachment Relationships Develop Despite the Absence of a Biological or Adoptive Connection Between Parent and Child.

Though Debra is not M.R.'s biological or adoptive mother, the development of attachment bonds has nothing to do with biology or the formal adoption process. *See* Joseph Goldstein et al., BEYOND THE BEST INTERESTS OF THE CHILD 27 (2d ed. 1979) (concluding the parent-child relationship can develop without reference to biology or formal adoption). Rather, a child's relationship to a psychological parent is defined by the "interaction,

companionship, interplay, and mutuality" which "on a continuing, day-to-day basis . . . fulfills the child's psychological needs for a parent, as well as the child's physical needs." *Id.* at 98; *see also* Nat'l Research Council & Inst. of Med., *supra*, at 234 ("[C]riteria for identification of attachment figures [include] provision of psychical and emotional care, continuity or consistency in the child's life, and emotional investment in the child.").

It is therefore the *quality* and *nature* of the interaction between parent and child, rather than any biological or legal connection, that creates and sustains these attachment relationships which have such a critical impact on children's development. *See* Ana H. Marty, et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-parental Caregiver*, 175 EARLY CHILD DEV. & CARE 271, 273 (2005) ("[T]he quality of [children's] attachment relationships is dependent on the nature of the interactions with their parents or other caregivers."); *see also* Am. Acad. of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 341 (2002) (finding that "[c]hildren's optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes"). This finding extends to attachment bonds between children and their same-sex parents. *See* Susanne Bennett, *Is There a Primary Mom? Parental Perceptions*

of Attachment Bond Hierarchies Within Lesbian Adoptive Families, 20 CHILD & ADOLESCENT SOC. WORK J. 159, 167–68 (2003) (finding, in a qualitative study of lesbian couples, that "quality of care was the salient factor in the establishment of an attachment hierarchy" and that "legal parent status" was not a "defining factor[ ] contributing to the attachment hierarchy.").[1]

The absence of a biological or formal adoptive connection between Debra and M.R. cannot conclude inquiry about the attachment bonds between them. If such an inquiry is to assess M.R.'s best interests, then it necessarily must examine the quality and nature of their relationship.

C. Sexual Orientation of Parents, as Well as Genetic or Adoptive Links to Their Children, Are Irrelevant to the Development of Strong Attachment Bonds.

The research also consistently shows that, in all relevant respects, lesbians and gay men parent as heterosexuals do. *See, e.g.*, G. Dorsey Green & Frederick W. Bozett, *Lesbian Mothers & Gay Fathers*, in HOMOSEXUALITY: RESEARCH APPLICATIONS FOR PUBLIC POLICY 197, 198 (John C. Gonsiorek & James D. Weinrichs eds., 1991) (concluding that "[t]he research is *extraordinarily clear* in its finding about lesbian and gay parents and their

[1] *See also* Raymond W. Chan, et al., *Psychosocial Adjustment Among Children Conceived Via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443, 454 (1998) ("[O]ur results are consistent with the general hypothesis that children's well-being is more a function of parenting and relationship processes within the family . . . [than] household composition or demographic factors.").

children: they look remarkably like their heterosexual counterparts and their children") (emphasis added). "[T]he weight of evidence gathered during several decades using diverse samples and methodologies" demonstrates "that there is no systemic difference between gay and nongay parents in emotional health, parenting skills, and attitudes towards parenting." Am. Acad. of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 343 (2002). Thus, not surprisingly, studies have concluded that a parent's sexual orientation is immaterial to the formation and importance of children's attachments, and children are just as likely to form close bonds with same-sex parents as with different-sex parents. *See* Am. Acad. of Pediatrics, *Family Pediatrics: Report of the Task Force on the Family*, 111 PEDIATRICS 1541, 1550 (2003) (finding "that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships"); A. Brewaeys, et al., *Donor Insemination: Child Development & Family Functioning in Lesbian Mother Families*, 12 HUM. REPROD. 1349, 1358 (1997) (finding the non-biological mother in lesbian families "was regarded by the child as just as much a 'parent' as the father in the heterosexual families").

Moreover, the lack of a biological or adoptive link does not impact the child's feelings for the same-sex parent. *See* Brewaeys et al., *supra*, at 1354

("Among the lesbian mothers, the quality of the parent-child interaction did not differ significantly between the biological and the [non-biological] mother."); *accord* Susan Golombok et al., *The European Study of Assisted Reproduction Families: Family Functioning & Child Development*, 11 HUM. REPROD. 2324, 2330 (1996) (finding the lack of a genetic link between a parent and child does not negatively impact parent-child relationships).

Where both same-sex parents have participated in a child's upbringing, the child will form a significant attachment relationship with each parent. A study evaluating child development in lesbian families found that "[b]oth women in the lesbian mother family were actively engaged in child care and a strong mutual attachment had been developed between [non-biological] mother and child." Brewaeys et al., *supra*, at 1356; *see also* Barbara M. McCandlish, *Against All Odds: Lesbian Mother Family Dynamics*, in GAY & LESBIAN PARENTS 23–38 (Frederick W. Bozett ed., 1987).

The research thus demonstrates with extraordinary clarity that neither sexual orientation nor the lack of genetic or adoptive bonds impacts the quality of the attachment bond formed between lesbian or gay parents and their children. Assuming as true the facts alleged by Debra, she was actively engaged in parenting M.R., and deep, meaningful parent-child attachment bonds formed between them.

D. Children Experience Severe Emotional Harm When Their Attachment Bonds with Their Parents Are Severed.

Continuity of the parent-child relationship is essential to a child's healthy development and overall well-being. Goldstein et al., *supra*, at 31–33; *see also* Marty et al., *supra*, at 274 ("[T]he quality of the attachment has profound effects on the child's social adjustment."); Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, *supra*, at 1145 ("Paramount in the lives of . . . children is their need for continuity with their primary attachment figures."); Nat'l Research Council & Inst. of Med., *supra*, at 265. Because children typically assume that they can depend on ongoing relationships with both parents, severance or curtailment of the parent-child bond can be "a particularly devastating experience." William F. Hodges, INTERVENTIONS OF CHILDREN OF DIVORCE: CUSTODY, ACCESS, & PSYCHOTHERAPY 8–9 (2d ed. 1991); *see also* Rayford W. Thweatt, *Divorce: Crisis Intervention Guided by Attachment Theory*, 34 AM. J. PSYCHOTHERAPY 240, 241 (1980) (explaining that upon separation from an attachment figure, children experience "a predictable sequence of behavior with four phases: denial, protest, despair, and detachment").

Numerous empirical findings "provide a solid research basis for predictions of long term harm associated with disrupted attachment [relationships] and loss of a child's central parental love objects." Frank J.

Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee*, 10 PSYCHOL. PUB. POL'Y & L. 5, 11 (2004); *see also* Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, *supra*, at 1146 ("Interruptions in the continuity of a child's caregiver are often detrimental."); Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody & Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 303 (2000). For example, interference with children's attachment relationships can lead to "aggression, fearful relationships, academic problems in school, and . . . elevated psychopathology." Marty et al., *supra*, at 274; *see also* Byrne et al., *supra*, at 118 ("[T]hreats or disruptions in the attachment relationships . . . lead to fear/anxiety."); Nat'l Research Council & Inst. of Med., *supra*, at 265 ("[A]ttachments buffer young children against the development of serious behavior problems, in part by strengthening the human connections.").

Studies of children of divorced parents confirm the emotional harm that can result when a child is separated from a parent to whom he or she is attached. *See, e.g.*, Judith S. Wallerstein & Sandra Blakeslee, SECOND CHANCES: MEN, WOMEN & CHILDREN A DECADE AFTER DIVORCE 145–60 (1989) (finding that children who do not maintain contact with parents suffer a continuing sense of loss and sadness); Judith S. Wallerstein & Joan B. Kelly,

SURVIVING THE BREAKUP: HOW CHILDREN & PARENTS COPE WITH DIVORCE 307 (1980) (finding that self-image of children from divorced families is "firmly tied to their relationship with both parents").

The "extreme distress" experienced by a child upon termination of an attachment figure's regular and customary role as a parent will occur regardless of whether there is a biological connection between parent and child. Fiona L. Tasker & Susan Golombok, GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT 12 (1997); *see also* Yvon Gauthier et al., *Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care*, 25 INFANT MENTAL HEALTH J. 379, 394 (2004) (explaining that children suffer greatly when separated from non-biological parent figures).

Specific research on children in gay and lesbian households demonstrates the same need for continuity—and resulting harm from disruption of attachment relationships—as can be manifested in children of heterosexual parents. *See, e.g.*, Tasker & Golombok, *supra*, at 12 (finding that cessation of the parent-child bond between a child and a lesbian psychological parent "can cause [the child] extreme distress"). When lesbian couples separate, the children mourn for the absent psychological parent just as they would for an absent biological or married parent after separation. *See* Martha

Kirkpatrick et al., *Lesbian Mothers & Their Children: A Comparative Study*, 51 AM. J. ORTHOPSYCHIATRY 545, 550 (1981).

Allowing the separation of a child from a psychological parent to become prolonged is thus detrimental to the child's best interests, and, taking Debra's allegations as true, the nature of her relationship with M.R. is such that their forced separation will put M.R. at risk of significant harm.

E. A Child's Health and Welfare Are Best Served by Nurturing and Maintaining Attachment Bonds with Parents.

In light of the importance of the parent-child bond to the overall health and welfare of children, researchers believe that children generally benefit from continued contact with both parents. *See* Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL'Y & L. 98, 103, 113–14 (2002) (explaining that everyday activities with both parents promote and maintain trust and confidence in the parents, while strengthening child-parent attachments); Denise Donnelly & David Finkelhor, *Does Equality in Custody Arrangement Improve Parent-Child Relationship?*, 54 J. MARRIAGE & FAM. 837, 838 (1992) ("Children who maintain contact with both parents tend to be better adjusted.").

The findings are no different for children of same-sex parenting relationships. As one prominent researcher explains, when same-sex parents who have jointly raised a child since birth separate, "it is reasonable to expect

that the best interests of the child will be served by preserving the continuity and stability of the child's relationship with both parents." Charlotte J. Patterson, *Children of Lesbian & Gay Parents*, 63 CHILD DEV. 1025, 1037 (1992); *see also* Am. Acad. of Pediatrics, *Policy Statement: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339 (last visited Jan. 29, 2009) (stating that children of gays and lesbians need the same permanence and security in parental relationships as children of heterosexual parents); Am. Psychoanalytic Ass'n, *Position Statement on Gay & Lesbian Parenting*, May 16, 2002, *available at* http://www.apsa.org/ABOUTAPSAA/POSITIONSTATEMENTS/GAYANDLESBIANPARENTING/tabid/471/Default.aspx (last visited Jan. 29, 2009) (concluding that the best interests of children require attachment to committed, nurturing, and competent parents, and that gay and lesbian individuals and couples are capable of meeting those requirements).

Additionally, and not surprisingly, empirical experience confirms that children benefit from access to greater financial resources and security. "One of the most consistent associations in developmental science is between economic hardship and compromised child development." Nat'l Research Council & Inst. of Med., *supra*, at 275. Depriving a child of the financial

support of a second parent limits the resources available to support the child and causes greater financial insecurity in the child's life. *See, e.g.*, Wallerstein & Blakeslee, *supra*, at 129–44 (describing the "genteel poverty" in which a single mother and her children lived, having received only sporadic financial support from the children's father following the parents' divorce).[2]

Thus, for both psychosocial and practical financial reasons, the research strongly supports that a child's best interests are met by conducting a measured examination of his or her relationship to adults with whom the child has formed meaningful attachment bonds. A decision to deny parental status would threaten to disrupt the child's development and well-being, as well as rob him or her of the many benefits inherent in a close and uninterrupted parent-child bond. Accordingly, it is in M.R.'s best interests—the New York guidepost for custody and visitation determinations—for the trial court to hear

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[2] *See also, e.g.*, Sanders Korenman et al., *Long-Term Poverty and Child Development in the United States: Results from the NLSY*, 17 CHILDREN OF YOUTH SERVICES REVIEW 127 (1996) (finding substantial developmental deficits among children who, on average are poor over a number of years relative to those who are not); Jane D. McLeod et al., *Trajectories of Poverty and Children's Mental Health*, 37 J. HEALTH & SOCIAL BEHAVIOR 207 (1996) (concluding that people with childhood histories of poverty had higher levels of depression and antisocial behavior); Child Welfare League of America, *National Data Analysis System Issue Brief: Childhood Poverty*, September 2005, *available at* http://ndas.cwla.org/include/pdf/Poverty_Final_IB.pdf (last visited Jan. 29, 2009) ("Children who grow up in poverty have poorer health, nutrition, housing and education outcomes.").

Debra's evidence regarding whether she is a psychological parent who should be afforded standing to petition for custody and visitation of M.R.

II. SIBLING BONDS BETWEEN CHILDREN SHOULD BE PROTECTED AND PRESERVED IN THE CHILDREN'S BEST INTERESTS, INCLUDING BONDS BETWEEN OLDER AND YOUNGER SIBLINGS.

The parties agree that Debra's daughter from a previous marriage stayed with Debra, Janice, and M.R. when she was home from college, and later, from law school, and thus she was a part of their household. *Debra H.*, No. 106569/08, Slip Op. at 2. Because maintaining relationships with siblings, including older siblings, is critical to a child's development and well-being, M.R.'s relationship with Debra's young adult daughter also should be evaluated when deliberating over M.R.'s best interests.

A. When a Child Has Siblings, the Formation of Healthy Sibling Bonds Is Critical to the Child's Development.

Social science research shows that "in most cases siblings, through their association with the parents," develop "feelings of attachment toward each other." David J. Whelan, *Using Attachment Theory When Placing Siblings in Foster Care*, 20 CHILD & ADOLESCENT SOC. WORK J. 21, 27–28 (2003). In fact, research findings reveal that "the sibling bond may become stronger and even more important than a child's preference for a parent." Lori Kaplan et al., *Splitting Custody of Children Between Parents: Impact on the Sibling System*,

74 FAMS. IN SOC'Y 131, 132 (1993). Sibling relationships often survive "for a lifetime, longer than most marriages and parent-child relationships." Victor Groza et al., *Siblings & Out-of-Home Placement: Best Practices*, 84 FAMS. IN SOC'Y 480, 480 (2003).

The importance of sibling attachment bonds is not exclusive to same-age siblings. Siblings separated by wide age gaps can also form meaningful attachment bonds, and studies have shown that older siblings are often "attachment figures" for younger siblings. Groza et al., *supra*, at 481. For example, "[o]lder siblings assist younger siblings in the transition to school both by acting as a role model and by giving information about the experience." *Id.* Thus, if Debra's young adult daughter has developed a sibling relationship with M.R., their attachment bonds are another important consideration for the trial court.

B. Children's Bonds to Older Siblings Can Be Especially Critical to Their Development and Well-Being When the Family Is Disrupted.

Parental separation or divorce can be among the most stressful events in a child's life. *See* Kaplan et al., *supra*, at 132 (noting that children surveyed ranked parental separation behind only the death of a parent or relative and an accident involving a parent on a list of 22 potential stressful events). "When it remains intact, the sibling group represents an element of continuity within the

process of family reorganization. Many studies also indicate that siblings can play an important role in helping each other to adjust to family transitions." *Id.* (citations omitted).

Siblings typically turn to one another "for mutual support and consolation during episodes of parental conflict" that lead to separation and divorce. Grania Sheehan et al., *Children's Perceptions of Their Sibling Relationships During Parental Separation & Divorce*, 41 JOURNAL OF DIVORCE & REMARRIAGE 69, 90 (2004). Indeed, studies confirm that when siblings are separated—either by divorce or by other family transitions—both the short- and long-term consequences can be profound. "[S]eparating siblings may affect their relationship later in life as well as their long-term quality of life." *Id.* at 132. *See also, e.g.*, Victoria Helkevitch Belford, *Sibling Relationship Troubles and Well-Being in Middle and Old Age*, 47 FAMILY RELATIONS 369, 374 (1998) (finding that memories of a positive relationship with a sibling during childhood can contribute to a person's positive affect and well-being in adulthood). "In the long term, the quality of [separated siblings'] lives may be diminished." Kaplan et al., *supra*, at 139.

During separation and divorce, older siblings in particular may take on a nurturing role, giving their younger siblings support that parents in conflict may be unable to provide. *Id.* In a slightly different context, when siblings

have been placed in foster care, older siblings were found to provide "caretaker behaviors of nurturance" toward their younger siblings, and younger siblings would typically use the older sibling as a "secure base from which to explore the [new] environment." Whelan, *supra*, at 28 (citation and internal quotations omitted).

These findings, consistent throughout more than three decades of research, have led to a consensus in the social work field that siblings should be kept together during periods of family transition. Carole H. Depp, *Placing Siblings Together*, CHILDREN TODAY, Mar.–Apr. 1983, at 14, 14 ("[I]n the majority of cases the longterm benefits to be gained by keeping a sibling group together seem to clearly outweigh those gained by separating the children."). Because of the degree of potential harm posed by severing contact with siblings, researchers have concluded that "continuing access" to siblings "is not only a right of the child but is in his or her best interest." Kaplan et al., *supra*, at 132. For this reason, and because of the unique role older siblings have been shown to play in the lives of their younger siblings, best efforts should be made to ensure that attachment bonds between children and their older siblings remain intact. The quality of M.R.'s relationship to Debra's older biological child ought to be another important consideration for the Court.

CONCLUSION

As shown above, decades of social science and child development research confirm the correctness of holding that children's best interests may compel parentage, custody, and visitation awards to preserve children's relationships with psychological parents—no differently than with biological or adoptive parents. In this case, M.R. has the right to declarations of parentage and awards of custody and visitation that ensure his interest in maintaining critical parent-attachment and sibling-attachment bonds is met. To permit findings consistent with the child's best interests, this Court should affirm the Supreme Court's Order of October 2, 2008.

Respectfully submitted,

KRAMER LEVIN NAFTALIS
& FRANKEL LLP

Dated: New York, NY
January 29, 2009

By: _____
Eve Preminger

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APPELLATE DIVISION—FIRST DEPARTMENT
PRINTING SPECIFICATION STATEMENT

I hereby certify pursuant to Rule 600.10(d)(1)(v) that the foregoing brief was prepared on a computer using Microsoft Word.

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Name of typeface:	Times New Roman
Point Size:	14
Double:	Double

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service and this statement is 5,237.

Respectfully submitted,

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& FRANKEL LLP

Dated: New York, NY
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The National Association of Social Workers,
The National Association of Social Workers' New York State Chapter, and
The National Association of Social Workers' New York City Chapter

EXHIBIT C

4

CORRECTED NOTICE OF APPEAL, DATED NOVEMBER 3, 2008 [4-5]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DEBRA H.,

Petitioner,

- against -

JANICE R.

Respondent.

Index No: 106569/08

CORRECTED
NOTICE OF APPEAL

PLEASE TAKE NOTICE that, Respondent, Janice R., hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the Decision and Order, dated October 2, 2008, made by the Supreme Court, New York County, (Harold B. Beeler, J.S.C.), and entered in the office of the County Clerk, New York County on October 9, 2008 (the "Decision and Order" attached hereto as Exhibit A) (1) holding that a non-biological, non-adoptive parent is entitled to a hearing to determine whether he/she "stands in *loco parentis* to the child" and therefore, is entitled to seek visitation and custody of a child in the care of his biological parent; (2) continuing Petitioner's visitation with Respondent's child and (3) granting the appointment of an attorney for Respondent's child.

This Appeal and Pre-Argument Statement are being amended to amend the reference to "guardian *ad litem*" to read instead "attorney for Respondent's child."

Dated: New York, New York
November 3, 2008

Appeal #2806

REISS EISENPRESS LLP

By: _____

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EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Harold B. Beeler Justice PART 9

Debra H.

per 7/8/08

- v -

CV Janice R.

INDEX NO. 106569/1

MOTION DATE 01

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

- Interim Order -

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

partially

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

RECEIVED
OCT 07 2008
IAS MOTION SUPPORT OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/2/08

HAROLD BEELER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

At Matrimonial Part 9 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 2nd of October, 2008.

PRESENT: HON. HAROLD B. BEELER,
Justice

DEBRA H.,

Petitioner,

-against-

JANICE R.,

Respondent.

INDEX NUMBER 106569/08

DECISION & ORDER

Petitioner moves by order to show cause for joint legal and physical custody of the subject child (hereinafter "M.R."), parenting time and telephone contact with M.R., appointment of an attorney for the child, and an immediate hearing regarding legal and physical custody of M.R. Respondent opposes the motion.

BACKGROUND

There are few facts in this matter which are undisputed. Respondent is a sole practicing attorney in Manhattan. Petitioner is a managing consultant who also owns her own firm. The parties met in January 2002 and became intimate shortly thereafter. Prior to meeting petitioner, respondent had attempted to become pregnant through artificial insemination, but was unable to carry to term. In the Spring of 2003, respondent successfully conceived M.R. through artificial insemination. Shortly thereafter, respondent moved into petitioner's apartment on West 90th Street while

maintaining her separate residence on West 89th Street. The dining room in petitioner's apartment was converted into M.R.'s bedroom. Petitioner's daughter from a previous marriage stayed in the second bedroom of the apartment when she visited from college, and then later, from law school. On September 25, 2003 the parties registered as domestic partners with the City of New York and on November 12, 2003 entered into a civil union in Vermont (petitioner's exhibits A, B).

Respondent gave birth to M.R. on December 8, 2003. Petitioner was present in the delivery room and cut the baby's umbilical cord. M.R. was given petitioner's last name as a middle name.[1] The child naming certificate issued by the parties' synagogue and the synagogue's newsletter announcing M.R.'s birth lists both parties as M.R.'s parents (petitioner's exhibit K).

Prior to M.R.'s birth, the parties met with an adoption attorney for the purpose of investigating a second-parent adoption. The attorney advised the parties that petitioner could not seek a second-parent adoption until M.R. was at least 6 months old. Although the parties have different explanations as to why, it is undisputed that petitioner never adopted M.R. Respondent did, however, execute a Power of Attorney, on February 20, 2006, appointing petitioner as M.R.'s guardian, until he turned 21 years old (petitioner's exhibit V).

In February 2006 respondent moved out of petitioner's apartment with M.R., and back into her own apartment on West 89th Street. Although the parties attempted to work on their relationship after respondent moved out, by March 2006 respondent had terminated the relationship.

Even after the parties were broken-up, petitioner continued to see and talk to M.R. on a daily

---

[1]After the parties separated, respondent commenced an action in the Civil Court of New York City, Kings County, to have petitioner's last name removed as M.R.'s middle name. In July 2006, Kings County Civil Court issued an order legally removing petitioner's last name from M.R.'s middle name. M.R.'s passport, issued a year earlier on July 5, 2005, did not include petitioner's last name as the child's middle name (respondent's exhibit C).

basis from February 2006 through May 2006. In or around May 2006, respondent limited petitioner's time with M.R. to a few hours every Sunday, Wednesday and Friday. Petitioner continued to have daily telephone contact with M.R. during this time. It is not clear to this court exactly why, but after the parties had been separated for approximately one month, respondent insisted that M.R.'s nanny, and later respondent herself, be present during all of petitioner's time with M.R. Beginning on or around March 14, 2008, respondent began to cut back on petitioner's access with M.R. On or around April 28, 2008, respondent terminated all of petitioner's physical visits with M.R.; shortly thereafter, on or around May 3, 2008, respondent terminated all of petitioner's telephone contact with M.R. as well.

On or around May 12, 2008, petitioner brought this instant order to show cause, seeking, *inter alia*, joint legal and physical custody and parenting time with M.R. A hearing on the Temporary Restraining Order was held on May 21, 2008, and after oral arguments, the court signed the order to show cause and granted petitioner interim access to M.R. on a basis consistent with the schedule in place before respondent began cutting back on petitioner's access, pending a full hearing on the motion. After oral arguments on the return date of the motion, July 10, 2008, the court issued a further order continuing petitioner's access with M.R. until a decision was made on the motion.

Although the parties agree to the facts as stated above, their affidavits and the affidavits of various third-parties in support of their respective positions, differ substantially with respect to the nature and extent of petitioner's relationship with respondent and, more significantly, with M.R.

According to petitioner, in or around June 2002, the parties were committed to one another and decided they wanted to have a family together. They agreed that respondent would be artificially inseminated and petitioner would adopt the child. Petitioner claims to have attended all doctor

appointments with respondent, and to have reviewed and selected a sperm donor with respondent. Once respondent was pregnant, petitioner states that they saw a lactation and Lamaze specialist together, interviewed baby nurses and nannies together and selected a pediatrician together. According to petitioner, the parties registered as domestic partners and entered into a civil union before respondent gave birth so that their son would be born to parents who were committed to one another.

As previously stated, petitioner was present in the delivery room when M.R. was born and cut his umbilical cord. Petitioner claims that M.R.'s first name honors both of the parties' fathers, and that his Hebrew name honors petitioner's brother.

According to petitioner, after having been advised by an adoption attorney prior to M.R.'s birth that the parties would have to wait until M.R. was at least six-months-old before petitioner could adopt him, petitioner again raised the subject of adopting M.R. with respondent some time in the summer of 2004. Petitioner claims that respondent dissuaded her from pursuing the adoption by telling her words to the effect of "we don't need an adoption. You are his parent. I am a lawyer. I know the court system. We don't want the Courts to get involved" (affidavit of petitioner dated May 12, 2008 at 12). According to petitioner, respondent also reassured her that she would never take M.R. away from her. Petitioner believed and trusted respondent, and therefore did not pursue the adoption any further.

Petitioner considers herself to be M.R.'s parent and states that she was held out as such. According to petitioner, the parties had birth announcements made for M.R. naming both parties as parents and sent them out to family and friends (petitioner's exhibit E). Both parties were also listed as M.R.'s parents on the child naming certificate issued by their synagogue and in the synagogue's

newsletter announcing M.R.'s birth (petitioner's exhibit K). Although when speaking, M.R. would generally refer to respondent as "mommy" and to petitioner by her first name, he would also, according to petitioner, sometimes call petitioner "mama." According to petitioner, respondent addressed petitioner in cards as her "wife", or M.R.'s "mommy" or "mom" (petitioner's exhibit XX). Petitioner further alleges that the parties would introduce each other and were introduced by others as M.R.'s parents, and she annexes cards from friends in which the parties are collectively referred to as M.R.'s "mommies" (petitioner's exhibit H).

Petitioner also claims to have contributed substantially to M.R.'s financial support during the time the parties lived together. According to petitioner, she and respondent shared the cost of converting her dining room into M.R.'s bedroom and child proofing the apartment. She also paid for the rabbi who performed M.R.'s bris, which was held in the petitioner's apartment (petitioner's exhibit J). In January of 2004, petitioner deposited $2,500 into an account that the parties opened for M.R.'s benefit (petitioner's exhibit J). She also claims to have paid for M.R.'s recreational expenses, travel, membership expenses, classes, clothing, shoes, toys, and books. With the exception of M.R.'s health insurance premiums, baby nurses and nanny, petitioner states that it was the parties' practice to share M.R.'s expenses.

From the time he was born until he was two years old, petitioner alleges to have performed all of the typical parenting responsibilities for a young child on behalf of M.R.: including, feeding him, changing him, dressing him, reading to him, and playing with him. Petitioner claims to have arranged various activities, classes and play dates for M.R. From his birth until last year, petitioner states that she and respondent continued to take M.R. to synagogue, doctor appointments, haircuts, and holiday and birthday celebrations together. When he was old enough, the parties toured pre-

schools together, went to interviews together, and were both listed on applications and school and camp contact lists as M.R.'s parents (petitioner's exhibits JJ and JJJ). Petitioner alleges that she and M.R. shared a very close relationship. She further claims that respondent was jealous of the bond she shared with M.R. and that her jealously ultimately led to the couple's break-up.

Respondent recounts a very different set of facts. According to respondent, she never intended to have a family with petitioner and in support, cites to the fact that she was attempting to become pregnant by artificial insemination before she even met petitioner. Respondent claims that petitioner had no input in her decision to have a child and in the issues surrounding that decision, including the selection of a sperm donor.

Respondent states that petitioner was never her "spouse." She claims to have entered into the civil union in November 2003, because petitioner insisted upon it and coerced her into it when she was eight months pregnant. Respondent acquiesced to petitioner's demands because, after consultation with an attorney, she was advised that the civil union would be of no legal significance in the State of New York and she wanted petitioner to stop nagging her. According to respondent, the ceremony in Vermont was of no personal or emotional significance to her either. Respondent points out that if she had wanted, the parties could have easily been married in Canada, where same sex marriages were legal at the time, since petitioner was working there two-three days per week throughout 2004. Respondent states that she did not marry petitioner, however, out of concern that marriage might lead to a situation where petitioner might later seek visitation with M.R. if the relationship were to end.

Respondent acknowledges seeing an adoption attorney with petitioner prior to M.R.'s birth, but says she did so in order to avoid further confrontation after petitioner insisted upon it. When

petitioner again raised the subject of adoption with respondent after M.R.'s birth, respondent refused and states that petitioner eventually dropped the subject.

Respondent alleges petitioner pressured her, 18 hours after giving birth, into making petitioner's last name M.R.'s middle name. Respondent says she reluctantly agreed to include the name on M.R.'s birth certificate, even though she had no intention of using it. M.R.'s passport issued on July 5, 2005 does not include petitioner's last name as his middle name (respondent's exhibit C). And in July 2006 respondent had petitioner's last name legally removed as M.R.'s middle name (respondent's exhibit D). Respondent further claims that it is only by coincidence that M.R.'s first name starts with the same letter as petitioner's father's, as M.R. was named solely in honor of respondent's father, not petitioner's. Moreover, respondent alleges that petitioner tricked her into giving M.R. petitioner's brother's Hebrew name by using her superior knowledge of the language to mislead respondent into believing that the name translated into something different.

Respondent argues that although petitioner may have held herself out as M.R.'s mother, she never did the same. According to respondent, she tolerated petitioner's attempts to create the appearance of a family in reliance on the Court of Appeal's decision in *Matter of Alison D. v. Virginia M.*, 77 NY2d 651 (1991), which, as an attorney, she had researched and determined precluded petitioner from claiming any rights as M.R.'s parent. Respondent claims that petitioner sent out birth announcements with both parties' names on them to her family and friends without respondent's permission. She also claims that without consulting her, petitioner listed herself as one of M.R.'s mothers on the child naming paperwork required by the synagogue, and therefore, both parties were listed as M.R.'s parents on the child naming certificate and in the synagogue's newsletter announcing M.R.'s birth. Likewise, respondent claims that petitioner, again without

respondent's knowledge or consent, sent in an additional camp application for the summer of 2007 on behalf of M.R., and therefore, both parties were included on the camp's parent list for last summer. Respondent notified the camp not to send any documents related to M.R. to petitioner and, accordingly, petitioner was not listed on the camp's parent list for this past summer. Respondent, however, does acknowledge that petitioner was listed on one of M.R.'s school applications as a "guardian just in case" since the parties were still together when M.R. enrolled (affidavit of respondent dated June 20, 2008 at 16). After the parties separated, respondent again notified the school not to disclose any information regarding M.R. to petitioner (respondent's exhibit N).

Respondent claims that neither she nor M.R. referred to the petitioner as "mommy" or any derivation thereof; rather, petitioner was always referred to by her first name or as "mommy's friend." Respondent states that only petitioner's friends sent petitioner cards in which she was addressed as "mommy." Respondent received congratulatory cards following M.R.'s birth addressed only to her (petitioner's exhibit B).

Respondent states that she has been M.R.'s sole financial support throughout his life. According to respondent, she paid approximately $50,000 out-of-pocket for intro-vitro-fertilization treatments and medications. She, with the help of her mother, also furnished M.R.'s bedroom and hired a professional to "child-proof" the apartment, at their sole cost. Respondent also alleges to have paid for more than 50% of petitioner's living expenses while the parties were residing together. She also paid for M.R.'s memberships to various parks and museums, his educational expenses, health insurance, baby nurse, nanny, vacations, clothes and toys, with the exception of a few toys that petitioner gave to him. Although petitioner initially paid for the cost of M.R.'s bris, respondent claims to have reimbursed her.

According to respondent, while petitioner may have helped out occasionally, respondent has always been M.R.'s primary caretaker. Either respondent, the baby nurses, or the nanny she hired would feed, bathe and read to M.R., not petitioner. Respondent hired and paid for all of the people who helped her care for M.R., without any input from petitioner. According to respondent, since petitioner traveled to Canada two-three times per week for work during the first year of M.R.'s life, it would have been impossible for her to have cared for M.R. in the manner in which she alleges. Respondent claims that she alone has made all decisions regarding M.R.'s education, health, and extra-curricular activities. She argues that she arranged for and attended all of M.R.'s doctor appointments and selected and attended all of M.R.'s classes with him.

Respondent denies that petitioner is as important to M.R. as she claims and that she ever resented petitioner's relationship with M.R. According to respondent, after the parties separated she initially allowed petitioner to see and talk to M.R. out of guilt. However, after approximately one month, respondent required that either M.R.'s nanny and then later, respondent herself, be present with petitioner whenever she was with M.R. Respondent states that she has been trying to terminate petitioner's visits with M.R. since March of 2006, but because petitioner would "throw a fit" every time she attempted to do so, respondent acquiesced to allowing her to continue to see her son (affidavit of respondent dated June 20, 2008 at 22). However, after *Beth R. v. Donna M.*, 853 NYS2d 501 (Sup Ct, NY County 2008), was decided, a decision widely known throughout the lesbian community, petitioner's demands on respondent and M.R. became increasingly aggressive. In response, respondent gradually began to cut back on petitioner's time with M.R. beginning on or around March 14, 2008. When petitioner threatened to hire an attorney and bring an action against respondent if she did not allow her to continue to see M.R., respondent cut off all contact between

petitioner and M.R.

According to respondent, M.R. did not ask for petitioner or react in anyway after respondent cut-off petitioner's contact with him. She states that he is a happy and well-adjusted boy, and, according to his teachers, was much more out-going and friendly during the month following the termination of his contact with petitioner. Respondent alleges that if M.R. was in anyway suffering as a result of not seeing petitioner, she would not have opposed this motion. Respondent believes that petitioner brought this action, not out of concern for M.R.'s welfare, but as a means of attempting to control her and her son's life.

LEGAL ANALYSIS

Petitioner seeks to have this court grant her joint legal and physical custody of M.R., with parenting time and telephone contact. She moves for the appointment of an attorney for the child to represent the best interests of M.R. Respondent opposes the application on the grounds that petitioner lacks standing to seek custody or visitation with M.R. since she is neither his biological nor adoptive parent. *Matter of Alison D. v. Virginia M.*, 77 NY2d 651 (1951); *Anonymous v. Anonymous*, 20 AD3d 333 (1st Dept 2005); *Gublin v. Moss-Gublin*, 45 AD3d 1230 (3d Dept 2007). The petitioner contends that the respondent is estopped from challenging her parental status *vis á vis* M.R. since petitioner, with the respondent's encouragement, has established strong parental ties to M.R. *In the Matter of Shondel v. Mark D.*, 820 NYS2d 199 (2006); *Beth R. .v. Donna M.*, 853 NYS2d 501 (Sup Ct, NY County 2008).

The statute applicable to this matter, DRL §70, states that "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...as the case may require...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 promote its welfare and happiness, and make award accordingly."

In the *Matter of Alison D. v. Virginia M.*, 77 NY2d 651 (1991), the case allegedly relied upon by respondent in fashioning her dealings with petitioner, the Court of Appeals held that a person who is not a biological or adoptive parent of a child is not a "parent" within the meaning of DRL §70, and therefore lacks standing to seek visitation. In *Alison D.*, the petitioner sought to have visitation with a child born to her former same-sex partner, with whom she shared joint parenting responsibilities during the first two and a half years of the child's life, on the grounds that she was the child's "de facto" parent or parent "by estoppel." *Id.* at 656. Applying a narrow reading of the term "parent" under the DRL, the court held that the petitioner "has no right under Domestic Relations Law §70 to seek visitation and, thereby, limit or diminish the right of the concededly fit biological parent to choose with whom her child associates." *Id.*

The court rendered its decision in *Alison D.* over the strong dissent of now Chief Judge Judith Kaye who opined that in taking such a "hard line" in defining "parent" under DRL §70, the majority had ignored the legislative purpose of the statute, which was to promote '"the best interest of the child' and the child's 'welfare and happiness.'" *Id.* at 659 *quoting* DRL §70. Chief Judge Kaye would have remanded the case to the trial court for a determination as to whether the petitioner stood in *loco parentis* to the child and, if so, whether it was in the child's best interest to allow the petitioner visitation rights. *Id.*

Since *Alison D.* was decided over seventeen years ago, some courts, while following the majority's holding in *Alison D.*, have expressed a reluctance in doing so or a willingness to recognize an equitable estoppel argument in custody or visitation disputes under different circumstances. *See Multari, Jr. v. Sorrell*, 287 AD3d 764, 767 (3d Dept 2001) (noting that while the court may be inclined to agree with the concurring opinion that an estoppel argument may be recognized under certain circumstances, it felt bound to adhere to *Alison D.*); *Bank v. White*, 40 AD3d 790, 791 (2d Dept 2007) ("Although equitable estoppel has been applied by this Court to visitation disputes under compelling circumstances, we decline to apply it under the facts of this case.") (citations omitted); *Gublin v. Moss-Gublin*, 45 AD3d 1230, 1231(3d Dept 2007) ("*Here*, the doctrine [of equitable estoppel] is inapplicable...*Under these circumstances*, it cannot be concluded that defendant led plaintiff to form a reasonable belief that her claim to custody of her second son would not be asserted.") (emphasis added); *Anonymous v. Anonymous*, 20 AD3d 333, 333 (1st Dept 2005) ("Although the doctrine of equitable estoppel has been applied in various proceedings involving paternity, custody and visitation, there is no basis for its invocation here.").

Other courts have entirely rejected the majority's reasoning in *Alison D.* and, instead, have relied on Chief Judge Kaye's dissent, applying equitable estoppel based on the best interests of the child in custody or visitation disputes. *See Jean Maby H. v. Jospeh H.*, 676 NYS2d 677 (2d Dept 1998); *Gilbert A. v. Laura A.*, 261 AD2d 886 (4th Dept 1997) (husband entitled to present proof as to whether the doctrine of equitable-estoppel applies with respect to his application for visitation with a child born during the marriage, but who was not his biological or adoptive child); *Beth R. v. Donna M.*, 853 NYS2d 501 (Sup Ct, NY County, 2008); *Christopher S. v. Ann Marie S.*, 173 Misc.2d 824, 832 (Sup Ct, Dutchess County 1997) (based on the best interest of the child, the

biological mother was equitably estopped from raising her ex-husband's status as a non-biological parent as an issue in a custody proceeding).

In *Beth R.*, the case most heavily relied upon by petitioner, the plaintiff commenced a divorce action against her same-sex spouse and sought a determination of her custodial rights and support obligations *vis á vis* the children born immediately before and during the marriage. 853 NYS2d 501. The parties in that case had been dating for approximately two years before the defendant became pregnant by artificial insemination. The parties had intended to marry in Canada prior to the birth of the child, but because of a death in the defendant's family, the wedding was postponed until approximately four months after the child was born.[2] The defendant had another child by artificial insemination approximately two years later. The plaintiff was present in the delivery room during the birth of both children and cut their umbilical cords. Although the defendant never allowed the plaintiff to adopt the children, both children were given the plaintiff's last name, the parties sent out birth announcements together, were on the same insurance plan, and the defendant named the plaintiff as the children's guardian in her will. The children referred to the defendant as "Mom" and the plaintiff as "Mommy." Each party cared for, supported and made important decisions regarding the children's upbringing.

In granting the plaintiff standing to seek custody, the court in *Beth R.* relied on a line of case law that has emerged, parallel to *Alison D.* and its progeny, in which equitable estoppel has been used as a defense where a person, typically a non-biological father, seeks to avoid child support obligations, or a biological father belatedly seeks recognition of his parental rights. *Beth R.*, 853

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[2]The parties had, however, obtained a marriage license in Canada before the birth of the first child.

NYS2d at 507 (*citing Matter of Diane E. v. Angel M.*, 20 AD3d 370 (1st Dept 2005); *Hammack v. Hammack*, 291 AD2d 718 (3d Dept 2002); *Fung v. Fung*, 238 AD2d 375 (2d Dept 1997); *Purificati v. Parcos*, 154 AD2d 360 (2d Dept 1989)). In particular, the court relied on the recent Court of Appeals decision in *Matter of Schondel J. v. Mark D.*, 7 NY3d 320 (2006) and the latter's reference to *Maby H. v. Joseph H.*, 246 AD2d 282 (2d Dept 1998).

In *Schondel J.* the court held that the best interests of the child warranted equitably estopping the child's non-biological father from denying paternity and from refusing to pay child support, since he had held himself out as the child's father and the child had justifiably relied on his representation of paternity. 7 NY3d at 328. The court in *Schondel J.* observed that "[t]he potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether *emotional* or financial, may leave the child in a worse position than if that support had never been given." *Id.* at 330 (emphasis added).

Although *Schondel J.* involved issues of paternity and child support, the court, nevertheless, cited to *Maby H. v. Joseph H.*, 246 AD2d 282 (2d Dept 1998), a custody and visitation proceeding, for the proposition that "New York courts have long applied the doctrine of estoppel in paternity and support proceedings. Our reason has been and continues to be the best interest of the child." *Schondel J.*, 7 NY3d at 328 (*citing Maby H.*, 246 AD2d at 285). In *Maby H.*, the court found that although the husband was not the biological or adoptive father of a child born to the wife prior to the marriage, the wife, nevertheless, was equitably estopped from contesting his standing to seek custody or visitation since, among other things, he was named the father on the child's birth certificate, he was held out as the father for the first five years of the child's life and he financially supported the child. *Maby H.*, 246 AD2d 282. In conclusion, the court in *Maby H.* stated "we are

of the opinion that the best interests of the child will not be served in this case if . . . *Alison D.* (supra) [is] blindly applied." *Id.* at 289.

The court in *Beth R.* found the Court of Appeals' reference in *Shondel J.*, a paternity and child support proceeding, to *Maby H.*, a custody and visitation proceeding, to be of significance and "not mere coincidence" in light of the "many cases that have authorized equitable estoppel as a defense to paternity proceedings" which the *Shondel J.* court could have cited to instead of *Maby H.* 853 NYS2d at 508. The court in *Beth R.* went on to state, "[i]f the concern of both the legislature and the Court of Appeals is what is in the child's best interest, a formulaic approach to finding that a "parent" can only mean a biologic or adoptive parent may not always be appropriate." *Id.* In reliance on *Shondel J.* and *Maby H.*, the court concluded that the facts before it justified a hearing to determine whether the best interests of the children warranted granting custodial rights to the plaintiff. *Id.* at 508-509.

An additional factor in support of the court's holding in *Beth R.* was that the parties were married. 853 NYS2d at 509. The court reasoned that the marriage in and of itself created obligations between the parties that could affect the children's welfare and also demonstrated the parties' intention to create familial bonds, particularly for the benefit of their children. *Id.* The court further pointed out that the birth of the second child during the marriage may require a finding that that child is the legitimate child of both parents. *Id.* (*citing* DRL § 73; *H v. P.*, 90 AD2d 434 (1st Dept 1982); *Laura G. v. Peter G.*, 15 Misc.3d 164 (Sup Ct, Delaware County 2007)).

This court shares the concern expressed by Chief Judge Kaye in *Alison D.*, 77 NY2d 651, and which was adopted in later cases, such as *Maby H.*, 246 AD2d 282, *Shondel J.*, 820 NYS2d 199, and most recently, *Beth R.*, 853 NYS2d 501, that a formulaic approach to defining the word "parent"

under the DRL may not always effectuate the legislature's express intent of furthering the best interests of the child. This court agrees that it is inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid support obligations, but preclude a nonbiological parent from invoking the doctrine against the biological parent in order to maintain an established relationship with the child. *Maby H.*, 246 AD2d at 287 (*citing Matter of Christopher S. v. Ann Marie S.*, 173 Misc.2d 824 (Fam Ct, Duch County 1997). In either scenario, the court's primary concern should be furthering the best interests of the child.

The facts as alleged by petitioner, if found to be true, establish a prima facie basis for invoking the doctrine of equitable estoppel. *Maby H.*, 246 AD2d at 289. Of particular significance are her allegations that the parties moved in together and consulted an adoption attorney prior to M.R's birth, sent out birth announcements together, were both listed as M.R.'s parents on the child-naming certificate and on some of M.R.'s school and camp documents, and that petitioner was present in the delivery room at M.R.'s birth and cut his umbilical cord, and that M.R. was given petitioner's last name as a middle name on his original birth certificate.

Moreover, the parties' civil union at the time of M.R.'s birth, is a significant, though not necessarily a determinative, factor in petitioner's estoppel argument. While respondent attempts to minimize the significance of the ceremony, parties to a civil union are given the same benefits, protections and responsibilities under Vermont law as are granted to those in a marriage. 15 VSA §1204(a), (d). This includes the assumption that the birth of a child during a couple's legal union is "extremely persuasive evidence of joint parentage." *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Sup Ct, VT 2006) (holding that the non-biologically-related partner is the parent of a child born by artificial insemination to the other partner of a civil union). Like the marriage in *Beth R.*,

the civil union here is strong evidence of the parties' intention to create familial bonds for their and M.R.'s benefit. *Beth R.*, 853 NYS2d 501.[3]

However, since respondent disputes many of the facts alleged by petitioner regarding the nature and extent of their relationship and petitioner's relationship with M.R., a hearing is required in order to resolve whether petitioner stands in *loco parentis* to the child and may, therefore, invoke the doctrine of equitable estoppel against respondent. *See Matter of Alison D. v. Virginia M.*, 77 NY2d 652, 662 (1991, Kaye, J., dissenting); *H.M. v. E.T.*, 851 NYS2d 58 (Fam Ct, Rockland County 2007) (ordering a hearing to determine whether a party is equitable estopped from denying responsibility to pay child support on behalf of her former same-sex partner's biological child).

The So-Ordered Stipulation regarding access dated July 10, 2008 shall remain in effect, pending a final decision on the issue of standing. Accordingly, all visits shall continue to take place in the petitioner's home with a mutually agreed upon third-party present. If it is determined that the petitioner stands in *loco parentis* to the child, a hearing will then be held to determine whether it is in the child's best interest to allow petitioner custodial and visitation rights.

That branch of the motion seeking appointment of an attorney for the child is granted. The parties' attorneys shall attempt to agree on an attorney for the child and shall submit the name to the court for its approval within seven days from the date of this decision. If the attorneys are unable to agree, they shall each anonymously submit the names of three attorneys for the child to the court within eight days from the date of this decision, and the court shall consider their recommendations

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[3]Notably, in no other custody and/or visitation case following the majority's holding in *Alison D.*, were the parties in a civil union at the time of the birth of the subject child(ren). In that regard, this case is one of first impression.

in its appointment. The cost of the attorney for the child shall be shared equally by the parties.

A status conference is scheduled for October 27, 2008 at 2:00 P.M. at Part 9, 71 Thomas Street, Room 304.

This constitutes the decision and order of the court.

DATE: **October 2, 2008**

ENTER:

Harold B Beeler

HAROLD B. BEELER, J.S.C.

HAROLD BEELER